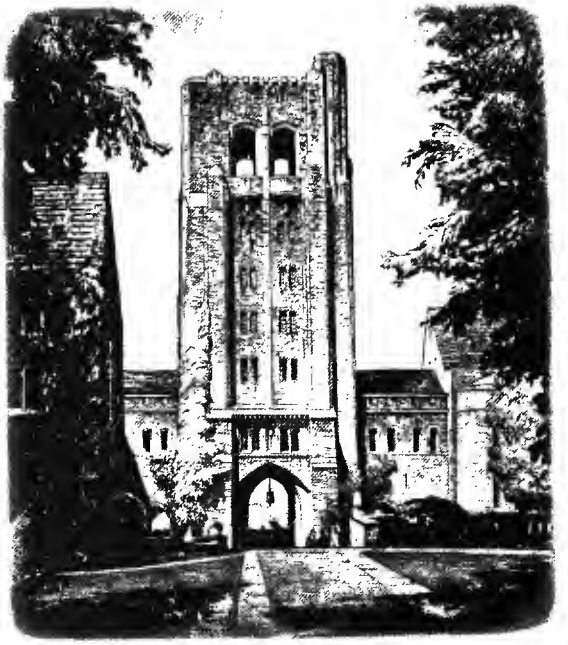

A COMMENTARY

ON THE

LAW OF EVIDENCE

IN CIVIL ISSUES.

BY

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IN TWO VOLUMES.

VOLUME II.

THIRD EDITION.

PHILADELPHIA:
KAY & BROTHER,
LAW BOOKSELLERS, PUBLISHERS, AND IMPORTERS.
1888.

PHILADELPHIA:
COLLINS PRINTING HOUSE,
705 Jayne Street.

BOOK II.

MODE OF RECEIVING PROOF.

(CONTINUED.)

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I. GENERAL CONSIDERATIONS.

§ 850. THE Schoolmen, as we have already seen, indulged in a profusion of speculations as to the probative force of evidence; declaring that certain kinds of evidence were to be be treated as half proof, other kinds as whole proof, while

Statutory assignments of

still other kinds were to be accepted with certain qualifications arbitrarily preassigned, without regard to what might be the actual truth. Similar rules with respect to the force to be assigned to certain forms of evidence have been adopted by some of our legislatures; and no doubt this is within their constitutional power.[1] But when such statutes are based upon distinctions philosophically absurd,—as when they enact that there shall be no conviction of certain offences on circumstantial evidence, in defiance of the truth that all evidence is circumstantial, or when they assign *a priori* valuations to various grades of admissible evidence,—they are open to the objection of sacrificing the substance of truth to an illogical form.

probative force to evidence.

§ 851. The error of the scholastic jurists, in this respect, may be readily explained. It should be remembered that jurisprudence, on its revival at the close of the Middle Ages, was speculative rather than practical; and that the subtile intellects of the then great juridical thinkers were employed in constructing multitudes of imaginary cases, and in settling for each arbitrary decisions in advance. The judges by whom these rules were to be applied were usually plain men, not versed in juridical distinctions; and it was better for the cause of public justice, so it was argued, that decisions, thus announced before the hearing of the case, should be treated as absolute. The reasoning thus adopted was that of demonstration based on the simplest form of Aristotle: "All A. is B.; C. is A.; therefore C. is B.;" or, "All killing is malicious; this is killing; therefore this is malicious." Or, "No sensible father can disinherit a child; A. is a sensible father; therefore he cannot disinherit a child." It is scarcely necessary to exhibit the fallacy of such arguments. Either the major or the minor premise must be false. In the illustrations before us, for instance, it is neither true that all killing is malicious, as there are innumerable instances of non-malicious killing; nor that no sensible parent disinherits a child, for there are at least some cases in which disinheritance is a wise parental act. The major premises of such syllogisms, therefore, should be changed from universal to particular, as follows: "Some killings are mali-

Error in this respect of the scholastic jurists.

[1] See infra, § 1238; Holmes *v.* Hunt, Y. 541; Howard *v.* Moot, 64 N. Y. 262; 122 Mass. 125; Hand *v.* Ballou, 12 N. Francis *v.* Baker, 11 R. I. 103.

cious;" "some sensible parents will not disinherit." It is obvious, however, that by such a process only a probable conclusion will be reached; a conclusion varying in probability with the extent of the major premise. If we were able to say, "Nine cases out of ten of killing are malicious," then we could conclude, supposing that we had a purely abstract case before us, that it is nine to one that the particular killing is malicious. Or if we could say, "In only one case in ten does a parent intend to disinherit a child;" then we could conclude that it is nine to one that in the present case the parent did not intend to disinherit the child. But this is all.

Intensity of proof cannot be arbitrarily fixed.

§ 852. The idea that we can ever have an abstract case before us is a scholastic fiction, the product of acute but purely speculative minds dealing with an unreal object. There can be no abstract killing proved in a court of justice to which the predicate of abstract malice can be arbitrarily attached. All killing proved is killing in the concrete; killing of a particular person, attracting certain animosities peculiarly to himself, killing by a particular person, under particular circumstances. There is no killing proved which is identical in its surroundings with any other prior killing on record; there is no killing proved that does not present *differentia* distinguishing it from the abstract killing of the Schoolmen. So with regard to the disinheriting parent. No two cases of disinheritance are alike. No one case exists which does not give the disinheriting act a tint which may remove it from the category of the scholastic abstract disinheritance. So, to return again to a trial which has been already frequently resorted to for illustrations, we may apply the scholastic axiom, that memory weakens with time, to the claimant in the Tichborne case. Could any statute, without flagrant injustice, compel a jury to say that Roger Tichborne had in twenty years forgotten his French tutors, his French surroundings, and even the French language which was his boyhood's vernacular? Or, without equal injustice, could Lady Tichborne's recognition of the claimant be treated as conclusive, because a statute, based on the scholastic maxim, should enact that parental recognition should be irrebuttable?[1]. Hence it may be well argued that a statute providing that certain evidence is to have a fixed and absolute valuation

[1] See supra, § 9.

can do no good, even in cases to which its principle is applicable, and in other cases may do much harm.[1] At the same time statutes making certain kinds of proof admissible or giving them *primâ facie* force, may only greatly expedite business, but may be the means by which the administration of justice is materially advanced.[2]

Relations in this respect of the statute of frauds.

§ 853. To the statute of frauds the distinctions which have been above noticed may be applied. That famous enactment goes on a principle directly the reverse of the scholastic rules. By those rules admissible evidence was divided into certain classes; and to one class was assigned the quality of whole proof, to another of half proof, to another of quarter proof. The statute of frauds, on the other hand, deals not with credibility, but with competency.[3] It says: "Now that important business is transacted largely in writing; now that every business man can write, and has by him the means of writing; now that the temptation to perjury in fabrication of claims resting only on oral evidence grows in proportion to the growth of wealth exposed to litigation, it is essential to impose a standard which shall require written proof for the legal establishment of all important claims."[4] For this purpose the statute adopted in the reign of Charles II., at the motion of Lord Chancellor Nottingham, prescribed a series of important limitations, which, more or less modified, have been enacted throughout the United States, and of which each day's experience adds to the value. Beneficial as this statute has been in its past workings, it has become still more important in the present condition of our jurisprudence; and we can fully accept the opinion of a learned Pennsylvania judge,[5] that the statute "allowing the parties in a controversy to be examined as witnesses on their own behalf admonishes us that it would be unwise to relax any of the rules of law arising out of the statute of limitations, and of frauds and perjuries."[6]

[1] See Smith *v.* Croom, 7 Fla. 81; Gardner *v.* O'Connell, 5 La. An. 353; Johnson *v.* Brock, 23 Ark. 282.

[2] Infra, § 1239 *a*.

[3] See Barrell *v.* Trussell, 4 Taunton, 121; Rann *v.* Hughes, 7 T. R. 350, n.

[4] See Rob. on Frauds, Pref.

[5] Paxson, J., 78 Penn. St. 49.

[6] The general policy of the statute of frauds is discussed at large in the first chapter of Reed on Statute of Frauds; a work as distinguished for its conscientious accuracy as for its fulness of detail.

II. TRANSFER OF LANDS.

§ 854. By the statute, as originally passed, all leases, estates, and interest in lands, whether of freehold or for terms of years, which have been created by parol, and not put in writing, and signed by the parties or an agent authorized in writing, are allowed only the force and effect of estates at will; except leases not exceeding the term of three years from making thereof, whereon the rent reserved shall amount to two-thirds of the improved value. In the United States there is much diversity in the enactments by which this clause is now represented. "It is believed that they all, with the exception of New York, agree in this, that if the agreement to let be executory, and not consummated by the lessee's taking possession, it cannot be enforced; if it be by parol, the statute prohibits any action upon such a contract.[1] If the lessee takes possession, the question arises whether by the statute the lease is binding as an agreement at common law, or the tenancy under it is a mere tenancy at will, or the lease, as such, is to be deemed void."[2] A lease which does not exceed three years from the time of making is, under the English statute, valid, although parol.[3] But the first two sections of the English statute, says Judge Henry Reed, in his work on the Statute of Frauds, "have been literally or even substantially re-enacted in only a few states, the majority of our American Commonwealths preferring to reduce the exception in favor of short leases to those for a term not longer than *one* year instead of *three;* while nearly all have refused the additional requirements as to the amount of rent to be reserved."[4]

By statute parol evidence cannot prove lease of over three years.

[1] 1 Washburn's Real Prop. (4th ed.) 614; citing Browne, Stat. Frauds, § 37; Edge *v.* Strafford, 1 Tyrw. 293; Larkin *v.* Avery, 23 Conn. 304; Delano *v.* Montague, 4 Cush. 42; Young *v.* Dake, 1 Seld. 463.

[2] Ibid.

[3] Rawlins *v.* Turner, 1 Ld. Ray. 736; Bolton *v.* Tomlin, 5 A. & E. 856; Morrill *v.* Mackman, 24 Mich. 286.

[4] See Reed, Stat. Frauds, §§ 795 *et seq.*, where the statutes are examined in detail.

See also 1 Washburn's Real Prop. (4th ed.) 614. See Birckhead *v.* Cummings, 4 Vroom, 44; Mayberry *v.* Johnson, 3 Green, 116; Adams *v.* McKesson, 53 Penn. St. 83; Morrill *v.* Mackman, 24 Mich. 283; Ragsdale *v.* Lander, 80 Ky. 61. As to New York, see Beardsley *v.* Duntley, 69 N. Y. 577.

§ 855. "Estates at will," under the statute, are to be treated, so it has been argued, as tenancies from year to year;[1] though more correctly, a party who, under the statute, is a tenant at will for the first year, from the fact that his lease is void, becomes a tenant from year to year as soon as his yearly rent is received.[2] As tenant, he is liable on any covenants of the lease which do not relate to the question of the length of the term avoided by the statute; and the landlord is reciprocally liable upon such covenants.[3] A term of three years, to commence at a future date, does not meet the requisitions of the statute; the three years, to be within the meaning of the statute, must begin with the date of the lease.[4] Where a parol lease is for a term certain, and is void under the statute, the tenancy from year to year expires with the term, without notice, although notice is required by statute to terminate a tenancy at will.[5]

§ 856. The third section of the statute of frauds virtually provides that no estates of lands, whatever be the character of such estates, shall be "assigned, granted, or surrendered," except by a writing signed by the party, or by his agent duly authorized in writing, unless by act and operation of law. This section "has been followed more or less exactly, by the statutes of the several United States, all of which require an instrument in writing in order to the conveyance of lands or other interests therein," which writing must be exact in its terms and description.[6] "And, with the exception of

Estates in land can be assigned only by writing.

[1] Clayton *v.* Blakey, 8 T. R. 3; *S. C.* 2 Smith's L. C. 97; Berrey *v.* Lindley, 3 M. & Gr. 512. See other authorities in Reed, Stat. Frauds, § 804.

[2] Richardson *v.* Gifford, 1 A. & E. 56; *S. C.* 3 M. & Gr. 512.

[3] Richardson *v.* Gifford, 1 A. & E. 56; *S. C.* 3 M. & Gr. 512; Arden *v.* Sullivan, 14 Q. B. 832; Beale *v.* Sanders, 3 Bing. N. C. 850; Tooker *v.* Smith, 1 H. & N. 732. For American cases, see Reed on Stat. Frauds, §§ 807, 816.

[4] Rawlins *v.* Turner, 1 Ld. Ray. 736. See Reed on Stat. of Frauds, § 813.

[5] Berrey *v.* Lindley, 3 M. & Gr. 498; Doe *v.* Stratton, 4 Bing. 446; Doe *v.* Moffatt, 15 Q. B. 257; Tress *v.* Savage, 4 E. & B. 36; Beardsley *v.* Duntley, 69 N. Y. 577; Taylor's Ev. 916; Reed on Stat. of Frauds, §§ 810, 819, and cases there cited.

[6] Odell *v.* Montross, 68 N. Y. 499. See Reed, Stat. of Frauds, §§ 544 *et seq.*, 556 *et seq.*, 601, 636, 766, 1033, 1036; Webster *v.* Clark, 60 N. H. 505; Pierson *v.* Ballard, 32 Minn. 263; Vindquest *v.* Perky, 16 Neb. 122. To constitute a formal conveyance a statement of consideration is essential, Phelps *v.* Stillings, 60 N. H.

three or four states, a deed under the hand and seal of the grantor is necessary, if the interest to be transferred is a freehold one."[1] Where, however, acts are done by the parties which are a part performance of the contract, a court of equity will compel a specific performance of the contract, wherever a fraud would be worked by vacating the contract.[2]

§ 857. It should be observed that the effect of the statute, in this section, is not to dispense with deeds when required by common law, but to require written instruments of transfer in cases which the common law did not cover; *e. g.*, lands and tenements in possession.[3] It has been held, though on questionable reasoning, to preclude parol assignments and surrenders of leases for terms less than three years.[4]

505; Phillips *v.* Adams, 70 Ala. 373. But an imperfect statement may be helped out by parol. Ellis *v.* Bray, 79 Mo. 229. See Smith *v.* Freeman, 75 Ala. 285. As to N. Y. statute in respect to consideration, see Drake *v.* Seaman, 97 N. Y. 230. That consideration need not be recited in a contract to convey, see Thornberg *v.* Masten, 88 N. C. 293. That the land should be adequately described, see Sherer *v.* Trowlidge, 135 Mass. 500; Gault *v.* Stormond, 51 Mich. 636; Springer *v.* Kleinsorge, 83 Mo. 152; Till *v.* Freeman, 30 Minn. 389; Schroeder *v.* Taafe, 11 Mo. Ap. 267; Bishop *v.* Fletcher, 48 Mich. 585.

[1] 3 Wash. Real Prop. 235; Underwood *v.* Campbell, 14 N. H. 396; Stewart *v.* Clark, 13 Met. 79; Colvin *v.* Warford, 20 Md. 396. See, also, Jellison *v.* Jordon, 68 Me. 373; Wilson *v.* Black, 104 Mass. 406; Parsons *v.* Phelan, 134 Mass. 109. See Reed on Stat. of Frauds, § 1059.

[2] Fonbl. Eq. Laussat's ed. 150; Neale *v.* Neale, 9 Wall. 1; Glass *v.* Hulbert, 102 Mass. 24; Phillips *v.* Thompson, 1 Johns. Ch. 131; Parkhurst *v.* Van Cortland, 14 Johns. R. 15; *S. C.* 1 Johns. Ch. 284; Ryan *v.* Dox, 34 N. Y. 312; Freeman *v.* Freeman, 43 N. Y. 34; Weir *v.* Hill, 2 Lans. 278; Syler *v.* Eckhart, 1 Binney, 378; Hill *v.* Myers, 43 Penn. St. 170; Riesz's Appeal, 73 Penn. St. 485; De Wolf *v.* Pratt, 42 Ill. 207; Armstrong *v.* Kattenhorn, 11 Ohio, 265; Peters *v.* Jones, 35 Iowa, 512; Townsend *v.* Sharp, 2 Overton, 192. See Thompson *v.* Gould, 20 Pick. 134; Wells *v.* Calnan, 107 Mass. 514; Com. *v.* Kreager, 78 Penn. St. 477; and see particularly infra, §§ 904, 909.

[3] Rob. on Frauds, 248; Lyon *v.* Reed, 13 M. & W. 303; Rowan *v.* Lytle, 11 Wend. 616; McKinney *v.* Reader, 7 Watts, 123.

[4] Mallett *v.* Brayne, 2 Camp. 103; Thomson *v.* Wilson, 2 Stark. R. 379; Rowan *v.* Lytle, 11 Wend. 616; Logan *v.* Barr, 4 Harr. 546, and cases cited in Reed, Stat. Frauds, §§ 777 *et seq.* See, however, *contra*, McKinney *v.* Reader, 7 Watts, 123; Greider's App., 5 Barr, 422, and other cases cited in Reed, Stat. of Frauds, §§ 777, 778, where the distinctions on this topic are given and the conflicting cases noticed. As to how far an invalid assignment can operate as an underlease, see Pollock *v.* Stacy, 9 Q. B. 1033; Beardman *v.* Wilson, L. R. 4 C. P. 57, in which

§ 858. The exception "act and operation of law," to the section above noticed, has been much discussed. The surrender, to be within the exception, so has it been held,[1] must be the act of the law, as distinguished from that of the parties whose intent may be thereby overridden. A first lease, for a greater term, is surrendered by accepting a second lease, for a shorter term.[2]

Surrender by operation of law excepted.

§ 859. At the same time it is now held that nothing short of an express demise will operate as a surrender of an existing lease.[3] But it is argued that if a lessee were to accept, *in accordance with his contract*, a second lease voidable upon condition, this, even in the event of its avoidance, would amount to a surrender of the former term; because such second lease would pass *ab initio* the actual interest contracted for, though that interest would be liable

last case it was held that an underlease of the whole term amounts to an assignment. As to surrender by act and operation of law, see Hamerton *v.* Stead, 3 B. & C. 482; Parmenter *v.* Reed, 13 M. & W. 306; Foquet *v.* Moor, 7 Ex. R. 870; Lynch *v.* Lynch, 8 Ir. Law R. 142. Infra, §§ 858 *et seq.*

[1] Lyon *v.* Reed, 3 M. & W. 306.

[2] See 1 Wms. Saunders, 236, *c.*; Hamerton *v.* Stead, 3 B. & C. 482; 5 D. & R. 478; Lynch *v.* Lynch, 6 Irish L. R. 142. See Reed, Stat. of Frauds, §§ 780, 785, 791. The exception applies primarily "to cases where the owner of a particular estate had been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman; and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor." Lyon *v.* Reed, 13 M. & W. 306, per Parke, B. See, to the same effect, Schieffelin *v.* Carpenter, 15 Wend. 400; Smith *v.* Niver, 2 Barb. 180. Cf. discussion in Reed, Stat. of Frauds, §§ 765–7, 772, 785, 789.

[3] Foquet *v.* Moor, 7 Ex. R. 870; Crowley *v.* Vitty, Ibid. 319. See Reed, Stat. of Frauds, §§ 507, 515, 540, 770.

to be defeated at some future period.[1] But a lease will not, under the exception, be held to be surrendered by the acceptance of a *void* lease, which creates no new estate whatever,[2] or even the acceptance of a *voidable* lease, which being afterwards made void, *contrary to the intention* of the parties, does not pass an interest *according to the contract*.[3] Nor is a surrender worked by the single circumstance of a tenant entering into an agreement to purchase the leased estate;[4] though this may of course be done by written limitations, express or implied.[5] But where a tenant, in pursuance of a license to quit, gives up possession, which is resumed by the landlord, this will be deemed a surrender by operation of law, which will preclude the landlord from recovering rent falling due after his resumption of possession.[6]

Surrender by operation of law now held to include acts done by landlord and tenant inconsistent with tenant's interest.

§ 860. An important extension of the old construction of "operation of law" has taken place in late years. Suppose the landlord, with the tenant's assent followed by the tenant's surrender of the estate, conveys the leased estate to a stranger; is the tenant, in the teeth of such a conveyance, in which he himself participated, to continue in the enjoyment of his lease? In equity, unquestionably, he would be precluded from further intermeddling with the estate.[7] Nor, such is now the better opinion, can he

[1] Taylor's Ev. § 920; citing Roe *v.* Abp. of York, 6 East, 102; Doe *v.* Bridges, 1 B. & Ad. 847, 856; Doe *v.* Poole, 11 Q. B. 716, 723; Fulmerston *v.* Steward, Plowd. 107 *a*, per Bromley, C. J.; Co. Litt. 45 *a*; Lloyd *v.* Gregory, Cro. Car. 501; Whitley *v.* Gough, Dyer, 140–146. See Jackson *v.* Butler, 8 Johns. 394; Rowan *v.* Lytle, 11 Wend. 616; Reed, Stat. of Frauds, §§ 785, 791.

[2] Roe *v.* Abp. of York, 6 East, 86, explained by Abbott, C. J., in Hamerton *v.* Stead, 3 B. & C. 481, 482; Lynch *v.* Lynch, 6 Ir. Law R. 142, per Lefroy, B.; Wilson *v.* Sewell, 4 Burr. 1980; Davison *v.* Stanley, Ibid. 2213, per Ld. Mansfield.

[3] Doe *v.* Poole, 11 Q. B. 713; Doe *v.* Courtenay, 11 Q. B. 702–722; overruling Doe *v.* Forwood, 3 Q. B. 627.

[4] Doe *v.* Stanton, 1 M. & W. 695, 701; Tarte *v.* Darby, 5 M. & W. 601. See Reed, Stat. of Frauds, § 818.

[5] Ibid. See Donellan *v.* Read, 3 B. & Ad. 905; Lambert *v.* Norris, 2 M. & W. 335.

[6] Grimman *v.* Legge, 8 B. & C. 324; 2 M. & R. 438, *S. C.*; Dodd *v.* Acklom, 6 M. & Gr. 672; Phené *v.* Poplewell, 31 L. J. C. P. 235; 12 Com. B. N. S. 334, *S. C.*; Whitehead *v.* Clifford, 5 Taunt. 518. See Cannan *v.* Hartley, 19 L. J. C. P. 323; 9 Com. B. 634, *S. C.*; McKinney *v.* Reader, 7 Watts, 123; Lamar *v.* McNamee, 10 Gill. & J. 116; Browne on Frauds, § 55; Reed, Stat. of Frauds, §§ 772, 786, 792 *et seq.* See Lounsberry *v.* Snyder, 31 N. Y. 514.

[7] McDonald *v.* Pope, 9 Hare, 705; Reed, Stat. of Frauds, § 774.

at law be held to have retained his rights. The lease is surrendered by operation of law.[1]

§ 861. However it may be in equity, it is settled that at law the cancellation of a deed, even though accompanied by a surrender of the land, cannot, under the statute of frauds, operate to revest, even by agreement of parties, the estate, unless the solemnities prescribed by the statute be adopted.[2] Nor can we infer surrender merely from the deed being found cancelled in the possession of the lessor.[3] But where a deed has not been recorded, and the grantee wishing to sell the estate, delivers it up and cancels it, and the grantor executes a new deed to the purchaser, the title of the latter is good.[4] A written contract, however, for the sale of real estate, may be rescinded by parol.[5]

Mere cancellation of deed does not revest estate.

[1] Reed, Stat. of Frauds, §§ 770, 772, 774, 780, 782, 789, 790 *et seq.*; Thomas *v.* Cook, 2 Stark. R. 408; *S. C.* 2 B. & A. 119; 8 B. & C. 732; Dodd *v.* Acklam, 6 M. & Gr. 672; Walker *v.* Richardson, 2 M. & W. 882; Grimman *v.* Legge, 8 B. & C. 324; Davison *v.* Gent, 1 H. & N. 744; Reese *v.* Williams, 2 C., M. & R. 581; Reeve *v.* Bird, 4 Tyr. 612; Nickells *v.* Atherston, 10 Q. B. 944; Lynch *v.* Lynch, 6 Irish L. R. 131; Hesseltine *v.* Seavey, 16 Me. 212; Randall *v.* Rich, 11 Mass. 494; Bedford *v.* Terhune, 30 N. J. 453; Lounsberry *v.* Snyder, 31 N. Y. 514; Smith *v.* Niver, 2 Barb. 180; Whitney *v.* Myers, 1 Duer, 266; McKinney *v.* Reader, 7 Watts, 123; Lamar *v.* McNamee, 10 Gill. & J. 116. See qualifying remarks of Lord Wensleydale, in Lyon *v.* Reed, 13 M. & W. 309, and comments thereon in Taylor's Ev. § 926; Reed on Stat. of Frauds, §§ 765, 789 *et seq.* See, as further doubting, Thomes *v.* Gardner, 39 N. J. L. 530.

[2] See Magennis *v.* MacCullough, Gilb. Eq. R. 236; Roe *v.* Abp. of York, 6 East, 86, 101; Wootley *v.* Gregory, 2 Y. & J. 536; Bolton *v.* Bp. of Carlisle, 2 H. Bl. 263, 264; Doe *v.* Thomas, 9 B. & C. 288; 4 M. & R. 218, *S. C.*; Walker *v.* Richardson, 2 M. & W. 882; Natchbolt *v.* Porter, 2 Vern. 112; Rob. on Frauds, 251, 252; Ibid. 248, 249; Browne on Frauds, §§ 41, 214; Butler *v.* Gardner, 8 Johns. R. 394; Anderson *v.* Anderson, 4 Wend. 474; Hunter *v.* Page, 4 Wend. 585; Rowan *v.* Lytle, 11 Wend. 616.

[3] See Bolton *v.* Bp. of Carlisle, 2 H. Bl. 263, 264; Walker *v.* Richardson, 2 M. & W. 892; Ward *v.* Lumley, 5 H. & N. 87; Reed, Stat. of Frauds, §§ 782, 789.

[4] Browne on Frauds, § 60; citing Holbrook *v.* Tirrell, 9 Pick. 105; Nason *v.* Grant, 21 Me. 160; Mussey *v.* Holt, 4 Fost. 248; Farrar *v.* Farrar, 4 N. H. 191; Dodge *v.* Dodge, 33 N. H. 487; Faulks *v.* Burns, 1 Green Ch. (N. J.) 250; Mallory *v.* Stodder, 6 Ala. 801; Holmes *v.* Trout, 7 Peters, 171. *Contra*, Gilbert *v.* Bulkley, 5 Conn. 262; Raynor *v.* Wilson, 6 Hill, 469. See Reed, Stat. of Frauds, §§ 782–3.

[5] Boyce *v.* McCulloch, 3 W. & S. 429; infra, § 1017. See Reed, Stat. of Frauds, § 779.

§ 862. Assignments, as well as surrenders, may take place by operation of law, and thus be excepted by the statute. A lessor, for instance, dies intestate, in which case the reversion vests in his heir-at-law; or a lessee dies intestate, and the lease vests in his administrator, by operation of law. Even an executor *de son tort*, so far as concerns himself, may be treated as the assignee of a lease; and in cases of this class, when an action is brought against the heir, or administrator, or executor *de son tort*, it has been held enough to charge in the declaration that the reversion or lease respectively came to the defendant "by assignment thereof then made."[1] A similar assignment, by operation of law, passes, on a woman's marriage, her chattels real to her husband. So when any person is adjudged a bankrupt, his property, whether real or personal, present or future, vested or contingent,[2] becomes vested, without any deed of assignment or conveyance, in the statutory assignees. It is, however, settled, that a parol assignment by a sheriff of leasehold premises, taken in execution under a *fieri facias*, is void at law, though the assignee has entered and paid rent to the head landlord.[3]

Assignments by operation of law excepted by statute.

§ 863. By the fourth section of the statute certain solemnities of writing are necessary to the transfer of an "interest in lands;" and multitudinous are the adjudications as to what this term includes.[4] The statute has been held to include contracts to abate a tenant's rent;[5] to assign rent;[6] to submit to arbitration the question whether a lease shall be granted;[7] to assign an equitable interest;[8]

In other respects writing is essential to transfer interest in lands.

[1] Paull *v.* Simpson, 9 Q. B. 365; Derisley *v.* Custance, 4 Tr. 75.

[2] See Stanton *v.* Collier, 3 E. & B. 274; Beckham *v.* Drake, 2 H. of L. Cas. 579; Rogers *v.* Spence, 12 Cl. & Fin. 700; Herbert *v.* Sayer, 5 Q. B. 965; Jackson *v.* Burnham, 8 Ex. R. 173.

[3] Doe *v.* Jones, 9 M. & W. 265; *S. C.* 1 Dowl. N. S. 352.

[4] See Bingham's Real Estate, 244 *et seq.*; White *v.* White, 1 Harr. (N. J.) 202; Keeler *v.* Tatnell, 3 Zabr. 62; Hall *v.* Hall, 2 McC. Ch. 269; Madigan *v.* Walsh, 22 Wis. 501. See discussion in Reed, Stat. of Frauds, §§ 704 *et seq.* This clause is not in the Texas statute. Anderson *v.* Powers, 59 Tex. 213.

[5] O'Connor *v.* Spaight, 1 Sch. & Lef. 306. See Taylor's Ev. § 948; Reed, Stat. of Frauds, § 555.

[6] Whitting, in re, 27 Wr. 385.

[7] Walters *v.* Morgan, 2 Cox Ch. R. 369. See Reed, Stat. Frauds, §§ 524, 529, 537, 749.

[8] Infra, § 903 *a*; Smith *v.* Burnham, 3 Sumn. 435; Richards *v.* Richards, 9 Gray, 313; Simms *v.* Kilian, 12 Ired. L. 252. And so as to equity of redemption. Odell *v.* Montross, 68 N. Y. 499;

to assign "squatter's rights;"[1] to assign an interest in a salt well,[2] and in an oil well;[3] to exchange land for labor;[4] to relinquish a tenancy, and let another party into possession for the residue of a term;[5] to readjust a boundary;[6] to permit the profits of a clergyman's living to be received by a trustee;[7] to become a partner in a colliery, which was to be demised by the partnership upon royalties;[8] to transfer an easement;[9] to take furnished lodgings;[10] to sell a pew in a church for an unlimited period;[11] to reserve a shed from the operation of a deed;[12] to sell brick being part of a burned house;[13] to grant,[14] or otherwise to transfer to another a mortgagor's equity of redemption;[15] to reconvey if purchase-money is not paid,

Cowles *v.* Marble, 37 Mich. 158. See Reed, Stat. Frauds, §§ 72–3 *et seq.*, 975, 998, 1015, 1033.

[1] Hayes *v.* Skidmore, 27 Ohio St. 331; Reed, Stat. of Frauds, §§ 377, 725.

[2] McDowell *v.* Delap, 2 Marsh. 33.

[3] Henry *v.* Colby, 3 Brewst. 175.

[4] Dowling *v.* McKenney, 124 Mass. 478. See Reed, Stat. Frauds, §§ 621, 732.

[5] Buttemere *v.* Hayes, 5 M. & W. 456; 7 Dowl. 489, *S. C.*; Smith *v.* Tombs, 3 Jur. 72, Q. B.; Cocking *v.* Ward, 1 Com. B. 858; Kelly *v.* Webster, 12 Com. B. 283; Smart *v.* Harding, 15 Com. B. 652; Hodgson *v.* Johnson, 28 L. J. Q. B. 88; E., B. & E. 685, *S. C.*; Reed, Stat. of Frauds, §§ 623, 625, 695, 718, 740, 742, 792. See Bacon *v.* Parker, 137 Mass. 309. But not, it seems, an expectancy in a parent's estate. Galbraith *v.* McLain, 84 Ill. 379; Reed, Stat. of Frauds, §§ 666, 726.

[6] Sharp *v.* Blankenhip, 67 Cal. 441.

[7] Alchin *v.* Hopkins, 1 Bing. N. C. 102; 4 M. & Sc. 615, *S. C.*

[8] Caddick *v.* Skidmore, 2 De Gex & J. 52, per Lord Cranworth, Ch.; 27 L. J. Ch. 153, *S. C.*; Allen *v.* Richard, 83 Mo. 55.

[9] R. *v.* Salisbury, 8 A. & E. 716; Cook *v.* Stearns, 11 Mass. 533. See Morse *v.* Copeland, 2 Gray, 302; Foot *v.* Northampton Co., 23 Conn. 223; Selden *v.* Canal Co., 29 N. Y. 639; Reed, Stat. of Frauds, §§ 720, 722. Under this head falls a grant of a right to shoot and carry away game. Webber *v.* Lee, 9 Q. B. D. 315.

[10] Edge *v.* Strafford, 1 C. & J. 391; 1 Tyr. 293, *S. C.*; Inman *v.* Stamp, 1 Stark. R. 12, per Ld. Ellenborough; Mechelen *v.* Wallace, 7 A. & E. 49; 2 N. & P. 224, *S. C.*; Vaughan *v.* Hancock, 3 Com. B. 766; Reed, Stat. of Frauds, §§ 812, 815.

[11] Baptist Ch. *v.* Bigelow, 16 Wend. 28.

[12] Detroit R. R. *v.* Forbes, 30 Mich. 165.

[13] Meyers *v.* Schemp, 67 Ill. 469.

[14] Massey *v.* Johnson, 1 Ex. R. 255, per Rolfe, B. See Toppin *v.* Lomas, 16 Com. B. 145; Kelley *v.* Kelley, 54 Mich. 30; Reed, Stat. of Frauds, § 514.

[15] Scott *v.* McFarland, 13 Mass. 309; Marble *v.* Marble, 5 N. H. 374; Kelley *v.* Stanberry, 13 Ohio, 408. See Pomeroy *v.* Winship, 12 Mass. 514; Junkins *v.* Lovelace, 72 Ala. 303.

or on other contingencies;[1] to procure, as a broker, the sale of a lease;[2] to an agreement by which B. is to take half, at a fixed price, of lands to be purchased by A.[3] But, as we shall see more fully hereafter, the statute has been held not to include an equitable mortgage by the deposit of title-deeds;[4] or a sale of a house about to be put on rollers for removal;[5] or a subsequent collateral agreement, modifying terms of payment or identifying property, after the title has vested in the vendee;[6] or an agreement for contingent profits in a real estate speculation;[7] or a collateral agreement by a lessee to pay a percentage on money laid out by the landlord on the premises,[8] or other collateral agreement;[9] or a contract relating to the investigation of a title or boundaries of land;[10] or an agreement for board and lodging, no particular rooms being demised;[11] or a license for the enjoyment of an easement or

[1] Gallagher *v.* Mars, 50 Cal. 23. See Wilson *v.* McDowell, 78 Ill. 514; Grover *v.* Buck, 34 Mich. 319; Richardson *v.* Johnson, 41 Wis. 100; Reed, Stat. of Frauds, §§ 493, 737.

[2] Horsey *v.* Graham, L. R. 5 C. P. 9; 39 L. J. C. P. 58, *S. C.*

[3] Durphy *v.* Ryan, 116 U. S. 491.

[4] Russell *v.* Russell, 1 Br. C. C. 269; 12 Ves. 197; Hall *v.* McDuff, 24 Me. 311; Hackett *v.* Reynolds, 4 R. I. 512; Welsh *v.* Usher, 2 Hill Ch. 166; Chase *v.* Peck, 21 N. Y. 584; Keith *v.* Horner, 32 Ill. 526; Wilson *v.* Lyon, 51 Ill. 530; Gothard *v.* Flynn, 25 Miss. 58; Jarvis *v.* Dutcher, 16 Wis. 307. But see Bowers *v.* Oyster, 3 Penn. R. 239; Hale *v.* Henrie, 2 Watts, 143; Strauss's Appeal, 49 Penn. St. 358; Vanmeter *v.* McFaddin, 8 B. Mon. 435. See Reed, Stat. of Frauds, §§ 783, 1042, 1043, 1051.

[5] Long *v.* White, 42 Ohio St. 59. See Rogers *v.* Cox, 96 Ind. 157.

[6] Negley *v.* Jeffers, 28 Ohio St. 90; McConnell *v.* Brayner, 63 Mo. 461; infra, § 1026. As to how far the statute precludes subsequent variation, see Cummings *v.* Arnold, 3 Met. (Mass.) 486; Stearns *v.* Hall, 9 Cush. 31; C. Allen, J., Hastings *v.* Lovejoy, 140 Mass. 265. And see infra, §§ 901, 927; Reed, Stat. of Frauds, §§ 440, 458, 461, 462, 463.

[7] Mahagan *v.* Mead, 63 N. H. 130; Spencer *v.* Lawton, 14 R. I. 494; Babcock *v.* Reed, 99 N. Y. 609; Benjamin *v.* Zell, 100 Penn. St. 33; Everhart's App., 106 Penn. St. 349; Carr *v.* Leavitt, 54 Mich. 540; Snyder *v.* Wolford, 33 Minn. 175.

[8] Hoby *v.* Roebuck, 7 Taunt. 157. See Scott *v.* White, 71 Ill. 289; Gafford *v.* Stearns, 51 Ala. 434. See Reed, Stat. of Frauds, §§ 662, 672.

[9] McGinnis *v.* Cook, 57 Vt. 56; Babcock *v.* Reed, 50 N. Y. S. C. 126; McMullin *v.* Sanders, 79 Va. 356; Little *v.* McCarter, 89 N. C. 233; Hale *v.* Stuart, 76 Mo. 20; Coe *v.* Griggs, 76 Mo. 619.

[10] Jeakes *v.* White, 6 Ex. R. 873; Sherrill *v.* Hagan, 92 N. C. 345.

[11] Wright *v.* Stavert, 29 L. J. Q. B. 161; 2 E. & E. 721, *S. C.*; White *v.* Maynard, 111 Mass. 250. See Reed, Stat. of Frauds, § 758.

similar right;[1] or an agreement for the moving of a watercourse;[2] or an agreement, between two contiguous owners, to adjust an ambiguous boundary line;[3] or a contract that an arbitrator shall determine the amount of damages sustained by a party, in consequence of a road having been made through his lands.[4] On the Pacific coast, under the usage which has there grown up of transferring mining claims by parol, it has been held that the transfer of such claims is not within the statute.[5] But in California such transfers must now, by statute, be in writing.[6]

Fixtures.

§ 863 *a*. Fixtures, when of a permanent character affixed to the land, are an interest in land under the statute. As to whether a particular kind of fixture—*e. g.*, gas fixtures —are of this character depends, in part, on local usage.[7] When put on distinctively as personalty they may be sold as personalty.[8] Hence, also, permissions to tenants to put on and take off fixtures may be by parol.[9]

As to partnership and corporation realty.

§ 864. The statute has been held, in England, not to cover shares in a company possessed of real estate, if the company be *incorporated* by statute or by charter, and the real property be vested in the corporation, who are to have the sole management of it. In such case, the shares of the individual proprietors will be personalty, and will consist of nothing more than a right to participate in the net produce of the property of the company.[10] In this country the same distinction is

[1] 1 Washburn's Real Prop. 4th ed. 639; Angell on Watercourses, § 168; Browne, Stat. Frauds, § 232; Johnson *v.* Wilkinson, 139 Mass. 3.

[2] Hamilton, etc., Co. *v.* R. R., 29 Ohio St. 341; Reed, Stat. of Frauds, § 758.

[3] Taylor *v.* Zepp, 14 Mo. 482; Turner *v.* Baker, 64 Mo. 218. See Boyd *v.* Graves, 4 Wheat. 513.

[4] Gillanders *v.* Ld. Rossmore, Jones Ex. R. 504; Griffiths *v.* Jenkins, 3 New R. 489, per Crompton and Shee, JJ., in Bail Ct. For the English references above, see Taylor, § 948.

[5] Kinney *v.* Mining Co., 4 Sawy. 451; Table Mountain Co. *v.* Stranahan, 20 Cal. 208; Antoine *v.* Ridge Co., 23 Cal. 222; Savage *v.* Stone, 1 Utah, 35.

[6] Gollen *v.* Fett, 30 Cal. 184; Melton *v.* Lambert, 51 Cal. 258; Reed, Stat. of Frauds, § 706.

[7] In Philadelphia gas-burners are treated as fixtures. Jarechi *v.* Philharmonic Society, 79 Penn. St. 403.

[8] See Lee *v.* Gaskell, L. R. 1 Q. B. 700; Hallen *v.* Rundle, 1 Cr. M. & Ros. 274; Elwes *v.* Mawe, 2 Sm. Lead. Ca. 177; Hey *v.* Bruner, 61 Penn. St. 87.

[9] Carter *v.* Salmon, 43 L. T. Rep. 490; Lombard *v.* Ruggles, 9 Me. 67; O'Leary *v.* Delaney, 63 Me. 584; Dubois *v.* Kelly, 16 Barb. 507. See Trappes *v.* Harter, 2 C. & M. 153.

[10] Taylor's Ev. § 949; Bligh *v.* Brent, 2 Y. & C. Ex. R. 268; Bradley *v.* Holdsworth, 3 M. & W. 422; Hibble-

in most states maintained.[1] It has been further ruled that the statute does not extend to the transfer of interests in unincorporated companies, in any cases where trustees are seised of the real estate in trust to use it for the benefit of the shareholders, and to make profits out of it (to the enjoyment of which the rights of the stockholders are restricted),[2] as part of the stock in trade. On the other hand, if the trustees hold the real estate in trust for themselves, and for co-adventurers, present and future, in proportion to their number of shares, then transfers of shares in such trust cannot be made without writing.[3] It has been further ruled that the question, under which of these two species of trusts the lands of any particular company may be held, is one of fact, to be determined in each case by the jury.[4] So far as concerns partnerships, the English rule, and that obtaining in some jurisdictions in this country, is that the existence of a partnership, which holds or is to hold lands, may be proved by parol, and that when a partnership is thus established, it may be shown by parol that its property consists of land.[5] But

white *v.* M'Morine, 6 N. & W. 214, per Parke, B.; 2 Rail. Ca. 67, *S. C.*; Humble *v.* Mitchell, 11 A. & E. 205; 2 Rail. Ca. 70, *S. C.*; Baxter *v.* Brown, 7 M. & Gr. 216, per Tindal, C. J.; Hilton *v.* Geraud, 1 De Gex & Sm. 187; Watson *v.* Spratley, 10 Ex. R. 237, per Martin, B., 244, per Parke, B.; Bulmer *v.* Norris, 9 Com. B. N. S. 19. See Edwards *v.* Hall, 25 L. J. Ch. 82; 6 De Gex, M. & G. 74, *S. C.* (overruling Ware *v.* Cumberledge, 20 Beav. 503); Holdsworth *v.* Davenport, 3 Ch. D. 185; and see, also, Powell *v.* Jessopp, 18 Com. B. 336, and Taylor *v.* Linley, 2 De Gex, F. & J. 84; Pennybacker *v.* Leary, 65 Iowa, 220; Entwistle *v.* Davis, L. R. 4 Eq. 275; Lindley on Partnership, Bk. 1. ch. 4; Reed, Stat. of Frauds, § 727.

[1] Tappan *v.* Bank, 19 Wall. 499; Wheelock *v.* Moulton, 15 Vt. 519; Tippets *v.* Walker, 4 Mass. 595; Wells *v.* Cowles, 2 Conn. 514; Smith *v.* Tarlton, 2 Barb. Ch. 336; Chester *v.* Dickerson, 54 N. Y. 1; *S. C.* 52 Barb. 349; Brownson *v.* Chapman, 63 N. Y. 625; Barksdale *v.* Finney, 14 Grat. 356; Fraser *v.* Child, 4 E. D. Smith, 153. See Vaupell *v.* Woodward, 2 Sandf. Ch. 143, and cases cited in Reed, Stat. of Frauds, § 728.

[2] Watson *v.* Spratley, 10 Ex. R. 222. See Myers *v.* Perigal, 2 De Gex, M. & G. 599; Walker *v.* Bartlett, 18 Com. B. 845; Hayter *v.* Tucker, 4 Kay & J. 243; Bennett *v.* Blain, 15 Com. B. N. R. 518, *S. C.*; Freeman *v.* Gainsford, 34 L. J. C. P. 95; Entwistle *v.* Davis, 36 L. J. Ch. 825; Law Rep. 4 Eq. 272, *S. C.*; Wells *v.* Mayor, etc., L. R. 10 C. P. 402.

[3] Ibid.; Baxter *v.* Brown, 7 M. & Gr. 198; Boyce *v.* Green, Batty, 608. See Morris *v.* Glynn, 27 Beav. 218; Black *v.* Black, 15 Ga. 445.

[4] Watson *v.* Spratley, 10 Ex. R. 222, per Parke and Alderson, BB.

[5] Supra, § 78; Lindley on Partnership, Bk. I. ch. 4; Reed, Stat. Frauds, § 727; Dale *v.* Hamilton, 5 Hare, 369; 2 Ph. 266; Essex *v.* Essex, 20 Beav.

in other states, partnership contracts must be in subordination to the statute.[1] But though land acquired by a partnership for partnership purposes may pass as personalty, so far as concerns parties and privies, the mere agreement to form a partnership to deal in land cannot, in some jurisdictions, be enforced, or damages recovered for its infringement, unless it be in writing.[2] We may, in addition, notice, that *scrip* and *shares* in joint-stock companies, whether incorporated or unincorporated, *are not* "*goods, wares, and merchandise*," within the seventeenth section of the act.[3]

Under statute seal is not necessary for transfer of term for years; but writing is.

§ 865. So far as concerns terms for years, the better opinion is, that a writing without seal is sufficient for transfer.[4] This is clearly the case with transfers of existing leases.[5] And the better opinion is, that if a writing is sealed it will operate as a lease, though not signed.[6]

449; Nutt *v.* Bank, 4 Cranch C. C. 102; Buffum *v.* Buffum, 49 Me. 23; Dyer *v.* Clark, 5 Metc. 562; Dutton *v.* Woodman, 9 Cush. 255; Fall River Co. *v.* Borden, 10 Cush. 471; Bunnel *v.* Taintor, 4 Conn. 573; Chester *v.* Dickerson, 54 N. Y. 7; *S. C.*, 52 Barb. 349; Personette *v.* Pryme, 34 N. J. Eq. 29; Everhart's App., 106 Penn. St. 349; Morrill *v.* Colehour, 82 Ill. 625; Richards *v.* Grinnell, 63 Iowa, 44; Pennyball *v.* Leary, 65 Iowa, 260; Falkner *v.* Hunt, 73 N. C. 573; Evans *v.* Green, 23 Miss. 274; Thomas *v.* Hammond, 47 Tex. 49.

[1] Sedam *v.* Shaffer, 5 W. & S. 529; Le Fevre's App., 125; Rowland *v.* Booser, 10 Ala. 695; Parker *v.* Bodley, 4 Bibb, 103; Kidd *v.* Carson, 33 Md. 37; Wheatley *v.* Calhoun, 12 Leigh, 272. See other cases in Reed, Stat. Frauds, § 727.

[2] Smith *v.* Burnham, 3 Sumn. 460. See Linscott *v.* McIntire, 15 Maine, 201.

[3] Humble *v.* Mitchell, 11 A. & E. 205; 2 Rail Ca. 70, *S. C.*; Hibblewhite *v.* McMorine, 6 M. & W. 214, per Parke, B.; Knight *v.* Barber, 16 M. & W. 66; Tempest *v.* Kilner, 3 Com. B. 249; Bowlby *v.* Ball, Ibid. 284; Dunouft *v.* Albrecht, 12 Sim. 189; Watson *v.* Spratley, 10 Ex. R. 222. See Reed, Stat. Frauds, §§ 234, 301.

[4] Maule, J., Aveline *v.* Whisson, 4 M. & G. 80; Mayberry *v.* Johnson, 3 Green (N. J.), 116; 4 Greenl. Cruise, 34; Roberts on Frauds, 249; Browne, Stat. of Frauds, § 7; Reed, Stat. of Frauds, §§ 510, 730, 803 *et seq.*

In Pennsylvania a seal has been held not to be necessary to a lease of land under ground-rent. Cadwalader *v.* App, 81 Penn. St. 194. That equitable effect will be given to unsealed writings, see supra, §§ 692 *et seq.*

[5] Farmer *v.* Rogers, 2 Wils. 26; Beck *v.* Phillips, 5 Burr. 2827; Courtail *v.* Thomas, 9 B. & C. 288; Holliday *v.* Marshall, 7 Johns. R. 211; Allen *v.* Jaquish, 21 Wend. 628; Reed, Stat. of Frauds, §§ 730, 766, 767 *et seq.*, 1064.

[6] Aveline *v.* Whisson, 4 Man. & Gr. 801; Cherry *v.* Hemming, 4 W., H. & G. 631; Cooch *v.* Goodman, 2 A. & E. (N. S.) 580. See Wood *v.* Goodridge, 6 Cush. 117; Gardner *v.* Gardner, 5 Cush. 483. As to general rules in respect to seals, see supra, §§ 692–3. As to conflicting authorities on this point, see Reed, Stat. Frauds, §§ 803, 1064.

§ 866. Much discussion has arisen as to what products of the soil are included, when on the soil, under the term "interest in lands," and what are not. It is conceded on all sides that the term does not include fruits, which from the nature of things are perishable, and which, if not removed immediately, are valueless. Hence it is that a contract for the sale of such fruit is not a contract for any interest in lands, though the fruits are to be removed from the soil by the purchaser.[1] The same distinction is applicable to all ephemeral and transitory produce of the earth, reared annually by labor and expense, and in actual mature existence at the time of the contract—as, for instance, a ripened crop of corn,[2] or hops,[3] or potatoes,[4] or peaches,[5] or turnips[6]—though the purchaser is to harvest or dig them.[7] On the other hand, when the produce to be sold is not, from its perishable condition while on the soil, in a state which requires its immediate removal, if it is to be of value, then, under the statute, it is an interest in lands.[8] Hence the stat-

"Interest in lands" does not include ripe though ungathered fruit, or crops annually removed; but otherwise as to such produce of the soil as is capable of permanent attachment to it.

[1] Thayer *v.* Rock, 13 Wend. 53. See Browne, Stat. Frauds, § 241; Reed, Stat. Frauds, § 707; Parker *v.* Staniland, 11 East, 362. So as to crude turpentine. Lewis *v.* McNatt, 65 N. C. 65. As questioning position in text, see Rodwell *v.* Phillips, 9 M. & W. 501.

[2] See Jones *v.* Flint, 10 A. & E. 753; 2 P. & D. 594, *S. C.*

[3] Per Parke, B., in Rodwell *v.* Phillips, 9 M. & W. 503, questioning Waddidgton *v.* Bristow, 2 B. & P. 452. See, also, Graves *v.* Weld, 5 B. & Ad. 119, 120; Reed, Stat. Frauds, §§ 707, 709.

[4] Sainsbury *v.* Matthews, 4 M. & W. 343; 7 Dowl. 23, *S. C.*; Evans *v.* Roberts, 5 B. & C. 829; 8 D. & R. 611; Warwick *v.* Bruce, 2 M. & Sel. 205; Reed, Stat. Frauds, § 707 *et seq.*

[5] Purner *v.* Piercy, 40 Md. 212; Reed, Stat. Frauds, § 711.

[6] Dunne *v.* Ferguson, Hayes, 540; Emmerson *v.* Heelis, 2 Taunt. 38, *contra*, must be considered as overruled by Evans *v.* Roberts, 5 B. & C. 833, 834, and by Jones *v.* Flint, 10 A. & E. 759. See Reed, Stat. Frauds, § 708.

[7] Mr. Taylor questions whether the same rule would apply to contracts respecting the sale of teasles, liquorice, madder, clover, or other crops of a like nature, which do not ordinarily repay the labor by which they are produced *within the year* in which that labor is bestowed, and consequently, as it seems, do not fall within the law of emblements. Taylor's Ev. § 952; citing Graves *v.* Weld, 5 B. & Ad. 105, 118–120; 1 Sug. V. & P. 156.

[8] See Bostwick *v.* Leach, 3 Day, 476; Brown *v.* Sanborn, 21 Minn. 402; Reed, Stat. Frauds, § 711.

It is true, that the distinction in the text is apparently overridden in Warwick *v.* Bruce, supra; but in that case it did not appear but that the potatoes could be at once harvested. See Bryant *v.* Crosby, 40 Me. 9; Claflin *v.* Carpenter, 4 Met. (Mass.) 580; Sherry *v.* Picken, 10 Ind. 375; Bull *v.* Gris-

ute has been held to cover agreements respecting the sale of growing trees,[1] or wheat,[2] or grass,[3] or standing though growing underwood,[4] or growing poles.[5] But while forest trees, though planted, are within the statute ;[6] it is otherwise with nursery slips, whose office it is to be stored on the soil, not for permanency, but for sale.[7]

§ 867. It has been sometimes said that where there is a license to the vendee to enter and carry off the crop, then the crop is personalty, but when there is no such license, then the crop is realty. But this distinction cannot be sustained. If a vendee should be licensed to enter a grove a year or two hence, and cut down and carry off a load of saplings, the contract would concern realty, because, between the contract and the performance, the soil would pass into the trees. On the other hand, if the vendor should say, "I will now cut down and stack these trees, and sell them to you at so much a cord," then the contract would be for personalty, though there was no license to the vendee.[8] The question is, is the

wold, 19 Ill. 631; Marshall *v.* Ferguson, 23 Cal. 65. But as sustaining the text may be noticed Green *v.* Armstrong, 1 Denio, 550; Bank *v.* Crary, 1 Barb. 542; Warren *v.* Leland, 2 Barb. 613; Bishop *v.* Bishop, 1 Kernan, 123; Bennett *v.* Scutt, 18 Barb. 347; Westbook *v.* Eager, 1 Harr. (N. J.) 81. Cf. Buck *v.* Pickwell, 1 Williams (Vt.), 157; Reed, Stat. Frauds, §§ 708 *et seq.*, 719, 796.

[1] Rodwell *v.* Phillips, 9 M. & W. 501, resolving a doubt suggested by Littledale, J., in Graves *v.* Weld, 5 B. & Ad. 116; Smith *v.* R. R., 4 Keyes, 180; Robbins *v.* McKnight, 1 Halst. Ch. 229; Owens *v.* Lewis, 46 Ind. 489; Cool *v.* Box Co., 87 Ind. 531; Daniels *v.* Bailey, 43 Wis. 566; Lillie *v.* Dunbar, 62 Wis. 198.

[2] Kerr *v.* Hill, 27 W. Va. 576.

[3] Crosby *v.* Wadsworth, 6 East, 602; Carrington *v.* Roots, 2 M. & W. 248; Gilmore *v.* Wilbur, 12 Pick. 120; Powell *v.* Rich, 41 Ill. 566; Powers *v.* Clarkson, 17 Kans. 218; Reed, Stat. Frauds, §§ 707, 709, 800. See distinctions taken in Reiff *v.* Reiff, 64 Penn. St. 134.

[4] Scorell *v.* Boxall, 1 Y. & J. 396.

[5] Teal *v.* Auty, 2 B. & B. 99; 4 Moore, 542, *S. C.*; Bishop *v.* Bishop, 1 Kernan, 123. See, however, comments in Browne, Stat. Frauds, § 25; Reed, Stat. Frauds, §§ 709, 740.

When a vendor has contracted to sell timber at so much per foot, this was held not to pass an interest in lands. The court regarded the contract in the same light as if it had related to the sale of timber already felled. Smith *v.* Surman, 9 C. & P. 501; *S. C.* M. & R. 455, as explained by Lord Abinger, in Rodwell *v.* Phillips, 9 M. & W. 505; Reed, Stat. Frauds, § 710.

[6] Marshall *v.* Green, 1 C. P. D. 39.

[7] Miller *v.* Baker, 1 Metc. (Mass.) 27; Whitmarsh *v.* Walker, Ibid. 314.

[8] See Marshall *v.* Green, 1 C. P. D. 40, where Lord Coleridge said: "It would seem obvious that a sale of twenty-two trees to be taken away immediately was not a sale of an interest in land, but merely of so much timber."

strength of the soil to go into the crop after the sale is made, or is it not? If it does, then what is sold is "an interest in land."[1] If, however, what is sold is the annual crop, ripe, and to be cut before it draws materially from the soil, then the crop is not "an interest in land."[2] It may be added, *a fortiori*, that where land is to be contracted to be sold or let, and the vendee or tenant agrees to buy the growing crops, the crops are regarded as still drawing from the soil, and as therefore under the fourth section of the statute, which requires contracts to be in writing.[3] But when the essence of the thing sold is labor, not land, the statute does not apply.[4] Or, to revert to the old terms, while *fructus naturales* are real property, as in the main products of land, *fructus industriales* are personalty, as in the main products of labor.

[1] Knox *v.* Haralson, 2 Tenn. Ch. 232; though see Green *v.* R. R., 73 N. C. 524; Reed, Stat. Frauds, § 711. That the question does not hang upon the purchaser's right to enter and gather, appears by Lord Ellenborough's remarks in Parker *v.* Staniland, 11 East, 362. See Jones *v.* Flint, 10 Ad. & El. 753; Nettleton *v.* Sikes, 8 Met. (Mass.) 34; Whitmarsh *v.* Walker, 1 Met. (Mass.) 313; Claflin *v.* Carpenter, 4 Met. (Mass.) 583.

[2] Anon., 1 Ld. Raym. 182; Mayfield *v.* Wadsley, 3 B. & Cr. 357; Smith *v.* Surman, 9 B. & C. 561; Rodwell *v.* Phillips, 9 M. & W. 505; Marshall *v.* Green, 1 C. P. D. 35; Safford *v.* Annis, 7 Me. 168; Cutler *v.* Pope, 13 Me. 377; Bryant *v.* Crosby, 40 Me. 107; Whitmarsh *v.* Walker, 1 Met. (Mass.) 313; Claflin *v.* Carpenter, 4 Met. (Mass.) 580; Kilmore *v.* Howlett, 48 N. Y. 569; Harris *v.* Frink, 49 N. Y. 27; Hershey *v.* Metzgar, 90 Penn. St. 218; Smith *v.* Bryan, 5 Md. 141; Smith *v.* Fritt, 1 Dev. & Bat. 242; Robinson *v.* Ezzell, 72 N. C. 223; Cain *v.* McGuire, 13 B. Mon. 340; Davis *v.* McFarlane, 37 Cal. 636. See Reed, Stat. Frauds, §§ 707–711.

[3] Falmouth *v.* Thomas, 1 C., M. & R. 19; Mayfield *v.* Wadsley, 3 B. & C. 361. See Reed, Stat. Frauds, §§ 664, 694, 708; 10 Alb. L. J. 272; 20 Am. L. J. 615.

[4] Pitkin *v.* Noyes, 48 N. H. 294.

In Greenl. on Ev., § 271, the position is broadly taken that where produce of the land is specifically sold, this is not a sale of interest in land, unless the intention of the parties to the contrary be shown. This view is adopted in Erskine *v.* Plummer, 7 Greenl. 447; Cutler *v.* Pope, 13 Me. 377; Purner *v.* Piercy, 40 Md. 141. On the other hand, the weight of authority is that to convert natural products of land into personalty, such must be shown to have been the intention of the parties, the burden of proving which position is on the party setting it up. Kingsley *v.* Holbrook, 45 N. H. 318; Green *v.* Armstrong, 1 Denio, 550; Killmore *v.* Howlett, 48 N. Y. 569; Slocum *v.* Seymour, 36 N. J. L. 139; Pattison's App., 61 Penn. St. 294; Scotten *v.* Brown, 4 Harr. (Del.) 324; Russell *v.* Myers, 32 Mich. 523. See McClintock's App., 71 Penn. St. 366; Bingham on Real Prop., 190 *et seq.*

§ 868. When the statute requires simply a memorandum in writing as a constituent of a contract, a writing by an agent is sufficient, without a written authority to the agent. Authority to execute a *deed*, by the first section of the statute, must be in writing, because this is specifically required; but it is otherwise as to an agreement to convey, the authority to execute which, on the part of the agent, may be by parol.[1] For the sale of goods, under the statute of frauds, a parol authority is adequate.[2] An auctioneer's memorandum or entry, signed by him, whether as to real or personal estate, binds both parties.[3]

Agent's authority limited by statute.

[1] Emmerson *v.* Heelis, 2 Taunt. 38; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Kenneys *v.* Proctor, 1 Jac. & W. 350; Higgins *v.* Senior, 8 Mees. & W. 844; Mortimer *v.* Cornwell, 1 Hoff. Chan. 351; Moody *v.* Smith, 70 N. Y. 598; Long *v.* Hartwell, 34 N. J. 116; Riley *v.* Minor, 29 Mo. 439; Broun *v.* Eaton, 21 Minn. 409; Rottman *v.* Wasson, 5 Kans. 552. See Neaves *v.* Mining Co., 90 N. C. 412; Jackson *v.* Scott, 67 Ala. 99.

[2] See cases as to brokers, collected in Wharton on Agency, §§ 720 *et seq.*; infra, § 869.

[3] Hinde *v.* Whitehouse, 7 East, 258; Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt, 209; Kenworthy *v.* Schofield, 2 B. & C. 945; Farebrother *v.* Simmons, 1 B. & Ald. 333; Cleaves *v.* Foss, 4 Greenl. 1; Pike *v.* Balch, 38 Me. 302; Smith *v.* Arnold, 5 Mason, 414; Bent *v.* Cobb, 9 Gray, 397; Morton *v.* Dean, 13 Met. 388; McComb *v.* Wright, 4 Johns. Ch. 659; Johnson *v.* Buck, 6 Vroom, 338; Pugh *v.* Chesseldine, 11 Ohio, 109; Hart *v.* Wood, 7 Blackf. 568; Burke *v.* Haley, 7 Ill. 614; Cherry *v.* Long, Phill. (N. C.) 466; Gordon *v.* Saunders, 2 McCord Ch. 164; Episc. Church *v.* Leroy, Riley (S. C.), Ch. 156; White *v.* Crew, 16 Ga. 416; Adams *v.* McMillan, 7 Port. 73; Jelks *v.* Barrett, 52 Miss. 315. See Reed, Stat. Frauds, §§ 293, 314, 1073 *et seq.*

On a bill for specific performance of an auction sale of a house and premises it appeared that after the sale the auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to A. S., and deposit paid at close of sale," and he also signed this receipt, "P., March 29th, 1880. Received of A. S. the sum of 21*l.*, as deposit on property purchased at 420*l.*, at Sun Inn, P., at above date, Mr. G. C., owner." The statute of frauds was set up in defence. The conditions contained no description of the property sold, but posters had been put up describing the property to be sold on the 29th March, at the Sun Inn. It was held, that the word "purchased" was enough to connect the receipt with the poster, and that the statute of frauds was satisfied. Shardlow *v.* Cotterill, 20 Ch. D. 90; 51 L. J. Ch. 353. See Reed, Stat. Frauds, §§ 350, 407–409.

III. SALES OF GOODS.

Sales of goods must be evidenced by writings unless there be part payment, or earnest, or delivery; and consideration must appear.

§ 869. By the seventeenth section no contract for the sale of goods, wares, or merchandise, for the *price* of ten pounds or upwards, shall be good, unless the buyer shall accept part of the goods, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or unless "some note or memorandum in writing of the said *bargain* be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."[1] One party cannot sign as the other's agent;[2] but there may be a common agent for both parties.[3] The language in the fourth section is in this respect substantially the same as that of the seventeenth;[4] and in order to satisfy either, it has been held that the *consideration* for the *agreement* in the one case, and for the *bargain*[5] in the other, must appear expressly or impliedly in the writing signed by the party to be charged. This rule applies, according to the English construction,[6] not only to bargains for the sale of goods, but to agreements upon consideration of marriage,[7] to contracts for the sale of lands, and to agreements not to be performed within a year,[8]

[1] By Lord Tenterden's Act, which has been transferred to the codes of several of the United States, "all contracts for the sale of goods, of the *value* of ten pounds and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." See Pawelski *v.* Hargreaves, 47 N. J. L. 334; Hanson *v.* Roter, 64 Wis. 622; Lyle *v.* Shinnebarger, 17 Mo. Ap. 66.

[2] Sharman *v.* Brandt, L. R. 6 Q. B. 720. See Murphy *v.* Boese, L. R. 10 Ex. 126; Reed, Stat. Frauds, § 370.

[3] See Wharton on Agency, §§ 644, 718, and cases cited supra, § 868.

[4] Taylor's Evidence, § 933, citing Kenworthy *v.* Schofield, 2 B. & C. 947, per Bayley, J. See Reed, Stat. Frauds, §§ 314, 344, 348, 350, 372.

[5] In Egerton *v.* Mathews, 6 East, 307, the bargain imported consideration on the face of it. See per Parke, J., in Jenkins *v.* Reynolds, 3 B. & B. 21; and see Mahon *v.* U. S., 16 Wall. 143; Norris *v.* Blair, 39 Ind. 90; Calkins *v.* Falk, 1 Abb. (N. Y.) App. 291.

[6] Taylor's Evidence, § 933. See Browne on Statute of Frauds, § 388.

[7] See Saunders *v.* Cramer, 3 Dru. & War. 87; Reed, Stat. Frauds, §§ 341, 369, 391, 398.

[8] Lees *v.* Whitcomb, 5 Bing. 34; 2 M. & P. 86, *S. C.*; Sykes *v.* Dixon, 9 A. & E. 693; 1 P. & D. 463, *S. C.*; Sweet *v.* Lee, 3 M. & Gr. 466; Reed, Stat. Frauds, §§ 365, 439.

and also to special promises made by executors or administrators to answer damages out of their own estate. In the United States, the same rule as to statement of consideration has been adopted in New Hampshire,[1] New York,[2] Maryland,[3] South Carolina,[4] Georgia,[5] Michigan,[6] Indiana,[7] and Wisconsin.[8] It has been rejected in Maine,[9] Vermont,[10] Massachusetts,[11] New Jersey,[12] Pennsylvania,[13] Ohio,[14] North Carolina,[15] and Missouri.[16] A covenant under seal, however, need not, it is said, express the consideration.[17] It is not necessary, in any case, that the consideration should be stated on the face of the written memorandum in express terms. It is sufficient if it can be collected, not indeed by mere conjecture, however

[1] Underwood *v.* Campbell, 14 N. H. 393.

[2] Kerr *v.* Shaw, 13 Johns. 236.

So by subsequent statutes; Sackett *v.* Palmer, 25 Barb. 179; Marquand *v.* Hipper, 12 Wend. 520; Smith *v.* Ives, 15 Wend. 182; Bennett *v.* Pratt, 4 Denio, 275; Newberg *v.* Wall, 65 N. Y. 484; Stone *v.* Browning, 68 N. Y. 598. See Reed, Stat. of Frauds, §§ 399, 417.

So of a guarantee indorsed on a promissory note. Hunt *v.* Brown, 5 Hill, 145; Hall *v.* Farmer, 5 Denio, 484; Brewster *v.* Silence, 8 N. Y. 207; Draper *v.* Snow, 20 N. Y. 331.

But since the Act of 1863 a guarantee need no longer express consideration. Speyers *v.* Lambert, 1 Sweeney (N. Y.), 335; 16 Abb. (N. S.) 309; 37 How. Pr. 315; Reed, Stat. Frauds, §§ 426, 429, 432.

[3] Sloan *v.* Wilson, 4 Har. & J. 322; Hutton *v.* Padgett, 26 Md. 228; Reed, Stat. Frauds, § 432.

[4] Stephens *v.* Winn, 2 Nott & McC. 372; though see Lecat *v.* Tavel, 3 McC. 158.

[5] Hargroves *v.* Cooke, 15 Ga. 321.

[6] Jones *v.* Palmer, 1 Doug. 379. See James *v.* Muir, 33 Mich. 223; McElroy *v.* Buck, 35 Mich. 434.

[7] Gregory *v.* Logan, 7 Blackf. 112. See Reed, Stat. Frauds, §§ 426, 431.

[8] Taylor *v.* Pratt, 3 Wis. 674. See Meincke *v.* Falk, 55 Wis. 427.

[9] Levy *v.* Merrill, 4 Greenl. 189; Gilligan *v.* Boardman, 29 Me. 81. See Reed, Stat. Frauds, §§ 433, 439.

[10] Patchin *v.* Swift, 21 Vt. 297; Reed, Stat. Frauds, § 427.

[11] Packard *v.* Richardson, 17 Mass. 122. But see Oakman *v.* Rogers, 120 Mass. 214, to the effect that letters arranging the sale of fruit jars, stating the price, but not the number or mode of delivery, did not satisfy the statute.

[12] This is by Rev. Stat., p. 446, which provides that consideration need not be set forth or expressed in the writing. In Beardsley *v.* Beardsley, 2 South. 570, it was held that the consideration need not be expressed, though this was limited by Young *v.* Lee, 1 Spencer, to cases where the consideration could be inferred from the writing. See Reed, Stat. Frauds, § 426.

[13] Paul *v.* Stackhouse, 38 Penn. St. 302; Bowser *v.* Cravener, 56 Penn. St. 132.

[14] Reed *v.* Evans, 17 Ohio, 128.

[15] Ashford *v.* Robinson, 8 Ired. 114.

[16] Halsa *v.* Halsa, 8 Mo. 305. See Browne, Stat. Frauds, § 389; Reed, Stat. Frauds, § 427.

[17] Douglass *v.* Howland, 24 Wend. 35; Rosenbaum *v.* Gunter, 2 E. D. Smith, 415.

plausible,[1] but by fair and reasonable, if not necessary, intendment from the whole tenor of the writing.[2] Even, however, under the strict rule adopted by the English courts, any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or disadvantage sustained by the plaintiff, however small may be the benefit on the one hand, or the inconvenience on the other, is a sufficient consideration, if such act be performed or such inconvenience be suffered by the plaintiff, with the consent, express or implied, of the defendant, or, in the language of pleading, at his special instance and request.[3]

Other material averments must be in writing.

§ 870. The contract, under the statute, must contain the names of the parties, and the general terms of the bargain,[4] and the promise,[5] either directly or by reference;[6] but any memorandum will suffice, which contains all that leads to future certainty.[7] It is sufficient, for instance,

[1] Hawes *v.* Armstrong, 1 Bing. (N. C.) 765, 766, per Tindal, C. J.; James *v.* Williams, 5 B. & Ad. 1109, per Patterson, J.; Raikes *v.* Todd, 8 A. & E. 855, 856, per Ld. Denman. May *v.* Ward, 134 Mass. 127.

[2] Joint *v.* Mostyn, 2 Fox & Sm. 4; Saunders *v.* Cramer, 3 Dru. & War. 87; Price *v.* Richardson, 15 M. & W. 540; Caballero *v.* Slater, 14 Com. B. 300. See Neelson *v.* Sanborne, 2 N. H. 413; Simons *v.* Steele, 36 N. H. 73; Adams *v.* Bean, 12 Mass. 139; Sears *v.* Brink, 3 Johns. 210; Leonard *v.* Vredenburgh, 8 Johns. 29; Rogers *v.* Kneeland, 10 Wend. 252; Marquand *v.* Hipper, 12 Wend. 520; Parker *v.* Wilson, 15 Wend. 346; Gates *v.* McKee, 3 Kern. 232; Church *v.* Brown, 21 N. Y. 315; Weed *v.* Clark, 4 Sandf. 31; Dugan *v.* Gittings, 3 Gill, 138; Williams *v.* Ketcham, 19 Wis. 231; Lecat *v.* Tavel, 3 McCord, 158; Otis *v.* Hazeltine, 27 Cal. 80. See Taylor's Ev. § 934; Reed, Stat. Frauds, §§ 421, 428, 429, 438, 439.

[3] Taylor's Evidence, § 935, and cases there cited; 1 Selw. N. P. 43 *et seq.*; 2 Wms. Saund. 137 *g*, 137 *k*, and cases there collected.

[4] Reed, Stat. Frauds, §§ 315, 342, 358, 392, 394, 397 *et seq.*, 424, 501, 505; Archer *v.* Baynes, 5 Ex. R. 625; Wood *v.* Midgley, 5 De Gex, M. & G. 41; Holmes *v.* Mitchell, 6 Com. B. (N. S.) 361; Laythoarp *v.* Bryant, 2 Bing. N. C. 742; Remick *v.* Sandford, 118 Mass. 102; aff. *S. C.* 120 Mass. 315; Smith *v.* Shell, 82 Mo. 215; Fry *v.* Platt, 32 Kan. 62; North *v.* Mendell, 73 Ga. 400.

[5] Reed, Stat. Frauds, §§ 352 *et seq.*, 399, 414, 417, 418; Carroll *v.* Cowell, 1 Jebb & Sy. 43; Morgan *v.* Sykes, cited in argument in Coats *v.* Chaplin, 3 Q. B. 486. See Salmon Falls Co. *v.* Goddard, 14 How. 446; Smith *v.* Arnold, 5 Mason, 416; Ide *v.* Stanton, 15 Vt. 691; Ives *v.* Hazard, 4 R. I. 14; McFarson's Appeal, 11 Penn. St. 503; Soles *v.* Hickman, 20 Penn. St. 180; Kinlock *v.* Savage, 1 Speers Eq. 470; Farwell *v.* Lowther, 18 Ill. 252.

[6] Riley *v.* Farnsworth, 116 Mass. 223; Reed, Stat. Frauds, § 392.

[7] Taylor's Evidence, § 936; Slater *v.* Smith, 117 Mass. 96; Reed, Stat. Frauds, §§ 361, 410, 416.

for the vendor to undertake in writing to purchase a particular article at a named price, though it be agreed at the same time that the article in question shall have some alteration or addition made to it before delivery.[1] It has also been held, that if a party agrees to pay rent for a certain farm at a specified sum per acre, the number of acres need not be specified;[2] nor need there be a specification of the quantity of goods in a contract, in consideration of forbearance, to pay for all goods supplied to a third party during the antecedent month.[3] Nor is it necessary that the writing should specify, when this is not practicable, the particular mode,[4] or time of payment,[5] or even the specific price in figures.[6] Hence a written order for goods "on moderate terms" is sufficient,[7] though, if a definite price be agreed upon, it should be stated in the contract.[8]

§ 871. As to parties, greater particularity is requisite; and either expressly or inferentially their names must be collected from the memorandum.[9] The statute was held to be satisfied in this respect where the defendant, having purchased various articles in the plaintiff's shop, signed his name and address in the "Order-book," at the head of an entry which specified the articles and the prices; as the plaintiff's name was printed on the fly-leaf of the book, and the

[1] Sarl *v.* Bourdillon, 1 Com. B. N. S. 188; Reed, Stat. Frauds, §§ 399, 401, 402.

[2] Shannon *v.* Bradstreet, 1 Sch. & Lef. 73, per Ld. Redesdale.

[3] Bateman *v.* Phillips, 15 East, 272; Shortrede *v.* Cheek, 1 A. & E. 57, 58, 60; Bleakley *v.* Smith, 11 Sim. 150. See, to same effect, Shelton *v.* Braithwaite, 7 M. & W. 437, 438; Dobell *v.* Hutchinson, 3 A. & E. 371; Powell *v.* Dillon, 2 Ball & B. 420; Spickernell *v.* Hotham, 1 Kay, 669; Rabaud *v.* D'Wolff, 1 Peters, 499. See cases in Reed, Stat. Frauds, §§ 348, 398, 403, 415, 416, 422, 437, 438.

[4] Sarl *v.* Bourdillon, 1 Com. B. (N. S.) 188.

[5] Kriete *v.* Myer, 61 Md. 588.

[6] Valpy *v.* Gibson, 4 Com. B. 864, per Wilde, C. J.

[7] Ashcroft *v.* Morrin, 4 M. & Gr. 450. See Reed, Stat. Frauds, § 419.

[8] Elmore *v.* Kingscote, 5 B. & C. 583; 8 D. & R. 343, *S. C.*; Goodman *v.* Griffiths, 1 H. & N. 574.

[9] Reed, Stat. Frauds, §§ 346, 359 *et seq.*, 376, 399, 401 *et seq.*; Champion *v.* Plummer, 1 Bos. & P. (N. R.) 252; Vandenbergh *v.* Spooner, Law Rep. 1 Ex. 316; and 4 H. & C. 519, *S. C.*; Williams *v.* Byrnes, 2 New R. 47, per Pr. C.; 1 Moo. P. C. (N. S.) 154, *S. C.*; Warner *v.* Willington, 3 Drew. 523; Wheeler *v.* Collier, M. & M. 125, per Ld. Tenterden; Skelton *v.* Cole, 4 De Gex & J. 587; Williams *v.* Lake, 2 E. & E. 349; Newell *v.* Radford, L. R. 3 C. P. 52; Sherborne *v.* Shaw, 1 N. H. 159; Nichols *v.* Johnson, 10 Conn. 198; Osborne *v.* Phelps, 19 Conn. 73; Bailey *v.* Ogden, 3 Johns. R. 399.

defendant might have seen it had he thought fit to look for it.[1] But, under the statute, no substantial part of the contract can be by parol,[2] though abbreviations may be helped out by parol.[3]

But may be inferred from several documents.

§ 872. It is enough, in order to meet the requirements of the statute, if the substance of the contract is to be inferred from writing, either by the parties or by their agent, though these writings are made up of disjointed memoranda, or of a protracted correspondence.[4] For this purpose it will be enough to produce a letter or memorandum signed by the party or his agent, though it does not contain in itself any one of the terms of the agreement, if it distinctly refers to and recognizes any writing which does contain them;[5] and a memorandum by the common agent of both parties will be sufficient for the purpose.[6] A letter, however, to be so received, must ratify the written but unsigned contract relied on.[7] It is sufficient, how-

[1] Sarl *v.* Bourdillon, 1 C. B. N. S. 188.

[2] Wheelan *v.* Sullivan, 102 Mass. 204; Thayer *v.* Rock, 13 Wend. 53; Wright *v.* Weeks, 25 N. Y. 153. See Reed, Stat. Frauds, §§ 322, 357, 408, 511, 544.

[3] Infra, § 926; Mann *v.* Bishop, 136 Mass. 495; Heideman *v.* Wolfstein, 12 Mo. App. 366.

[4] Supra, § 617; Reed, Stat. Frauds, §§ 346, 361, 390, 392, 394, 402, 681; Allen *v.* Bennet, 3 Taunt. 169; Jackson *v.* Lowe, 1 Bing. 9; Phillimore *v.* Barry, 1 Camp. 513, per Ld. Ellenborough; Warner *v.* Willington, 3 Drew. 523; Skelton *v.* Cole, 4 De Gex & J. 587; Marshall *v.* R. R., 16 How. U. S. 314; Dodge *v.* Van Lear, 5 Cranch C. C. 278; Pettibone *v.* Derringer, 4 Wash. C. C. 215; Beckwith *v.* Talbot, 95 U. S. 289; North Berwick Co. *v.* Ins. Co., 52 Me. 336; Abbott *v.* Shepard, 48 N. H. 14; Connecticut *v.* Bradish, 14 Mass. 296; Beers *v.* Jackman, 103 Mass. 192; Short Mountain Co. *v.* Hardy, 114 Mass. 197; Peck *v.* Vandermuth, 99 N. Y. 29; Cossitt *v.* Hobbs, 56 Ill. 231; Union Canal *v.* Loyd, 4 Watts & S. 394; Douglass *v.* Mitchell, 35 Penn. St. 440; Downer *v.* Morrison, 2 Grat. 250. See Passaic Co. *v.* Hoffman, 3 Daly, 495.

[5] Dobell *v.* Hutchinson, 3 A. & E. 355, 371; 5 N. & M. 251, 260, *S. C.*; Llewellyn *v.* Ld. Jersey, 11 M. & W. 189; Gibson *v.* Holland, 1 H. & R. 1; Law Rep. C. P. 1; Macrory *v.* Scott, 5 Ex. R. 907; Kenworthy *v.* Schofield, 2 B. & C. 945; Ridgway *v.* Wharton, 3 De Gex, M. & G. 677; 6 H. of L. Cas. 238, *S. C.*; 1 Sug. V. & P. 171; Bauman *v.* James, Law Rep. 3 Ch. Ap. 508; Crane *v.* Powell, Law Rep. 4 C. P. 123, *S. C.*; Reuss *v.* Pickley, L. R. 1 Exc. 342; Nesham *v.* Selby, L. R. 13 Eq. 19; O'Donnell *v.* Leeman, 43 Me. 158; Morton *v.* Dean, 13 Met. 385; Talman *v.* Franklin, 14 N. Y. 584; Moore *v.* Mountcastle, 61 Mo. 424. See Stanley *v.* Dowdesdell, L. R. 10 C. P. 102; Parkman *v.* Rogers, 120 Mass. 264. See Reed, Stat. Frauds, §§ 314, 344, 348, 355, 390, 397, 408, 521.

[6] Butler *v.* Thomson, 92 U. S. 412. Supra, § 869; Wharton on Ag. § 644.

[7] Taylor's Ev. § 937, citing Archer *v.* Baynes, 5 Ex. R. 625; Richards *v.* Por-

ever, if the letter enumerates all the essential terms of the bargain, although it include excuses for the non-acceptance of the goods, which form the subject-matter of the contract.[1] Telegrams[2] may form part of the material from which a contract may be inferred. It has been held that in such case, in order to make the sender responsible, the original signature of the sender or his agent must be produced,[3] and the terms be adequately expressed;[4] although where the rule is that the telegraph company is the agent of the sender, the sendee is bound by the message forwarded by the company.[5] Nor is it necessary, as will also be hereafter shown more fully, that the contract should be technically *inter partes*. Liability under the statute may be imposed by a letter addressed to a third party,[6] or by an answer to a bill in chancery, or by an affidavit in any legal proceeding;[7] or by an auctioneer's memorandum;[8] or by a broker's

ter, 6 B. & C. 437; Cooper *v.* Smith, 15 East, 103. See Goodman *v.* Griffiths, 1 H. & N. 574; Jackson *v.* Oglander, 2 Hem. & M. 465.

[1] Taylor's Ev. § 937; Bailey *v.* Sweeting, 9 Com. B. N. S. 843; Wilkinson *v.* Evans, Law Rep. 1 C. P. 407; and 1 H. & R. 552, *S. C.*; Buxton *v.* Rust, Law Rep, 7 Ex. 1. See Leather Cloth *v.* Hieronomus, L. R. 10 Q. B. 140; Neaves *v.* Mining Co., 90 N. C. 412.

[2] Supra, § 617; infra, § 1128; Reuss *v.* Pickley, L. R. 1 Exch. 342; 4 H. & C. 588; Reed, Stat. of Frauds, § 339.

[3] Copeland *v.* Arrowsmith, 18 L. T. (N. S.) 755; Godwin *v.* Francis, L. R. 5 C. P. 293; Dunning *v.* Robert, 35 Barb. 463; Unthank *v.* Ins. Co., 4 Biss. 357; Crane *v.* Maloney, 39 Iowa, 39; Wells *v.* R. R., 30 Wis. 605. See supra, § 617; Reed, Stat. of Frauds, §§ 339, 341, 352. That the telegraph company may be the sender's agent for this purpose, see Howley *v.* Whipple, 8 N. H. 487. In England this agency is not admitted; and it is now settled the agency is not to be implied from the mere fact of telegraphic transmission. Henzel *v.* Papa, L. R. 6 Exch. 7, and other authorities cited supra, § 617; infra, § 1128.

[4] Trevor *v.* Wood, 36 N. Y. 307; McElroy *v.* Buck, 35 Mich. 434; Watt *v.* Cranberry Co., 63 Iowa, 730; Saveland *v.* Green, 40 Wis. 431; Reed, Stat. Frauds, § 339.

[5] Supra, § 617; infra, § 1128; Howley *v.* Whipple, 48 N. H. 487; Dunning *v.* Roberts, 33 Barb. 463; Trevor *v.* Wood, 36 N. Y. 307.

[6] Moore *v.* Hart, 1 Verm. 110; Longfellow *v.* Williams, Pea. Add. Cas. 225, per Lawrence, J.; Rose *v.* Cunynghame, 11 Ves. 550, per Ld. Hardwicke; Atk. 503; 1 Smith L. C. 272; Gibson *v.* Holland, 1 H. & R. 1; *S. C.* Law Rep. 1 C. P. 1; Wilkins *v.* Burton, 5 Vt. 76; Betts *v.* Loan Co., 21 Wis. 80; Robertson *v.* Ephraim, 18 Tex. 118. See Clark *v.* Tucker. 2 Sandf. 157; Kinloch *v.* Savage, 1 Speers, 143.

[7] See fully infra, § 912; and see Doe *v.* Steel, 3 Camp. 115; Barkworth *v.* Young, 26 L. J. Ch. 153, 158, per Kindersley, V. C.; Knowlton *v.* Mosely, 105 Mass. 136; Forrest *v.* Forrest, 6 Duer, 102; Cook *v.* Barr, 44 N. Y. 158; Bowen *v.* De Lattre, 6 Whart. R. 430; Fulton *v.* Gracey, 15 Grat. 314.

[8] Wharton on Agency, § 655. Supra, § 868.

entries;[1] or by any other written engagement, though signed solely by the party charged or his agent.[2] But a written memorandum, made after the action is brought, will not satisfy the statute.[3] And the writings, when several are depended on, cannot, in material matters, be supplemented out by parol.[4]

§ 873. As the statute does not require that the writing should be *subscribed*[5] by the party to be charged, but merely that it should be signed, it makes no difference, in this respect, whether the party charged inserts his name at the beginning, or in the body, or at the foot or end of a document.[6] But, as a question of fact, it will be for the jury to determine whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it.[7] On the one hand, it has been held to be sufficient, where a party signed as witness to a deed reciting the agreement to be proved, the knowledge of the recital being brought home to the party.[8] On the other hand, where an agreement, drawn up by the secretary of one of the contracting parties, contained the names of both parties in the body of the instrument, but concluded, "As witness our hands," and no signatures were subscribed, the court held that the statute was not

Place of signature immaterial, and initials will suffice if identified.

[1] Whart. on Agency, § 718.

[2] See cases cited in succeeding sections; Vassault *v.* Edwards, 43 Cal. 458; Rutenberg *v.* Main, 47 Cal. 213; McWilliams *v.* Lawless, 15 Neb. 131; as limiting above, see Banks *v.* Man. Co., 20 Fed. Rep. 667.

[3] Bill *v.* Bament, 9 M. &.W. 36.

[4] Nesham *v.* Selby, L. R. 13 Eq. 191; L. R. 7 Ch. Ap. 406; Pierce *v.* Carff, L. R. 6 Q. B. 210; Reed, Stat. Frands, §§ 328, 361, 366, 396.

[5] In New York, where the word "subscribed" is used, there must be a signing at the end. McGiveon *v.* Fleming, 12 Daly, 289.

[6] Taylor's Ev. § 939; Reed, Stat. Frands, §§ 381, 384 *et seq.*, 397, 427, 681; Caton *v.* Caton, L. R. 2 H. L. 127; Lobb *v.* Stanley, 5 Q. B. 574, 583; Johnson *v.* Dodgson, 2 M. & W. 659, per Ld. Abinger; Durrell *v.* Evans, 1 H. & C. 174; Knight *v.* Crockford, 1 Esp. 190, 193, per Eyre, C. J.; Ogilvie *v.* Foljambe, 3 Mer. 53; Saunderson *v.* Jackson, 2 B. & P. 238, per Ld. Eldon; Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 63, per Ld. Cottenham; Holmes *v.* Mackrell, 3 Com. B. N. S. 789; Bleakley *v.* Smith, 11 Sim. 150; Ulen *v.* Kittredge, 7 Mass. 235; Penniman *v.* Hartshorn, 13 Mass. 87; Parks *v.* Brinkerhoff, 2 Hill (N. Y.) 663; Drury *v.* Young, 58 Md. 546; Hill *v.* Johnson, 3 Ired. Eq. 432; Evans *v.* Ashley, 8 Mo. 177. See, as giving a stricter rule, Hodgkins *v.* Bond, 1 N. H. 284; Jackson *v.* Titus, 2 Johns. R. 432.

[7] Johnson *v.* Dodgson, 2 M. & W. 659, per Ld. Abinger; Taylor, § 939; Beckwith *v.* Talbot, 95 U. S. 288.

[8] Welford *v.* Beezley, 1 Ves. Sen. 6.

satisfied, as it was clearly intended that the agreement should not be perfected till the names were added at the foot.[1] In New York, under the Revised Statutes, the memorandum was to be signed at the end by the party charged.[2] While the party's Christian name may be given by initials, or omitted altogether,[3] the surname must be substantially exact.[4] Hence it has been held that if a letter be signed by the mere initials of the party, if such initials cannot be identified by parol,[5] or if it be subscribed, without signature, "by your affectionate mother,"[6] or the like, it will not suffice. A *printed* signature has been accepted as adequate where the party to be charged had written other parts of the memorandum, or had done other acts amounting to a recognition of his printed name.[7] All that is required to satisfy the statute, is that the agreement or memorandum should be signed "by the party to be charged therewith," that is, by the party whether plaintiff or defendant against whom the claim is made.[8] Under the English statutes an oral

[1] Hubert *v.* Treherne, 3 M. & Gr. 743; 4 Scott N. R. 486, *S. C.*

[2] Davis *v.* Shields, 26 Wend. 341; reversing *S. C.* 24 Wend. 322; James *v.* Patten, 6 N. Y. 9; reversing *S. C.* 8 Barb. 344. See Reed, Stat. Frauds, §§ 385, 400.

[3] Lobb *v.* Stanley, 5 Q. B. 574, 581; Ogilvie *v.* Foljambe, 3 Mer. 53.

[4] McElroy *v.* Seery, 61 Md. 389.

[5] Reed, Stat. Frauds, §§ 384, 386, 421; Hubert *v.* Moreau, 2 C. & P. 528; 12 Moore, 216, *S. C.*; Sweet *v.* Lee, 3 M. & Gr. 452, 460. To the effect that parol evidence is admissible to explain initials, see Phillimore *v.* Barry, 1 Camp. 513; Salmon Falls Co. *v.* Goddard, 14 How. 447; Barry *v.* Coombe, 1 Peters, 640; Sanborn *v.* Flagler, 9 Allen, 474. Reed, Stat. Frauds, §§ 320, 341, 348, 352, 386, 392. Infra, § 939.

[6] Selby *v.* Selby, 3 Mer. 2, per Sir W. Grant.

[7] Schneider *v.* Norris, 2 M. & Sel. 286; Saunderson *v.* Jackson, 2 B. & P. 238. See Penniman *v.* Hartshorn, 13 Mass. 87. In New York, a printed signature, under the Revised Statutes, is insufficient. Davis *v.* Shields, 26 Wend. 351.

[8] Reed, Stat. Frauds, §§ 358 *et seq.*, 361, 391; Taylor's Ev. § 940; Laythoarp *v.* Bryant, 2 Bing. N. C. 735; 8 Scott, 238, *S. C.*; Liverpool Borough Bk. *v.* Eccles, 4 H. & N. 139; Seton *v.* Slade, 7 Ves. 275, per Ld. Eldon; Edgerton *v.* Mathews, 6 East, 307; Allen *v.* Bennet, 3 Taunt. 169. The last two cases were decisions on § 17, which uses the word *parties*. These cases, Mr. Taylor holds, overrule the dicta of Ld. Redesdale and Sir T. Plumer, in Lawrenson *v.* Butler, 1 Sch. & Lef. 13; and O'Rourke *v.* Perceval, 2 Ball & B. 58. As to when a covenantee may sue for a breach of covenant, although he has not executed the deed, Mr. Taylor refers to Wetherell *v.* Langston, 1 Ex. R. 634; Pitman *v.* Woodbury, 3 Ex. R. 4; Brit. Emp. Ass. Co. *v.* Browne, 12 Com. B. 723; Morgan *v.* Pike, 14 Com. B. 473; Swatman *v.* Ambler, 8 Ex. R. 72. In New York, under the statute, the contract may be signed only by the party chargeable. McCrea *v.* Purmort, 16 Wend. 460; Edwards

acceptance of a written and signed proposal in its entirety is sufficient to charge the party making the proposal.[1]

When main object of contract is sale of goods, contract must be in writing.

§ 874. When the object of the contract is the sale of goods of the price or value of £10 or upwards, or whatever may be the limit, the contract falls within the seventeenth section of the English statute, though it includes other matters, as, for instance, the agistment of cattle, to which the statute does not apply.[2] Contracts for work and labor are not included in the statute; and hence, if a contract is substantially for labor, though it incidentally involves the transfer of goods,[3] or the manufacture of goods,[4] it need not be in writing; and so if the transfer be merely on trial;[5] and so of an agreement to share in a speculation in stock already owned by one of the parties.[6] Still, if the main object be the delivery of goods, the contract must be written; and hence, a contract to make a set of teeth to fit the employer's mouth has been held to be within the statute.[7] Fixtures, also, when chattels, are not within the fourth section, so that a contract concerning them must be in writing.[8] With respect to the price, when several arti-

v. Ins. Co., 21 Wend. 467; Worrall *v.* Munn, 5 N. Y. 229; Nat. Ins. Co. *v.* Loomis, 11 Paige, 431; Dykers *v.* Townsend, 24 N. Y. 57; Burrell *v.* Root, 40 N. Y. 496; Justice *v.* Lang, 42 N. Y. 493; *S. C.* 52 N. Y. 323; and so generally, Marqueze *v.* Caldwell, 48 Miss. 23; Vassault *v.* Edwards, 43 Cal. 458; Rutenberg *v.* Main, 47 Cal. 213. That an auctioneer's memorandum should be signed, see Rafferty *v.* Lougee, 63 N. H. 54.

[1] Reed, Stat. Frauds, §§ 387 *et seq.* 391, 395, 419; Taylor's Ev. § 940; citing Creswell, J., in Ashcroft *v.* Morrin, 4 M. & Gr. 451; Watts *v.* Ainsworth, 3 Fost. & Fin. 12; 1 H. & C. 83, *S. C.*; Smith *v.* Neale, 2 Com. B. N. S. 67, 88; Peek *v.* N. Staffords. Ry. Co., 29 L. J. Q. B. 97, in Ex. Ch.; Warner *v.* Willington, 3 Drew. 532; Ruess *v.* Picksley, Law Rep. 1 Ex. 342; 4 H. & C. 588, *S. C.* See Forster *v.* Rowland, 7 H. & N. 103; Penniman *v.* Hartshorn, 13 Mass. 87; Bent *v.* Cobb, 9 Gray, 397: McComb *v.* Wright, 4 Johns. C. 659. That both parties must sign a contract of service for more than a year, see Wilkinson *v.* Heavenwich, 58 Mich. 574.

[2] Harman *v.* Reeve, 18 C. B. 595; 25 L. J. C. P. 257. Reed, Stat. Frauds, §§ 220, 238, 242, 250, 253. In New York the limit is $50; "gold," when treated as a staple, is within the statute. Peabody *v.* Speyers, 56 N. Y. 230.

[3] Clay *v.* Yates, 1 H. & N. 73.

[4] Joyce *v.* Schloss, 15 Abb. (N. Y.) N. Cas. 373.

[5] Fitzpatrick *v.* Woodruff, 96 N. Y. 561; Kuhns *v.* Gates, 92 Ind. 66.

[6] Bullard *v.* Smith, 139 Mass. 492.

[7] Lee *v.* Griffin, 1 B. & S. 272.

[8] Browne on St. of Frauds, § 234; Reed, Stat. of Frauds, §§ 233 *et seq.*, 714 *et seq.*; supra, § 866 *a*.

cles are bought at one time, the transaction will be regarded as one entire contract, though the prices are distinct; and, consequently, if the whole purchase-money amounts to the minimum fixed by the statute, the case will be covered by the statute, though neither of the articles taken separately may be of that value.[1] A mere agreement to give credit, on account of a precedent debt, does not validate the sale.[2]

§ 875. To take a case out of the seventeenth section, on the ground that the goods have been accepted and received, so as to come within the exception to the section, a compliance with both requisites is necessary.[3] An acceptance and receipt of a substantial part of the goods, however, will be as operative as an acceptance and receipt of the whole.[4] The acceptance may either precede or follow the receiving of the article, or may accompany such receiving.[5] The authorization of an agent to receive does not imply authorization to accept.[6] The receipt must be of a character to preclude the vendor

Acceptance and receipt of goods take case out of statute.

[1] Taylor's Ev. § 956; Baldey *v.* Parker, 2 B. & C. 37; 3 D. & R. 220, *S. C.*; Allard *v.* Greasart, 61 N. Y. 1. See, also, Elliott *v.* Thomas, 3 M. & W. 170; Bigg *v.* Whisking, 14 Com. B. 195; Mills *v.* Hunt, 17 Wend. 333; 20 Wend. 431; Gilman *v.* Hill, 36 N. H. 311; Shindler *v.* Houston, 1 Comst. (N. Y.) 261.

[2] Brabin *v.* Hyde, 32 N. Y. 519; Mattice *v.* Allen, 3 Keyes, 492; Teed *v.* Teed, 44 Barb. 96.

[3] Cusack *v.* Robinson, 1 B. & S. 299; Cross *v.* O'Donnell, 44 N. Y. 661; Caulkins *v.* Hellman, 47 N. Y. 449; Hicks *v.* Cleveland, 48 N. Y. 84; Brewster *v.* Taylor, 63 N. Y. 587. See Reed, Stat. Frauds, §§ 260 *et seq.*

[4] Morton *v.* Tibbett, 15 Q. B. 434, per Ld. Campbell; Kershaw *v.* Ogden, 34 L. J. Ex. 159; 3 H. & C. 717, *S. C.*; Gardner *v.* Grout, 2 C. B. (N. S.) 340; Danforth *v.* Walker, 40 Vt. 257; Atwood *v.* Lucas, 53 Me. 508; Davis *v.* Eastman, 1 Allen, 422; Carver *v.* Lane, 4 E. D. Smith, 168; Dows *v.* Montgomery, 5 Rob. (N. Y.) 445; Rickey *v.* Tenbroeck, 63 Mo. 563. See Garfield *v.* Paris, 96 U. S. 557; Somers *v.* McLaughlin, 57 Wis. 358; Farmer *v.* Gray, 16 Neb. 401; Reed, Stat. Frauds, §§ 264, 278, 280.

A rescission, followed by an exchange of goods, is not within the statute. Norton *v.* Simonds, 124 Mass. 19, citing Townsend *v.* Hargraves, 118 Mass. 325.

[5] Cusack *v.* Robinson, 1 B. & S. 299; Morton *v.* Tibbett, 15 Q. B. 434. See Atwood *v.* Lucas, 53 Me. 508; Danforth *v.* Walker, 40 Vt. 257; Dugan *v.* Nichols, 125 Mass. 43; Bass *v.* Walsh, 39 Mo. 192; Southwest Co. *v.* Stanard, 44 Mo. 71.

[6] Nicholson *v.* Bower, 1 E. & E. 172; Hansom *v.* Armitage, 5 B. & A. 557; Norman *v.* Phillips, 14 M. & W. 276; Barney *v.* Brown, 2 Vt. 374; Snow *v.* Warner, 10 Met. (Mass.) 133; Outwater *v.* Dodge, 6 Wend. 400; Reed, Stat. Frauds, §§ 275, 283 *et seq.*

from retaining any lien on the goods.[1] As long as a seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.[2] A sale in which the seller refuses to permit the buyer to take possession or control of the goods, but claims and asserts his lien as vendor, does not exhibit an acceptance under the statute.[3] The acceptance must be absolute and final.[4] It must be clearly and substantively proved;[5] but it may take place subsequently to the making of the oral agreement.[6] Merely picking out and marking goods by the vendee[7] in the vendor's shop does not, so it is said, deprive the vendor, even when he assents to it, of his right of lien.[8] The question of acceptance and

[1] Baldey *v.* Parker, 2 B. & C. 37, 44; 3 D. & R. 220, *S. C.*; Maberley *v.* Sheppard, 10 Bing. 101, 102, per Tindal, C. J.; Smith *v.* Surman, 9 B. & C. 561, 577, per Parke, J.; 4 M. & R. 455, *S. C.*; Tempest *v.* Fitzgerald, 3 B. & A. 680, 684, per Holroyd, J.; Carter *v.* Toussaint, 5 B. & A. 859, per Bayley, J.; Holmes *v.* Hoskins, 9 Ex. R. 753; Cusack *v.* Robinson, 1 B. & S. 308, per Blackburn, J.; Gilman *v.* Hill, 36 N. H. 311; Green *v.* Merriam, 28 Vt. 801; Shindler *v.* Houston, 1 Comst. 261; Leven *v.* Smith, 1 Denio, 571; Ralph *v.* Stuart, 4 E. D. Smith, 627; Vincent *v.* Germond, 11 Johns. 283; Ward *v.* Shaw, 7 Wend. 404; Southwest Co. *v.* Stanard, 44 Mo. 71.

[2] Benjamin on Sales, Am. ed. 151; Reed, Stat. Frauds, §§ 260 ff, 262, 272, 281, 283; Browne Stat. Frauds, §§ 317 *et seq.*; Baldey *v.* Turner, 2 B. & C. 37; Safford *v.* McDonough, 120 Mass. 290.

[3] Safford *v.* McDonough, 120 Mass. 290.

[4] Reed, Stat. Frauds, §§ 269, 278, 280 *et seq.*; Norman *v.* Phillips, 14 M. & W. 283, per Alderson, B.; Smith *v.* Surman, 9 B. & C. 561, 577, per Parke, J.; 4 M. & R. 455, *S. C.*; Howe *v.* Palmer, 3 B. & A. 321, 325, per Holroyd, J.; Hansom *v.* Armitage, 5 B. & A. 559, per Abbott, C. J.; Acebal *v.* Levy, 10 Bing. 384, per Tindal, C. J.; Stone *v.* Browning, 68 N. Y. 598; Bacon *v.* Eccles, 43 Wis. 227. See, as denying proposition in text, Morton *v.* Tibbett, 15 Q. B. 428. See, also, Parker *v.* Wallis, 5 E. & B. 21; and Currie *v.* Anderson, 29 L. J. Q. B. 90, per Crompton, J.; 2 E. & E. 600, *S. C.*

[5] Carver *v.* Lane, 4 E. D. Smith, 168; Stone *v.* Browning, 51 N. Y. 211; Clark *v.* Tucker, 2 Sandf. 157; Knight *v.* Mann, 120 Mass. 219.

[6] Walker *v.* Mussey, 16 Mees. & W. 302; Davis *v.* Moore, 13 Me. 427; Sprague *v.* Blake, 20 Wend. 61; McKnight *v.* Dunlop, 1 Seld. 542; Field *v.* Runk, 22 N. J. 525.

[7] Cusack *v.* Robinson, 1 B. & S. 299; 30 L. J. Q. B. 261, *S. C.* See Spencer *v.* Hale, 30 Vt. 314. Reed, Stat. Frauds, §§ 273 *et seq.*

[8] Baldey *v.* Parker, 2 B. & C. 37; 3 D. & R. 220, *S. C.*; Bill *v.* Bament, 9 M. & W. 36; Proctor *v.* Jones, 2 C. & P. 532; Kealy *v.* Tenant, 13 Ir. Law R. N. S. 394, said by Mr. Taylor to overrule Hodgson *v.* Le Bret, 1 Camp. 233; and Anderson *v.* Scott, Ibid. 235, n. See Saunders *v.* Topp, 4 Ex. R. 390; and Acraman *v.* Morrice, 8 Com. B. 449; Ward *v.* Shaw, 7 Wend. 404; and see *contra*, Browne on Frauds, § 325.

receipt is for the jury, to be determined by the circumstances of the particular case.[1] But ordinarily there is no delivery until the goods are under the dominion and exclusive control of the purchaser.[2]

Where the goods are ponderous or inaccessible, a constructive delivery will suffice;[3] such, for example, as the giving up the key of the warehouse in which they are deposited, or the warehouseman making an entry of transfer in his books, or the delivery of other indicia of property.[4] Such acts, however, must be unequivocal.[5] Hence, it has been held that the mere acceptance and retainer, by the purchaser, of the delivery order of goods deposited

[1] Morton *v.* Tibbett, 15 Q. B. 441; Dodsley *v.* Varley, 12 A. & E. 632; 2 P. & D. 448, *S. C.*; Langton *v.* Higgins, 4 H. & N. 402; Aldridge *v.* Johnson, 7 E. & B. 885; Kershaw *v.* Ogden, 34 L. J. Eq. 159; 3 H. & C. 717, *S. C.*; Elmore *v.* Stone, 1 Taunt. 458; Smith *v.* Surman, 9 B. & C. 570; Castle *v.* Sworder, 6 H. & N. 828, reversing a decision in Ex., reported 5 H. & N. 281; Carter *v.* Toussaint, 5 B. & A. 855; 1 D. & R. 515, *S. C.*; Beaumont *v.* Brengeri, 5 Com. B. 301; Holmes *v.* Hoskins, 9 Ex. R. 753; Marvin *v.* Wallace, 6 E. & B. 726; Taylor *v.* Wakefield, 6 E. & B. 765; Edan *v.* Dudfield, 1 Q. B. 302; 4 P. & D. 656, *S. C.*; Lillywhite *v.* Devereux, 15 M. & W. 289, 291. See Boynton *v.* Veazie, 24 Me. 286; Green *v.* Merriam, 28 Vt. 801; Wilkes *v.* Ferris, 5 Johns. R. 344; Benford *v.* Schell, 55 Penn. St. 393; Phillips *v.* Hunnewell, 4 Greenl. 376; Gilman *v.* Hill, 36 N. H. 311; Ely *v.* Ormsby, 12 Barb. 570; Baily *v.* Ogden, 3 Johns. R. 420; Simmonds *v.* Humble, 13 Com. B. N. S. 258. See observation in Reed, Stat. Frauds, §§ 261, 303. As to the effect of handing over a sample of the goods, see Gardner *v.* Grout, 2 Com. B. N. S. 340.

In Marshall *v.* Green, L. R. 1 C. P. D. 35, it was held that where the vendee, a timber merchant, who bought some growing trees by verbal contract, cut down six of them and sold the lops and tops, the vendor was too late in attempting to countermand the sale.

[2] Outwater *v.* Dodge, 7 Cow. 85; Marsh *v.* Rouse, 44 N. Y. 643; Safford *v.* McDonough, 120 Mass. 290. Reed, Stat. Frauds, §§ 281 *et seq.*

[3] See Reed, Stat. Frauds, §§ 297 *et seq.*; Townsend *v.* Hargraves, 118 Mass. 325; Parker *v.* Jervis, 3 Keyes, 271; Phillips *v.* Mills, 55 Ga. 325.

[4] Chaplin *v.* Rogers, 1 East, 195, per Ld. Kenyon; Brinley *v.* Spring, 7 Greene, 241; Chappel *v.* Marvin, 2 Aik. 79; Leonard *v.* Davis, 1 Black (U. S.), 476; Badlam *v.* Tucker, 1 Pick. 389; Higgins *v.* Cheesman, 9 Pick. 6; Turner *v.* Coolidge, 2 Met. (Mass.) 350; Jewett *v.* Warren, 12 Mass. 300; Wilkes *v.* Ferris, 5 Johns. R. 344; Calkins *v.* Lockwood, 17 Conn. 174; Benford *v.* Schell, 55 Penn. St. 393; Harvey *v.* Butchers, 39 Mo. 211; Sharon *v.* Shaw, 2 Nev. 289. See Reed, Stat. Frauds, §§ 280, 297 *et seq.*

[5] Nicholle *v.* Plume, 1 C. & P. 272, per Best, C. J.; Edan *v.* Dudfield, 1 Q. B. 307. See Boardman *v.* Spooner, 13 Allen, 353; Cushing *v.* Breed, 14 Allen, 376; Remick *v.* Sanford, 120 Mass. 309; Wilkes *v.* Ferris, 5 Johns. R. 335; Stanton *v.* Small, 3 Sandf. 230.

with a warehouseman as agent of the vendor will not amount to an actual receipt of the goods, so as to bind the bargain.[1] To work a transfer, the delivery order must be lodged by the purchaser with the warehouseman, who must agree to become the agent of the vendee.[2]

Acceptance by carrier or expressman is not acceptance by vendee.

§ 876. It was at one time supposed that where goods, orally purchased, are delivered to a carrier or wharfinger named by the vendee, such delivery was sufficient to satisfy the statute.[3] The better opinion, however, now is, that though the delivery to the carrier may be a delivery to the purchaser, the acceptance of the carrier is not an acceptance by the purchaser, unless he be authorized by him to accept,[4] but when so authorized the delivery is sufficient.[5] Acceptance by the customary carrier, or expressman, is not *per se* sufficient.[6] The carrier's authority from the vendee, however, is a question of fact.[7] It must also be remembered, that a vendee may be bound by the retention for an unreasonable time, by his general agent, of goods, when the latter has been authorized by the former to examine their quality.[8]

[1] M'Ewan *v.* Smith, 2 H. of L. Cas. 309.

[2] Farina *v.* Home, 16 M. & W. 119, 123, per Parke, B.; Bentall *v.* Burn, 3 B. & C. 423; 5 D. & R. 284, *S. C.* See, to same effect, Cushing *v.* Breed, 14 Allen, 376; Stanton *v.* Small, 3 Sandf. 230; Franklin *v.* Long, 7 Gill & J. 407; Williams *v.* Evans, 39 Mo. 201. See Hankins *v.* Baker, 46 N. Y. 666.

[3] Hart *v.* Sattley, 3 Camp. 528, per Chambre, J. See Dawes *v.* Peck, 8 T. R. 330, and Dutton *v.* Solomonson, 3 B. & P. 582. See Reed, Stat. Frauds, §§ 284 *et seq.*

[4] Johnson *v.* Dodgson, 2 M. & W. 656, per Parke, B.; Forstburg *v.* Mining Co., 9 Cush. 117; Atherton *v.* Newhall, 123 Mass. 141; Rodgers *v.* Phillips, 40 N. Y. 519; Kutz *v.* Fleischer, 67 Cal. 93. See Thompson *v.* Menck, 2 Keyes, 82; Acebal *v.* Levy, 10 Bing. 376; 4 M. & Sc. 217, *S. C.*; Coats *v.* Chaplin, 3 Q. B. 483; Nicholson *v.* Bower, 1 E. & E. 172; Norman *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364; Hunt *v.* Hecht, 8 Ex. R. 814; Hart *v.* Bush, E., B. & E. 494; Coombs *v.* Bristol & Ex. Ry. Co., 27 L. J. Ex. 401; Smith *v.* Hudson, 6 B. & S. 431; Allard *v.* Greasart, 61 N. Y. 1, and cases cited to note 2, § 875, p. 34. See cases cited in Reed, Stat. Frauds, §§ 284 *et seq.*

[5] Wilcox Co. *v.* Green, 72 N. Y. 17.

[6] Frostburg *v.* Mining Co., 9 Cush. 117. See Meredith *v.* Meigh, 2 E. & B. 364.

[7] Snow *v.* Warner, 10 Met. 132; Hawley *v.* Keeler, 53 N. Y. 114.

[8] Norman *v.* Phillips, 14 M. & W. 283.

§ 877. By the statute of frauds, as well as by the Code of New York, and those of several other states, payment of part will take a parol sale out of the statute,[1] and it is now held necessary that this payment should be part of the transaction in order to validate the sale.[2] A *tender*, unaccepted, is insufficient.[3] And the payment must be *actual*.[4] A mere *agreement* to pay, without corresponding credit, or some equivalent act of acceptance taking place, is not by itself enough.[5]

Partial payment may take case out of statute.

IV. GUARANTEES.

§ 878. The fourth section of the statute of frauds, which has been held to be inapplicable to deeds,[6] enacts, that no action shall be brought whereby to charge any executor or administrator upon any special promises to answer damages out of his own estate; or any person upon any special promise to answer for the debt, default, or miscarriage of another; or upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within one year from the making thereof; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.[7] An oral guarantee of the note

Guarantees must be in writing.

[1] Reed, Stat. Frauds, §§ 229, 270, 283, 303; Langfort *v.* Tyler, 1 Salk. 113; Blenkinsop *v.* Clayton, 7 Taunt. 597.

[2] Jackson *v.* Tupper, 101 N. Y. 515; though see Bissell *v.* Balcom, 39 N. Y. 278; reversing *S. C.* 40 Barb. 98; Allis *v.* Read, 45 N. Y. 142; Webster *v.* Zielly, 52 Barb. 482; Hunter *v.* Wetsell, 57 N. Y. 375; Organ *v.* Stewart, 60 N. Y. 413.

[3] Edgerton *v.* Hodge, 41 Vt. 676; Reed, Stat. Frauds, § 230.

[4] Artcher *v.* Zeh, 5 Hill, 200; Mattice *v.* Allen, 33 Barb. 543. See Ireland *v.* Johnson, 28 How. Pr. 463.

[5] Walker *v.* Mussey, 16 M. & W. 302; Ely *v.* Ormsby, 12 Barb. 570; Brand *v.* Brand, 49 Barb. 346; Walrath *v.* Ingles, 64 Barb. 265; Brabin *v.* Hyde, 32 N. Y. 519.

[6] Cherry *v.* Heming, 4 Ex. R. 631.

[7] As to meaning of words "lawfully authorized," see Norris *v.* Cooke, 30 L. T. 224; and see generally as to application of statute, Mahan *v.* U. S., 16 Wall. 143; Durant *v.* Allen, 48 Vt. 58; Calkins *v.* Falk, 1 Abb. (N. Y.) App. 291; Nugent *v.* Wolfe, 111 Penn. St. 471; Norris *v.* Blair, 39 Ind. 90; Miller *v.* Neihaus, 51 Ind. 401; First Nat. Bk. *v.* Bennett, 33 Mich. 520 Vaughan *v.* Smith, 65 Iowa, 579 Studley *v.* Barth, 54 Mich. 6.

of a third person, given in payment of a debt of the guarantor, is within the statute,[1] and so is a promise to sign a certain bond as security conditionally,[2] and a promise by a railway company to pay on account of a contractor, to whom it was indebted, the sum due by the contractor to a sub-contractor.[3] Some consideration must be inferrible from the writing, and its terms must be definite, or it will not hold,[4] though under some statutes it is enough if the consideration may be presumed from the character of the transaction itself without any direct statement.[5]

The statutory restriction as to guarantees relates to collateral, not original, promises.

§ 879. An important distinction exists between cases where, though goods are supplied to a third party, credit is given solely to the defendant, and cases where the person for whose use the goods are furnished is primarily liable, and the defendant only undertakes to pay for them in the event of the other party making default. An *original* promise, as above stated, need not be in writing, under the statute; a *collateral* promise has to be in writing.[6] In the application of this distinction, it has been

Reed, Stat. Frauds, §§ 25 *et seq.*; Shaaber *v.* Bushong, 105 Penn. St. 514; Morrissey *v.* Kinsey, 16 Neb. 17.

[1] Gill *v.* Herrick, 111 Mass. 501; Dows *v.* Swett, 120 Mass. 322; Hauer *v.* Patterson, 84 Penn. St. 274. See Clement's App., 52 Conn. 464. For criticism of Dows *v.* Swett, supra, see 2 A. M. L. Reg. 473; 27 Alb. L. J. 323.

[2] Haynes *v.* Burkam, 51 Ind. 130.

[3] Laidlow *v.* Hatch, 75 Ill. 11.

[4] Browne, Stat. Frauds, §§ 190–2; Wain *v.* Warlters, 5 East, 10; Ackley *v.* Parmenter, 98 N. Y. 425; Deutsch *v.* Kanders, 46 Md. 164; Vaughan *v.* Smith, 58 Iowa, 553; Hite *v.* Wells, 17 Ill. 90; Foster *v.* Napier, 74 Ala. 393; Agnew, Stat. Frauds, § 79.

[5] Sanders *v.* Barlow, 21 Fed. Rep. 836; Goodnow *v.* Bond, 59 N. H. 150. This is now the case in England. Agnew, Stat. Frauds, § 79; Reed, Stat. Frauds, §§ 25, 71 *et seq.*

[6] Reed, Stat. Frauds, §§ 20, 30, 37 *et seq.*, 84. As to the discussion of the so-called "fraud rule," see Reed, Stat. Frauds, §§ 54 *et seq.*; Taylor's Ev. § 941 *a*, citing Birkmyr *v.* Darnell, Salk. 27; 1 Smith L. C. 262, *S. C.*; Forth *v.* Stanton, 1 Wms. Saund. 211 *a*–211 *e*; Barrett *v.* Hyndman, 3 Ir. Law R. 109; Fitzgerald *v.* Dressler, 29 L. J. C. P. 113; 7 Com. B. N. S. 374, *S. C.*; Mallett *v.* Bateman, 16 Com. B. N. S. 530; 35 L. J. C. P. 40, in Ex. Ch.; 1 Law Rep. C. P. 163; and 1 H. & R. 109, *S. C.* See Orrell *v.* Coppock, 26 L. J. Ch. 269; Morse *v.* Nat. Bank, 1 Holmes, 209; Williamson *v.* Hill, 3 Mackey, 100; Hunter *v.* Randall, 62 Me. 423; Demerritt *v.* Bickford, 58 N. H. 523; Bailey *v.* Bailey, 56 Vt. 398; Bellows *v.* Sowles, 57 Vt. 164; Alger *v.* Scoville, 1 Gray, 391; Jepherson *v.* Hunt, 2 Allen, 423; Wills *v.* Brown, 118 Mass. 137; Walker *v.* Hill, 119 Mass. 249; Dows *v.* Swett, 120 Mass. 414; Stratton *v.* Hill, 134 Mass. 27; Dows *v.* Scott, 134 Mass. 140; Kingsley *v.*

held that agreements by factors to sell upon *del credere* commission do not fall within the fourth section of the statute of frauds, and consequently, need not be in writing.[1] But with this exception cases of this kind must be determined on the concrete facts, as to whether the evidence shows an original or a collateral promise.[2] It is plain that an agreement, upon a new and sufficient consideration to pay another's debt, is not within the statute.[3]

Balcome, 4 Barb. 131; Larson *v.* Wyman, 14 Wend. 246; Mallory *v.* Gillett, 21 N. Y. 412; Duffy *v.* Wunsch, 42 N. Y. 243; Booth *v.* Eighmie, 60 N. Y. 238; Kessler *v.* Sonneborn, 10 Daly, 383; Smart *v.* Smart, 97 N. Y. 559; Simmons *v.* Moore, 100 N. Y. 140; Schmidt *v.* Cowperthwait, 12 Daly, 381; Merriman *v.* Liggitt, 1 Weekly Notes, 379; Jefferson *v.* Slagle, 66 Penn. St. 202; Townsend *v.* Long, 77 Penn. St. 143; Merriman *v.* McManus, 102 Penn. St. 102; Huyler *v.* Atwood, 26 N. J. Eq. 504; Teeters *v.* Lamborn, 43 Ohio St. 144; Clifford *v.* Luhring, 69 Ill. 401; Bunting *v.* Darbyshire, 75 Ill. 408; Patmor *v.* Haggard, 78 Ill. 607; Power *v.* Rankin, 114 Ill. 52; Hall *v.* Woodin, 35 Mich. 67; Sutherland *v.* Carter, 52 Mich. 151; Larsen *v.* Jensen, 53 Mich. 151; Morris *v.* Osterhout, 55 Mich. 262; Mulcrone *v.* Lumber Co., 55 Mich. 622; Chamberlin *v.* Ingalls, 38 Iowa, 300; Lester *v.* Bowman, 39 Iowa, 611; Langdon *v.* Richardson, 58 Iowa, 610; Dickenson *v.* Colter, 45 Ind. 445; Horn *v.* Bray, 51 Ind. 555; Pettit *v.* Braden, 55 Ind. 201; Shaffer *v.* Ryan, 84 Ind. 140; Boyce *v.* Murphy, 91 Ind. 1; Louisville, etc., R. R. *v.* Caldwell, 98 Ind. 245; Elson *v.* Spraker, 100 Ind. 374; Windell *v.* Hudson, 102 Ind. 521; Wolke *v.* Fleming, 103 Ind. 521; West *v.* O'Hara, 55 Wis. 645; Hoile *v.* Bailey, 58 Wis. 434; Weisel *v.* Spence, 59 Wis. 301; Kelley *v.* Schupp, 60 Wis. 76; De Witt *v.* Root, 18 Neb. 576; Clay *v.* Tyson, 19 Neb. 530; Wilson *v.* Hentges, 29 Minn. 102; Whitehurst *v.* Hyman, 90 N. C. 487; Davis *v.* Tift, 70 Ga. 52; Howell *v.* Field, 70 Ga. 592; Baldwin *v.* Hiers, 73 Ga. 739; Lehman *v.* Levy, 69 Ala. 48; Madden *v.* Floyd, 69 Ala. 221; Thornton *v.* Williams, 71 Ala. 555; Thornton *v.* Guice, 73 Ala. 321; Carlisle *v.* Campbell, 76 Ala. 247; Hamilton *v.* Hodges, 30 La. An. 1290; Broom *v.* McGrath, 53 Miss. 243; Green *v.* Estes, 82 Mo. 337; Chapline *v.* Atkinson, 45 Ark. 67; Spann *v.* Cockran, 63 Tex. 240.

[1] Reed, Stat. Frauds, § 75; Couturier *v.* Hastie, 8 Ex. R. 40; Wickham *v.* Wickham, 2 K. & J. 478, per Wood, V. C.; Wolff *v.* Koppell, 5 Hill, 458; *S. C.* 2 Denio, 368; Bradley *v.* Richardson, 23 Vt. 720; Swan *v.* Nesmith, 7 Pick. 220.

[2] 1 Wms. Saund. 211 *b;* 1 Smith L. C. 262. See Mountstephen *v.* Lakeman, Law Rep. 5 Q. B. 613; *S. C.* L. R. 7 Q. B. 196; *S. C.* L. R. 7 H. L. 17; Richardson *v.* Robbins, 124 Mass. 105; Rodocanachi *v.* Buttrick, 125 Mass. 134; Crim *v.* Fitch, 53 Ind. 214; Hayward *v.* Gunn, 82 Ill. 385; Hardman *v.* Bradley, 85 Ill. 162; Barden *v.* Briscoe, 36 Mich. 254; Comstock *v.* Newton, 36 Mich. 277; Radcliffe *v.* Poundstone, 23 W. Va. 724; Hill *v.* Frost, 69 Tex. 25. See Reed, Stat. Frauds, §§ 37 *et seq.*

[3] Glidden *v.* Child, 122 Mass. 433; Gold *v.* Phillips, 10 Johns. R. 412; Myers *v.* Morse, 15 Johns. R. 425; Farley *v.* Cleveland, 9 Cow. 639; Union Bank *v.* Coster, 3 N. Y. 203;

§ 880. The statute, it will be remembered, limits the guarantees, which it requires to be in writing, to promises "to answer for the debt, default, or miscarriage of another."[1] It has been consequently held, that to bring the case within the statute, the liability of that other must continue, notwithstanding the promise.[2] Thus where the defendant, in consideration that the plaintiff would discharge out of custody his debtor taken on a *ca. sa.*, promised to pay the debt, it was held not to be necessary that this promise should be in writing, the reason being that the debtor's liability is at an end when he is discharged, and the promise of the defendant cannot take effect till after the discharge.[3] It has, however, been held, where an execution debtor was discharged out of custody upon giving a warrant of attorney to secure the payment of his debt by instalments, and the defendant, knowing of this warrant of attorney, undertook, in consideration of the discharge, to see the debt paid, that as the debtor's liability was kept alive by the warrant, the defendant's undertaking should be regarded in the light of a collateral guarantee, and, as such, was a promise within the meaning of the statute.[4] It is said, also, to make no difference whether the goods were delivered to the third party,[5] or the debt in-

To constitute a guarantee under the statute, the indebtedness of the person guaranteed must be continuous.

Sanders *v.* Gillespie, 64 Barb. 628; Tallman *v.* Bresler, 65 Barb. 369; Griffin *v.* Keith, 1 Hilt, 58; Neal *v.* Bellamy, 73 N. C. 384; Threadgill *v.* Lendon, 76 N. C. 24; Mobile R. R. *v.* Jones, 57 Ga. 198; Bissig *v.* Britton, 59 Mo. 204; Gridley *v.* Capen, 72 Ill. 11. See Green *v.* Disbrow, 59 N. Y. 334. As to the Pennsylvania rule, see Maule *v.* Bucknell, 50 Penn. St. 39, qualifying in part Leonard *v.* Vredenburgh, 8 Johns. R. 39.

[1] See Macrory *v.* Scott, 5 Ex. R. 907.

[2] See Gull *v.* Lindsay, 4 Ex. R. 45, 52; Butcher *v.* Stuart, 11 M. & W. 857, 873; Lane *v.* Burghart, 1 Q. B. 933, 937, 938; 1 G. & D. 312, *S. C.* Cf. Reader *v.* Kingham, 13 Com. B. N. S. 344; Anderson *v.* Davis, 9 Vt. 136; Watson *v.* Jacobs, 29 Vt. 169; Stone *v.* Symmes, 18 Pick. 467; Curtis *v.* Brown, 5 Cush. 492; Wood *v.* Corcoran, 1 Allen, 405; Watson *v.* Randall, 20 Wend. 201; Meriden Co. *v.* Zingsen, 48 N. Y. 247; Allshouse *v.* Ramsey, 7 Whart. R. 331; Andre *v.* Bodman, 13 Md. 241; Draughan *v.* Bunting, 9 Ired. L. 10; Click *v.* McAfee, 7 Port. 62; Eddy *v.* Roberts, 17 Ill. 505; Welch *v.* Marvin, 36 Mich. 59. See Reed, Stat. Frauds, § 94 *et seq.*, 99 *et seq.* As to modification of rule, see ibid. § 96.

[3] Bird *v.* Gammon, 3 Bing. N. C. 883; 5 Scott, 213; Goodman *v.* Chase, 1 B. & A. 297.

[4] Lane *v.* Burghart, 3 M. & Gr. 597. See Cooper *v.* Chambers, 4 Dev. (N. C.) 261.

[5] Matson *v.* Wharam, 2 T. R. 80; Anderson *v.* Hayman, 1 H. Bl. 120; Mountstephen *v.* Lakeman, 5 Law Rep. Q. B. 613; *S. C.* judgment reversed, but on another ground, L. R. 7 Q. B. 196. See Reed, Stat. Frauds, § 94.

curred, or the default committed by him, before or after the promise by the defendant; for a promise to indemnify is substantially within the statute.[1] But an undertaking to indemnify another against all liability, if he would enter into recognizances for the appearance of a defendant in a criminal trial, is held not to fall within the meaning of the statute, as relating to a *criminal* proceeding.[2] It must be noticed, however, that the statute covers cases of promises to make good the *tortious* as well as the *contractual* defaults of another.[3]

§ 881. When the undertaking is to pay another's debt, the burden is on the party who seeks to prove that the undertaking is an original and independent contract, so as to escape the statute. "The evidence, to change an existing contract relation between the plaintiff and a third party, and to prove a promise by the defendant to pay the debt of another, as a new and original undertaking, and not a contract of suretyship, must be clear and satisfactory; otherwise the case will fall within the operation of the statute of frauds, requiring the promise to be in writing."[4]

To escape statute, original undertaking must be specifically and fully proved.

V. MARRIAGE SETTLEMENTS.

§ 882. The statute further makes writing an essential to "agreements made in consideration of marriage." These words, it has been held, do not embrace mutual promises to marry; and therefore, notwithstanding the act, such promises may be orally made.[5] It should also be observed that though there may be, in other respects, such a part performance of marriage contracts as to take the case out of the

Marriage settlements must be in writing.

[1] Green *v.* Cresswell, 10 A. & E. 453, 458; 2 P. & D. 430, *S. C.*, overruling the dicta of Bayley and Parke, JJ., in Thomas *v.* Cook, 8 B. & C. 728; 3 M. & R. 444, *S. C.*; and explaining Adams *v.* Dansey, 6 Bing. 506. For other cases on this point, see supra, § 879.

[2] Cripps *v.* Hartnoll, 4 B. & S. 414, per Ex. Ch., overruling *S. C.* 2 B. & S. 697. See Kelsey *v.* Hibbs, 13 Ohio St. 340. Reed, Stat. Frauds, § 144.

[3] Kirkham *v.* Marter, 2 B. & A. 613; Turner *v.* Hubbell, 2 Day, 457; Richardson *v.* Crandall, 48 N. Y. 348.

[4] Eshleman *v.* Harnish, 76 Penn. St. 97; affirmed in Haverly *v.* Mercur, 78 Penn. St. 263; Reed, Stat. Frauds, §§ 74, 84 *et seq.* As to how far an irregular indorsement is a guarantee, see Reed, Stat. Frauds, § 353.

[5] Reed, Stat. Frauds, §§ 172–186; Taylor's Ev. § 945; B. N. P. 280 *c.*; Short *v.* Stotts, 58 Ind. 29; Blackburn *v.* Mann, 85 Ill. 222.

statute,[1] yet that the marriage *per se* is not a part performance within this rule.[2] Hence if a suitor orally promises to settle property on his intended wife, and the woman, relying on his honor, marries him, she cannot compel the performance of the settlement.[3] But it is now ruled in England, that an oral agreement made before marriage will be enforced in equity, if, subsequently to the marriage, it has been recognized and adopted in writing;[4] though there

[1] Thynne *v.* Glengall, 2 H. of L. Cas. 131; Clinan *v.* Cooke, 1 Sch. & Lef. 41; Kine *v.* Balfe, 2 Ball & B. 347, 348; Surcome *v.* Pinniger, 3 De Gex M. & G. 571; Taylor *v.* Beech, 1 Ves. Sen. 297; Clark *v.* Pendleton, 20 Conn. 508; Dugan *v.* Gittings, 3 Gill, 138; Dunn *v.* Tharp, 4 Ired. Eq. 7.

[2] Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 64, per Lord Cottenham; Redding *v.* Wilks, 3 Br. C. C. 401; Lassence *v.* Tierney, 1 M. & Gord. 571, 572, per Ld. Cottenham; 2 Hall & T. 115, 134, 135, *S. C.*; Warden *v.* Jones, 23 Beav. 487; aff. on app. 2 De Gex & J. 76, 84; Finch *v.* Finch, 10 Ohio St. 501. See expressions in Hatcher *v.* Robertson, 4 Strobh. Eq. 179. See Reed, Stat. Frauds, §§ 172 *et seq.*

[3] Montacute *v.* Maxwell, 1 P. Wms. 619; Caton *v.* Caton, Law Rep. 1 Ch. Ap. 137; 2 Law Rep. H. L. 127. See, for converse, Goldicutt *v.* Townsend, 28 Beav. 445. An oral contract to marry on condition of the execution of a specific ante-nuptial contract, the two being an indivisible transaction, is within the statute. Caylor *v.* Roe, 99 Ind. 1.

In Newman *v.* Piercey, High Court Chancery Division, 4 Ch. D. 41, 25 W. R. 36, a father, before the marriage of his daughter, told her and her intended husband that he had given her a leasehold house on her marriage. Immediately after the marriage, the daughter and her husband took possession of the house, paid the groundrent, and exercised acts of ownership. The father, after the marriage, refused to complete the gift by assignment. He continued to pay instalments of the purchase-money to the building society through which he had purchased it, but a sum of £110 was due to the society at the time of his death, which took place four years after the marriage. Held: (1.) That the possession following the verbal gift was a sufficient part performance to take the case out of the statute of frauds; and (2.) That the £110 must be paid out of the intestate's general assets.

See, however, as to redress in cases of fraud, Baron de Biel *v.* Hammersley, 3 Beav. 469, 475, 476, per Ld. Langdale; 12 Cl. & Fin. 45, 64; Williams *v.* Williams, 37 L. J. Ch. 854, per Stuart, V. C. See, also, Mannsell *v.* White, 4 H. of L. Cas. 1039; Bold *v.* Hutchinson, 20 Beav. 250; 5 De Gex, M. & G. 558, *S. C.*; Jameson *v.* Stein, 21 Beav. 5; Kay *v.* Crook, 3 Sm. & Giff. 407.

[4] Taylor's Ev. § 945, relying on Barkworth *v.* Young, 26 L. J. Ch. 153, 157, per Kindersley, V. C.; Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 64, per Ld. Cottenham, citing Hodgson *v.* Hutchinson, 5 Vin. Abr. 522; Taylor *v.* Beech, 1 Ves. Sen. 297; and Montacute *v.* Maxwell, 1 Str. 236; and questioning Randall *v.* Morgan, 12 Ves. 73, where Sir W. Grant expressed serious doubt upon the subject. See 12 Cl. & Fin. 86, per Ld. Brougham; and 3 Beav. 475, 476, per Ld. Langdale. Also Caton *v.* Caton, L. R. 1, Ch. Ap. 137; 35 L. J. Ch. 292, *S. C.*, overruling *S. C.* as decided by Stuart, V. C., 34 L. J. Ch. 564.

will be no interference, unless it appear that the marriage was contracted on the faith of the agreement.[1] It has also been held that if there has been a part performance of a parol agreement by the entry on and enjoyment by a married couple of the property agreed to be given to them, they assuming the burdens on such property, this takes the case out of the statute.[2]

VI. AGREEMENTS IN FUTURO.

Agreements not to be performed within a year must be in writing.

§ 883. The statutory prescription, that an agreement *not to be performed within a year* from the making thereof must be in writing, has been held not to operate where the contract is capable of being performed on the one side or on the other within a year.[3] It has also been held not to extend to an agreement made by a contractor to allow a stranger to share in the profits of a contract that is incapable of being completed within a year, because such an agreement amounts to nothing more than the sale of a right which is transferred entire on the bargain being struck.[4] It is further held that the statute is inapplicable in any case where the action is

[1] Ayliffe *v.* Tracy, 2 P. Wms. 65. See Chase *v.* Fitz, 132 Mass. 359.

[2] Ungley *v.* Ungley, L. R. 4 Ch. D. 73; 35 L. T. R. 619; L. R. 5 Ch. D. 887.

[3] Reed, Stat. Frauds, §§ 187 *et seq.*; Cherry *v.* Heming, 4 Ex. R. 631; and Smith *v.* Neale, 2 Com. B. N. S. 67; both recognizing Donellan *v.* Read, 3 B. & Ad. 899. See Taylor's Ev. § 946; S. P., Holbrook *v.* Armstrong, 10 Me. 31; Cabot *v.* Haskins, 3 Pick. 83; Greene *v.* Harris, 9 R. I. 401; Hodges *v.* Man. Co., 9 R. I. 482; Hardesty *v.* Jones, 10 Gill & J. 404; Cole *v.* Singerly, 60 Md. 343; Bates *v.* Moore, 2 Bailey, 614; Compton *v.* Martin, 5 Rich. 14; Johnson *v.* Watson, 1 Ga. 348; Rake *v.* Pope, 7 Ala. 161; Dickson *v.* Frisbee, 52 Ala. 165; Suggett *v.* Cason, 26 Mo. 221; Haugh *v.* Blythe, 20 Ind. 24; Marley *v.* Nohlett, 42 Ind. 85; Curtis *v.* Sage, 35 Ill. 22; Blair *v.* Walker, 39 Iowa, 406; Larrimer *v.* Kelley, 10 Kans. 298; Sutphen *v.* Sutphen, 30 Kans. 510; Gonzales *v.* Chartier, 63 Tex. 36. See Riddle *v.* Backus, 38 Iowa, 81; Dougherty *v.* Rosenberg, 62 Cal. 32. But the doctrine of Donellan *v.* Reed has been emphatically repudiated in Frary *v.* Sterling, 99 Mass. 461; Broadwell *v.* Getman, 2 Denio, 87; Pierce *v.* Paine, 28 Vt. 34; Emery *v.* Smith, 46 N. H. 151; 1 Smith's Leading Cas. 145, Am. ed.; Browne, Stat. Frauds, §§ 289–90. That the writings may be helped out by collateral papers, see Beckwith *v.* Talbot, 95 U. S. 289. That the question is one of fact, see Farwell *v.* Tillson, 76 Me. 227. The statute does not apply to agreements to marry. Brick *v.* Grapner, 36 Hun, 52.

[4] M'Kay *v.* Rutherford, 6 Moo. P. C. R. 413, 429.

brought upon an *executed* consideration.[1] A *part performance*, however, is not of itself sufficient to take the case out of the statute; but whenever it appears, either by express stipulation, or by inference from the circumstances, that the contract is not to be *completed* on either side within the year, written proof of the agreement must be given.[2] A part performance during the year will not be sufficient in such case.[3] Thus, where a servant is orally hired for a year's service, the service to begin at a future day, he cannot maintain an action against his master for discharging him before the expiration of the year.[4] It should be added, that the mere fact that the contract may be determined by the parties within the year will not take the case out of the statute, if by its terms it purports to be an agreement which is not to be completely performed till after the expiration of that period.[5] It is otherwise if the agreement is silent as to the time within which it is to be performed, and its duration rests upon a contingency, which is probable, but which may or may not happen within the year;[6] or when the gist of the

[1] Knowlman *v.* Bluett, L. R. 9 Ex. 307. See Taylor's Ev. §§ 893, 900–2, 953–4; Souch *v.* Strawbridge, 2 Com. B. 814, per Tindal, C. J.; Barkley *v.* R. R., 71 N. Y. 205. See Re Pentreguinea Coal Co., 4 De Gex, F. & J. 541.

[2] Boydell *v.* Drummond, 11 East, 142, 156, 159; Levison *v.* Stix, 10 Daly, 229; Reinheimer *v.* Carter, 31 Ohio St. 579; Groves *v.* Cook, 88 Ind. 169; Mallett *v.* Lewis, 61 Miss. 105. A contract for an insurance to begin within the year is not within the statute. Wiebeler *v.* Ins. Co., 30 Minn. 464.

[3] Lockwood *v.* Barnes, 3 Hill, 128; Wilson *v.* Martin, 1 Den. 602; Day *v.* R. R., 31 Barb. 548.

[4] Bracegirdle *v.* Heald, 1 B. & A. 722; Snelling *v.* Huntingfield, 1 C., M. & R. 20; 4 Tyr. 606, *S. C.*; Giraud *v.* Richmond, 2 Com. B. 835. See Cawthorne *v.* Cordrey, 13 Com. B. N. S. 406; Banks *v.* Crossland, L. R. 10 Q. B. 97; Nones *v.* Homer, 2 Hilton, 116; Sheehy *v.* Adarene, 41 Vt. 541; Kelly *v.* Terrell, 26 Ga. 551; Shipley *v.* Patton, 21 Ind. 169.

[5] Birch *v.* Ld. Liverpool, 9 B. & C. 392, 395; 4 M. & R. 380, *S. C.*; Roberts *v.* Tucker, 3 Ex. R. 632; Dobson *v.* Collis, 1 H. & N. 81; Pentreguinea Coal Co. re, 4 De Gex, F. & J. 541; R. *v.* Herstmonceaux, 7 B. & C. 555, per Bailey, J.; Parks *v.* Francis, 50 Vt. 626; Sutcliffe *v.* Atlantic Mills, 13 R. L. 480; Kimmins *v.* Oldham, 27 W. Va. 258.

[6] Taylor's Ev. § 947; Reed, Stat. Frauds, §§ 192 *et seq.*; Souch *v.* Strawbridge, 2 Com. B. 808; Ridley *v.* Ridley, per Romilly, M. R.; 34 Beav. 478; Wells *v.* Horton, 4 Bing. 40; 12 Moore, 177, *S. C.*; Gilbert *v.* Sykes, 16 East, 154; Peter *v.* Compton, Skin. 353; 1 Smith L. C. 283, *S. C.*; Fenton *v.* Emblers, 3 Burr. 1278; 1 W. Bl. 353, *S. C.* See Mayor *v.* Payne, 3 Bing. 285; 11 Moore, 2 *S. C.*; Murphy *v.* Sullivan, 11 Ir. Jur. N. S. 111; Farrington *v.* Donohue, 1 I. R. C. L. 675; Linscott *v.* McIntire, 15 Me. 201; Kent

agreement is that either party may rescind the contract within a year.[1] But a party who refuses to go on with such an agreement, after deriving a benefit from part performance, must pay for what he has received.[2]

The statute has been held applicable to contracts for the sale of lands.[3] But it does not apply to tenancies from year to year;[4] nor to agreements to execute a lease to begin at some future time.[5]

VII. WILLS.

Will must be executed in conformity with statute. English Will Acts.

§ 884. It is beyond the compass of the present treatise to analyze the statutory provisions, adopted in the several states of the American Union, to regulate the execution and proof of wills. In England, under the Will Act of 15 & 16 Vict., modifying prior legislation, no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made. Under this statute no other publication than that prescribed is necessary;[6] and a testamentary appointment is good, if in conformity with the act, though the instrument establishing it specifies additional solemnities.[7] Under the New York statute,

v. Kent, 18 Pick. 569; Lapham *v.* Whipple, 8 Met. 59; Plimpton *v.* Curtis, 15 Wend. 336; Artcher *v.* Zeh, 5 Hill, 200; Blakeney *v.* Goode, 30 Ohio St. 350; Jones *v.* Pouch, 41 Ohio St. 146; Heflin *v.* Milton, 69 Ala. 354; Brigham *v.* Carlisle, 78 Ala. 243; Chaffe *v.* Benoit, 60 Miss. 34. See Stout *v.* Ennis, 28 Kan. 706.

[1] Reed, Stat. Frauds, § 190 *et seq.*; Birch *v.* Liverpool, *ut supra;* Walker *v.* Johnson, 94 U. S. 424; McPherson *v.* Cox, 96 U. S. 404; Sherman *v.* Trans. Co., 31 Vt. 162; Somerby *v.* Buntin, 118 Mass. 279; Trustees *v.* Ins. Co., 19 N. Y. 305; Weir *v.* Hill, 2 Lans. 278; Argus Co. *v.* Albany, 7 Lansing, 264; 55 N. Y. 498; Kent *v.* Kent, 62 N. Y. 560; Harris *v.* Porter, 2 Harr. (Del.) 27; Southwell *v.* Beesley, 5 Oreg. 143; Frost *v.* Tarr, 53 Ind. 390.

[2] Day *v.* R. R., 51 N. Y. 583.

[3] Fall *v.* Hazelrigg, 45 Ind. 576; citing Boydell *v.* Drummond, 11 East, 142; Bracegirdle *v.* Heald, 1 B. & Ald. 723; Sobey *v.* Brisbee, 20 Iowa, 105; Young *v.* Dake, 1 Seld. 463; Wilson *v.* Martin, 1 Denio, 602. *Contra*, Browne on Statute of Frauds, § 272.

[4] Brown *v.* Kayser, 60 Wis. 1.

[5] Whiting *v.* Ohlert, 52 Mich. 462.

[6] Vincent *v.* Bp. of Soder & Man, 4 De Gex & Sm. 294. As to New York statute, see Gilbert *v.* Knox, 52 N. Y. 125; Hewitt's Will, 91 N. Y. 261.

[7] See as to this, Buckell *v.* Bleakhorn, 5 Hare, 131; Collard *v.* Simpson, 16 Beav. 543; *S. C.* 4 De Gex, M. & G. 224; West *v.* Ray, 1 Kay, 385.

requiring the signature to be at the end of the will, a will in which the last side of the page on which it is written has the witnesses' signatures at the top instead of the end, is not duly executed.[1] But it is otherwise when the signature comes after the attestation clause.[2]

Provisions in this respect of the statute of frauds.

§ 885. The statute of frauds,[3] which we must revert to as the basis of testamentary legislation in the United States as well as in England, relates exclusively, in its original text, to devises disposing of freehold realty, while the will act, just noticed, embraces personal estate. Another important distinction is, that two attesting witnesses are sufficient and necessary by the will act in all cases, while the statute of frauds requires the signature of at least three to all devises of freehold realty, but is silent as to other wills. By the will act, also, the testator must make or acknowledge his signature in the *actual contemporaneous presence* of these witnesses, though this is not necessary under the statute of frauds. Once more, by the will act, the will must be signed "at the foot or end thereof," whereas, under the statute of frauds, the signature is valid, if it appears on any part of the instrument.[4]

Distinctive adjudications under statutes.

§ 886. Under the terms of the English Will Act it has been ruled that both the attesting witnesses must subscribe the will at the same time, and in each other's presence. Hence, where a will was signed in the presence of a single witness who then attested it, the second witness signing only when the testator afterwards acknowledged his signature, this was held to be insufficient, though on the second occasion the first witness had acknowledged, but had not rewritten, his own signature.[5]

[1] Hewitt's Will, 91 N. Y. 261; see, to same effect, O'Neill's Will, 91 N. Y. 516; *aliter* under New Jersey law. Booth, in re, 3 Demar. 416.

[2] Younger *v.* Duffie, 94 N. Y. 535; Hallowell *v.* Hallowell, 88 Ind. 251.

[3] 29 Car. 2, c. 3, § 5.

[4] Much difficulty arose under this provision of the will act, which was obviated by an act passed in 1852, under the auspices of Lord St. Leonards, which provides that a signature is good which is at the end of a will, though there be an intervening space, or though attesting clauses intervene. See Taylor's Evidence, § 971.

[5] Taylor's Evidence, § 966, 7th ed. § 1052–3; Casement *v.* Fulton, 5 Moo. P. C. R. 139; Moore *v.* King, 3 Curt. 243; In re Simmonds, Ibid. 79; In re Allen, 2 Curt. 331; Slack *v.* Rusteed, 6 Ir. Eq. R. (N. S.) 1. See Gardiner, in re, 3 Demar. 98. But in Faulds *v.* Jackson, 6 Ec. & Mar. Cas. Supp. i.; and In re Webb, 1 Deane Ec. R. 1, Sir J. Dodson, on the authority of an unreported decision of Sir H. Fust, in Chodwick *v.* Palmer, held that the

The same conclusion has been reached where one of the witnesses to a will, on the occasion of its being re-executed in his presence, retraced his signature with a dry pen,[1] and where another witness, under similar circumstances, corrected an error in his name as previously written, and added the date.[2] Some act must be done on the face of the instrument to indicate a subscription.[3] So under a statute requiring two witnesses to a will, a will altered after one witness has signed is not duly proved.[4] As the word "presence," mentioned in the will act (as distinguished from the statute of frauds), means not only a bodily but a mental presence, the act, so has it been held, will not be satisfied if either of the witnesses be insane, intoxicated, asleep, or, it would seem, even blind or inattentive, at the time when the will is signed or acknowledged.[5] Under the New York statute, when witnesses to a will saw no act of signing it by the testator until after they had signed their own names to it, this was held not a sufficient attestation of the will.[6] And where the name of the testator (it not being proved by whom written) was entered in the middle of a sentence in the will, it appearing that he told the witnesses, before signing, that he had "drawed up" the paper, and he afterwards wrote his name in another form in another part of the instrument, this was held not a sufficient authentication of the previous signature.[7] Under the English Will Act, where the testator acknowledged a paper to be his will in the presence of witnesses, but these persons had neither

witnesses need not subscribe the will in the presence of each other. Under the statute of frauds this was clearly unnecessary. Jones *v.* Lake, 2 Atk. 177. Nor is it in New York. Barry *v.* Brown, 2 Demarest, 309; Bogart, in re, 67 How. Pr. 313. See, also, Johnson *v.* Johnson, 106 Ind. 475.

See, as to practice at common law, supra, § 739.

A will which was written twice on different pieces of paper, but the two documents were differently worded though to the same effect, while by mistake one of them was signed by the testator, and the other by the two attesting witnesses: was held not to be duly attested. Hatton, In Goods of, 6 P. D. 204; 50 L. J. P. 78; 30 W. R. 62.

[1] Playne *v.* Scriven, 7 Ec. & Mar. Cas. 122, per Sir H. Fust; 1 Roberts. 772, *S. C.* See Duffie *v.* Corridon, 40 Ga. 122.

[2] Hindmarsh *v.* Charlton, 8 H. of L. Cas. 160.

[3] Guyon, in re, L. R. 3 P. & D. 92.

[4] Charles *v.* Huber, 78 Penn. St. 448.

[5] Hudson *v.* Parker, 1 Roberts. 24, per Dr. Lushington.

[6] Sisters of Charity of St. Vincent de Paul *v.* Kelly. Opinion by Folger, J., 67 N. Y. 409.

[7] Ibid.

seen him sign it, nor seen his signature at the time of their subscription, a prayer for probate was rejected, though both the witnesses admitted that they had seen the testator writing the paper, and the will, when produced, actually bore his signature.[1] So far as concerns the signatures of the witnesses, it has been held that if their signatures were not attached in the testator's room, proof would be required to show that he was in such a position as to have seen them write.[2] On the other hand, where the testator, being in bed, did not exactly see one of the witnesses sign, in consequence of a curtain being drawn, but both the witnesses had really signed in his room, and in each other's presence, the will was admitted to probate,[3] and this is also the case when the testator is prevented by failure of eye-sight from seeing the witnesses, but is conscious of their presence.[4] The witnesses, so has this distinction been explained, are to see the signature made or acknowledged, because they are subsequently to attest it; but they are to subscribe the will in the presence of the testator, chiefly for the purpose of formally completing it; and although they cannot depose to the signature of the testator being made or acknowledged in their presence, unless they see the act, they may bear witness to their subscription in the presence of the testator, though he did not actually see them sign.[5]

Must be acknowledged by testator.

§ 887. Under the statute of frauds (in its original terms), it is not necessary for the witness to have seen the testator sign, if he acknowledges his signature, directly or inferentially, in their presence, and declares that the instrument is his will.[6] The testator, as we have seen,

[1] Hudson *v.* Parker, 1 Roberts. 14, per Dr. Lushington. But see Smith *v.* Smith, 35 L. J. Pr. & Mat. 65; L. R. 1 P. & D. 143, *S. C.*

[2] Norton *v.* Barett, Deane Ec. R. 259. A will was held not duly executed where the testatrix signed in the presence of two witnesses, who twenty minutes afterwards subscribed the document in an adjoining room. The door was open, but the testatrix was not aware that they were signing. Jenner *v.* Finch, 5 P. D. 106; 4 L. J. P. 78; infra, § 889.

[3] Newton *v.* Clarke, 2 Curt. 320. But see Tribe *v.* Tribe, 7 Ec. & Mar. Cas. 132; 1 Roberts. 775, *S. C.*; In re Kellick, 34 L. J. Pr. & Mat. 2; *S. C. nom.* In re Killick, 3 Swab. & Trist. 578. See Hayes *v.* West, 37 Ind. 21; and infra, §§ 887, 939.

[4] Riggs *v.* Riggs, 135 Mass. 238.

[5] Hudson *v.* Parker, 1 Roberts. 35, 36, per Dr. Lushington; Colman, in re, 3 Curt. 118; Neil *v.* Neil, 1 Leigh, 6.

[6] See Redfield on Wills, 1, 218–220; and see, to same effect, Welch *v.* Adams, 63 N. H. 344; Roberts *v.* Welch,

need not be in the same room, if near enough to hear, or to see the will when signed by the witnesses, if he wish.[1]

§ 888. In making the acknowledgment,[2] it is not necessary that the testator should actually point out to the witness his name and say this is my name or my handwriting; but if he states that the whole instrument was written by himself,[3] or if he requests the witnesses to put their names *underneath his*,[4] or if he intimates by gestures that he has signed the will, and that he wishes the witnesses to attest it,[5] or even, it seems, if he desires them to sign without stating that the paper is his will,[6] this will be a sufficient acknowledgment of his signature, provided it appears that the signature was affixed, and was seen by the witnesses when they signed at the testator's request. There must be, however, some acts or declarations by the testator from which the acknowledgment may be inferred.[7] As the statute requires, not that the *will*, but that the *signature*, should be attested,[8] it follows that if the witnesses sign before the testator

This acknowledgment may be inferred.

46 Vt. 164; Ela *v.* Edwards, 16 Gray, 91; Bagley *v.* Blackman, 2 Lans. 41; Smith *v.* Smith, 2 Lans. 266; Alpaugh's Will, 23 N. J. Eq. 507; Moale *v.* Cutting, 59 Md. 510; Sterling *v.* Sterling, 64 Md. 138; Holloway *v.* Galloway, 51 Ill. 159. See Sprague *v.* Luther, 8 R. I. 252. For other rulings as to attesting witnesses, see supra, §§ 723-9.

[1] Supra, § 886; Right *v.* Price, Dougl. 241; McElfresh *v.* Guard, 32 Ind. 408; Rudden *v.* McDonald, 1 Bradf. 352; Moore *v.* Moore, 8 Grat. 307; Sturdivant *v.* Brichett, 10 Grat. 67; Brooks *v.* Duffield, 23 Ga. 441; 1 Redfield on Wills, 246.

[2] The acknowledgment *may* be made by a blind testator. In re Mullen, 5 I. R. Eq. 309.

[3] Blake *v.* Knight, 3 Curt. 563; In re Cornelius Ryan, 1 Curt. 908, recognized in Ilott *v.* Genge, 3 Curt. 174.

[4] Gaze *v.* Gaze, 3 Curt. 451.

[5] In re Davies, 2 Roberts, 377; Lane *v.* Lane, 95 N. Y. 494; Beckett, in re, 35 Hun, 447.

[6] Turner *v.* Cook, 36 Ind. 129; Keigwin *v.* Keigwin, 3 Curt. 607; In re Ashmore, Ibid. 758, per Sir H. Fust; In re Bosanquet, 2 Roberts, 577; In re Dinmore, Ibid. 641; In re Jones, Deane Ec. R. 3. See Faulds *v.* Jackson, 6 Ec. & Mar. Cas. Supp. x. per Ld. Brougham; and see, fully, Taylor's Evidence, §§ 967-9.

[7] Rumsey, in re Dinmore, Demar. 494; Ludlow *v.* Ludlow, 36 N. J. Eq. 597.

Under the New York statute the testator must declare to the witnesses that the paper is his will. Larabee *v.* Ballard, 1 Demarest, 496; Porteus *v.* Holm, 4 Id. 14; see Buckhout *v.* Fisher, 4 Id. 277.

[8] Hudson *v.* Parker, 1 Roberts, 14; Ilott *v.* Genge, 3 Curt. 175, 181; Countess de Zichy Ferraris *v.* M. of Hertford, 3 Curt. 479; In re Summers, 7 Ec. & Mar. Cas. 562; 2 Roberts, 295, *S. C.*; In re Pearsons, 33 L. J. Pr. & Mat. 177; Fischer *v.* Popham, L. R. 3 P. & D. 246. The text is reduced from

the will is void, though the testator immediately afterwards affixes his signature in their presence.[1] A court of error, however, will not reverse because there was no explicit evidence by the subscribing witnesses that the testator either signed the will, or acknowledged his signature to it, in their presence, since if there is no ground of suspicion a court of error may presume due execution under the circumstances.[2] The same presumption applies in the absence or death of the witnesses, or in the event of their not remembering the facts attendant on the execution.[3] But acknowledgment of signature will be insufficient if the witnesses had not had the opportunity of seeing the signature.[4]

Testator may sign by a mark, or have

§ 889. Under the statute of frauds, which in this respect is not altered by the Will Act of 1838, the testator may have his hand guided by another person,[5] or he may sign by his mark only,[6] though his name does not appear, or

Taylor on Evidence, §§ 967 *et seq.*; Ibid. 7th ed. § 1055. All that is necessary is the attestation of signatures. Flood *v.* Pragoff, 79 Ky. 609.

[1] In re Byrd, 3 Curt. 117; In re Olding, 2 Ibid. 865; Cooper *v.* Bockett, 3 Ibid. 648; 4 Moo. P. C. R. 419, *S. C.*; Burke *v.* Moore, Ir. R. 9 Eq. 609, and cases cited supra.

[2] See Doe *v.* Davies, 9 Q. B. 650, per Ld. Denman; Blake *v.* Knight, 3 Curt. 547, 562. See, also, Beckett *v.* Howe, 39 L. J. Pr. & Mat. 1; 2 L. R. P. & D. 1, *S. C.*; Oliver *v.* Johns, 39 L. J. Pr. & Mat. 7; Kelly *v.* Keatinge, 5 I. R. Eq. 174; and see, as to presumption of regularity, infra, § 1313.

[3] Taylor's Evidence, § 970; Ibid. 7th ed. § 1056; supra, §§ 727, 737; Sandilands, in re L. R. 6 C. P. 411; Burgoyne *v.* Showler, 1 Roberts, 5, per Dr. Lushington; Hitch *v.* Wells, 20 Beav. 84; In re Leach, 6 Ec. & Mar. Cas. 92, per Sir H. Fust; Leech *v.* Bates, 1 Roberts, 714; In re Rees, 34 L. J. Pr. & Mat. 56; Brenohley *v.* Still, 2 Roberts, 162, 175–177; Thomson *v.* Hall, 2 Ibid. 426; In re Holgate, 1 Swab. & Trist. 261; Lloyd *v.* Roberts, 12 Moo. P. C. R. 158; Foot *v.* Stanton, Deane Ec. R. 19; Reeves *v.* Lindsay, 3 I. R. Eq. 509; Vinnicombe *v.* Butler, 3 Swab. & Trist. 580; Smith *v.* Smith, L. R. 1 P. & D. 143. See Croft *v.* Croft, 4 Swab. & Trist. 10; and Wright *v.* Rogers, L. R. 1 P. & D. 678; In re Thomas, 1 Swab. & Trist. 255, per Sir C. Cresswell; Gwillim *v.* Gwillim, 3 Swab. & Trist. 200; Trott *v.* Skidmore, 2 Swab. & Trist. 12; In re Huckvale, 36 L. J. Pr. & Mat. 84; 1 L. R. P. & D. 375; *S. C.*; Neely *v.* Neely, 17 Penn. St. 227. But see Pearson *v.* Pearson, 40 L. J. Pr. & Mat. 53.

[4] Blake *v.* Blake, (Ct. Ap.) 46 L. T. N. S. 641; modifying Beckett *v.* Howe, *ut sup.*

[5] Wilson *v.* Beddard, 12 Sim. 28.

[6] Baker *v.* Dening, 8 A. & E. 94; 3 N. & P. 228, *S. C.* See, to same effect, Taylor *v.* Draing, 3 N. & P. 228; Harrison *v.* Elwin, 3 Ad. & El. N. S. 117; Jackson *v.* Van Dusen, 5 Johns. 144; Palmer *v.* Stephens, 1 Denio, 471; supra, § 696. But a signature broken off, and not finished, on account of intervening unconsciousness, will not suffice. O'Niel, in re, 3 Demar. 427.

his hand guided; and witnesses may sign by initials and without additions.

though a wrong name does by mistake appear,[1] in the body of the will;[2] and the attesting witnesses, whether they can write or not, may also sign as marksmen;[3] and if one of them can neither read nor write, he may still sign his name by having his hand guided by the other.[4] It has also been held sufficient for witnesses to subscribe the will by their initials.[5] Under the statute of frauds, as well as by the Will Act, it has been held sufficient if any person, even though he be one of the two attesting witnesses, write,[6] or even stamp,[7] the testator's signature by his direction.[8] The *witnesses*, however, must attest

Where a testator has signed by a mark, no collateral inquiry will be allowed as to his capacity to have written his name; Ibid.; and no proof is required that the will was read over to him. Clarke *v.* Clarke, 2 I. R. C. L. 395. But see, under Missouri statute, Northcutt *v.* Northcutt, 20 Mo. 266. Sealing a will is not a sufficient signing. Smith *v.* Evans, 1 Wils. 313; Grayson *v.* Atkinson, 2 Ves. Sen. 459; Pratt *v.* McCullough, 1 McLean, 69. Nor is an unfinished effort, not meant or intended as a mark, there being no request by the testator for any one to sign for him. Ruloff's App., 26 Penn. St. 219. As to proof of mark generally, see supra, § 696. So as to text, Taylor, § 974.

[1] In re Douce, 2 Swab. & Trist. 593; In re Clarke, 1 Swab. & Trist. 22.

[2] In re Bryce, 2 Curt. 325.

[3] In re Amiss, 2 Roberts, 116. But an attesting witness cannot subscribe a will in another person's name. Pryor *v.* Pryor, 29 L. J. Pr. & Mat. 114.

[4] Harrison *v.* Elvin, 3 Q. B. 117; In re Lewis, 31 L. J. Pr. & Mat. 153; In re Frith, 1 Swab. & Trist. 8; Lewis *v.* Lewis, 2 Swab. & Trist. 153; Roberts *v.* Phillips, 4 E. & B. 450.

[5] Taylor, § 974 (7th ed. § 1060); In re Christian, 7 Ec. & Mar. Cas. 265, per Sir H. Fust; 2 Roberts. 110, *S. C.* See In re Trevanion, 2 Roberts. 311; Charlton *v.* Hindmarsh, 1 Swab. & Trist. 433; *S. C.* 28 L. J. Pr. & Mat. 132; *S. C.* at Nisi Prius, 1 Fost. & Fin. 540; *S. C. nom.* Hindmarsh *v.* Charlton, 8 H. of L. Cas. 160. See, too, In re Sperling, 33 L. J. Pr. & Mat. 25, where a witness, instead of signing his name, wrote "servant to M. S.," and this was held sufficient. 3 Swab. & Trist. 272, *S. C.*

A signature, however, was held insufficient, where an infirm witness, beginning to write his name, wrote "Sam'l," and then stopped. Maddock, in re, L. R. 2 P. & D. 169.

But a mere subscription of name will satisfy the statute, though there be no memorandum to indicate that the parties subscribing signed as witnesses. Bryan *v.* White, 2 Roberts. 315; Griffiths *v.* Griffiths, L. R. 2 P. & D. 306. Or though there be no formal attestation clause, or residences of the witnesses. Phillips, in re, 98 N. Y. 267.

[6] Smith *v.* Harris, 1 Roberts. 272; In re Bailey, 1 Curt. 914. See Herbert *v.* Berrier, 81 Ind. 1.

[7] Jenkins *v.* Gaisford, 32 L. J. Pr. & Mat. 122; 3 Swab. & Trist. 93, *S. C.* See Bennett *v.* Brumfitt, 37 L. J. C. P. 25; 2 Law Rep. C. P. 28, *S. C.*

[8] It has been even held sufficient where the scrivener, at the testator's request to sign for him, signed his own name instead of the testator's. In re Clark, 2 Curt. 329. See, also, In re Blair, 6 Ec. & Mar. Cas. 528.

the will, either by their own signatures or their marks,[1] or by the hand of another under their direction.[2] In what way they are to sign, under the English Will Act, has been already noticed.[3]

Imperfect will may be completed by reference to existing document.

§ 890. A will, as is the case with other documents under the statute of frauds, when imperfect in itself, may, by clear reference to it in an existing document,[4] be so identified with an instrument validly executed as to form part of it; and if this be the case, the defect of authentication arising from such paper being unattested or unexecuted will be cured.[5] Hence unattested wills and codicils have been confirmed by subsequent attested codicils.[6] Parol evidence may be received to explain irregularities as to attestation.[7]

Revocation cannot ordinarily be proved by parol.

§ 891. To set forth the statutes and adjudications of the several United States, in relation to the revocation of wills, belongs more properly to treatises on wills. As bearing, however, upon the general question of statutory limitations of proof, it may be proper here to notice the provisions of the statute of frauds in respect to testamentary revoca-

[1] In re Cope, 2 Roberts. 335; In re Duggins, 39 L. J. Pr. & Mat. 24; Taylor, 7th ed. § 1054.

[2] Lord *v.* Lord, 36 N. J. L. 597.

[3] Supra, § 886.

[4] Dickinson *v.* Stidolph, 11 Com. B. N. S. 341; Van Straubenzee *v.* Monck, 3 Swab. & Trist. 6; In re Greves, 1 Swab. & Trist. 250; Allen *v.* Maddock, 11 Moo. P. C. R. 427; In re Almosnino, 1 Swab. & Trist. 508; In re Brewis, 3 Swab. & Trist. 473; In re Luke, 34 L. J. Pr. & Mat. 105; In re Lady Truro, 35 L. J. Pr. & Mat. 89; L. Rep. 1 P. & D. 201, *S. C.*; In re Sunderland, 35 L. J. Pr. & Mat. 82; Law Rep. P. & D. 198, *S. C.*; In re Watkins, 35 L. J. Pr. & Mat. 14; Law Rep. 1 P. & D. 19, *S. C.*; In re Dallow, 35 L. J. Pr. & Mat. 81; Law Rep. 1 P. & D. 189, *S. C.*; Taylor, §§ 975, 1083; and as to cases of such incorporation, see supra, § 872.

[5] Countess de Zichy Ferraris *v.* M. of Hertford, 3 Curt. 493, per Sir H. Fust; In re Lady Durham, Ibid. 57; In re Dickins, Ibid. 60; In re Willerford, Ibid. 77; Habergham *v.* Vincent, 2 Ves. 204; In re Edwards, 6 Ec. & Mar. Cas. 306; In re Ash, Deane Ec. R. 181; In re Lady Pembroke, Ibid. 182; In re Stewart, 3 Swab. & Trist. 192; 4 Swab. & Trist. 211; Wikoff's App., 15 Penn. St. 281; Brausch *v.* McClellan, 100 Penn. St. 607.

The testator's declarations are admissible on the question whether a documentary instrument is duplicate or distinct. Hubbard *v.* Hubbard (Ch. Div. 1876), 24 W. R. 1058.

[6] Aaron *v.* Aaron, 3 De Gex & Sm. 475; Utterton *v.* Robins, 1 A. & E. 423; Gordon *v.* Ld. Reay, 5 Sim. 274; Doe *v.* Evans, 1 C. & M. 42; 3 Tyr. 56, *S. C.*; Allen *v.* Maddock, 11 Moo. P. C. R. 427. See In re Allnutt, 33 L. J. Pr. & Mat. 86; also Burton *v.* Newbery, L. R. 1 Ch. D. 234; Anderson *v.* Anderson, L. R. 13 Eq. 381. See supra, § 872.

[7] Devecmon *v.* Devecmon, 43 Md. 335.

tions, together with the leading rulings under that statute both in England and in the United States. By the statute of frauds (as amended by the English Will Act of 1838), "No will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances;" and "No will, or codicil, or any part thereof, shall be revoked otherwise than as aforesaid (by marriage), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same,[1] and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." By the statute of frauds, revocation is to be exclusively proved by a subsequent inconsistent will or codicil, or by a written revocation in the presence of three witnesses, or by burning, tearing, cancelling, or obliterating by the testator, or in his presence, and by his direction and consent. We may therefore cite the rulings under the Will Act, so far as concerns a common subject-matter of interpretation, in connection with the rulings under the statute of frauds.[2]

Revocation by subsequent will.

§ 892. No revocation clause is needed to revoke a former will by a later one. Hence a will duly executed, by which the testator disposes of his *whole* property, revokes all previous wills. A revocation has been held to be worked by a paper containing no appointment of executors,[3] even where such paper had to be proved by parol.[4] It must, however, be kept in mind, as a fundamental principle, that a former will cannot be revoked by one of later date, unless the later instrument contains a clause of express revocation, or unless the two wills are incapable of standing together.[5]

[1] See De Pontès *v.* Kendall, 31 L. J. Ch. 185, per Romilly, M. R. See Hicks, re, 65; 1 Law Rep. P. & D. 683, *S. C.*; Fraser, re, 2 Law Rep. P. & D. 40; Durance, in re, L. R. 2 P. & D. 406.

[2] Taylor, § 981, citing In re Cunningham, 4 Swab. & Trist. 194.

[3] Henfrey *v.* Henfrey, 4 Moo. P. C. R. 29; 2 Curt. 468, *S. C.*, in court below. See, as sustaining a revocation by a subsequent will only partially inconsistent, Plenty *v.* West, 1 Roberts. 264; *S. C.* in Ch. before Romilly, M. R. 22 L. J. Ch. 185.

[4] Havard *v.* Davis, 2 Binn. 406. But otherwise as to land under Act of 1833. Clark *v.* Morrison, 25 Penn. St. 453; Jones *v.* Murphy, 8 Watts & S. 275; Day *v.* Day, 2 Green. Ch. (N. J.) 549; Legare *v.* Ashe, 1 Bay, 464.

[5] Taylor's Evidence, § 981; Stoddart *v.* Grant, 1 Macq. Sc. Cas. H. of

§ 893. When the contention is that the testator directed his will to be destroyed by another, it is essential to the admissibility of proof of destruction, under the statute, that it should be of a destruction in the testator's presence; and it follows, therefore, that he has no power to make his will contingent, by giving authority even by the will itself to any person to destroy it after his death.[1]

Proof inadmissible to show destruction out of testator's presence.

§ 894. Revocation will not be complete unless the act of spoliation be deliberately effected on the document, *animo revocandi*.[2] This is expressly rendered necessary by the Will Act,[3] and is impliedly required by the statute of frauds.[4] It is further clear, that the burden of showing that a once valid will has been revoked by mutilation will lie upon the party who undertakes to prove the revocation.[5]

To revocation intention is requisite, and burden is on contestant.

§ 895. Declarations of the testator accompanying the act of destruction (though not such as are subsequently made)[6] will be admissible to explain his intent.[7] And so of declarations that the testator held that a prior will was in existence and operation.[8]

Contemporaneous declarations admissible.

§ 896. In a leading case under the statute of frauds, the testator, having given the will "something of a rip with his hands,

L. 163. See In re Graham, 3 Swab. & Trist. 69; Lemage *v.* Goodban, 1 Law Rep. P. & D. 57; In re Fenwick, 1 Law Rep. P. & D. 319; Dempsey *v.* Lawson, L. R. 2 P. D. 98; Geaves *v.* Price, 3 Swab. & Trist. 71; Birks *v.* Birks, 4 Swab. & Trist. 23.

[1] Stockwell *v.* Ritherdon, 6 Ec. & Mar. Cas. 409, 414, per Sir H. Fust.

[2] See In re Cockayne, Deane Ec. R. 177; Clark *v.* Smith, 34 Barb. 140; Griswold ex parte, 15 Abb. Pr. 299.

[3] Taylor's Evid. § 980.

[4] Bibb *v.* Thomas, 2 W. Bl. 1044.

[5] Harris *v.* Berrall, 1 Swab. & Trist. 153; Benson *v.* Benson, Law Rep. 2 P. & D. 172. See Spoonemore *v.* Cables, 66 Mo. 579.

[6] Staines *v.* Stewart, 2 Swab. & Trist. 320; Jackson *v.* Kniffen, 2 Johns. 31; Waterman *v.* Whitney, 1 Kern. 157; Forman's Will, 54 Barb. 274; Kirkpatrick, in re, 22 N. J. Eq. 463; Boudinot *v.* Bradford, 2 Yeates, 170; Smith *v.* Dolby, 4 Harring. 350; Dawson *v.* Smith, 3 Houst. 335; Devecmon *v.* Devecmon, 43 Md. 335; Beaumont *v.* Keim, 50 Mo. 28; Ladd's Will, 60 Wis. 187. See, however, Card *v.* Grinman, 5 Conn. 164; Wolf *v.* Bollinger, 62 Ill. 368; White *v.* Casten, 1 Jones L. (N. C.) 197; Youse *v.* Forman, 5 Bush. 337; Rodgers *v.* Rodgers, 6 Heisk. 489. Infra, § 899.

[7] Clark *v.* Scripps, 2 Roberts. 568; Richards *v.* Mumford, 2 Phillimore, 23; Card *v.* Grinman, 5 Conn. 164. See Angus, in re, 3 Demar. 93.

[8] Canada's App., 47 Conn. 450.

and having torn it so as almost to tear a bit off," rumpled it up and threw it into the fire, when a bystander saved it without his knowledge, before, as it seems, it was at all burnt, the court held the revocation was complete.[1] But where a testator, being angry with the devisee, began to tear his will, and had actually torn it into four pieces before he was pacified; but afterwards he fitted together and put by the several pieces, saying he was glad it was no worse; the court refused to disturb a verdict by which the jury had found that the act of cancellation was incomplete, as the testator, had it been otherwise, would have gone further in the process of destruction.[2] The *cutting* out the signature by the testator has been held to effect a revocation of the will, if not under the word "tearing," at least under the terms "or otherwise destroying the same."[3] The erasure by the testator of his own signature, or that of the witnesses, has the same effect, if shown to have been done *animo revocandi*.[4] Even the act of tearing off the *seal* from a will which had needlessly been executed as a sealed instrument, has been deemed a revocation.[5] Where, however, a will was found in a mutilated state, being both torn and cut, but the signatures of the testator and the attesting witnesses remained uninjured, the court, guided by the peculiar nature of the mutilations, held, in the absence of any extrinsic evidence, that the instrument was not revoked.[6] *A fortiori*, a destruction of a will under an attack of insanity is not, unless subsequently ratified, a revocation.[7]

Testator's act must go to indicate finality of intention.

§ 897. The English Will Act omits the term cancellation in its notice of the modes of destroying wills,[8] but under the statute, as

[1] Bibb *v.* Thomas, 2 W. Bl. 1043. See Doe *v.* Harris, 6 A. & E. 215, for questioning comments by Ld. Denman. And see Card *v.* Grinman, 5 Conn. 164; White *v.* Casten, 1 Jones, L. 197; Pryor *v.* Coggin, 17 Ga. 444; Mundy *v.* Mundy, 15 N. J. Eq. 290.

[2] Doe *v.* Perkes, 3 B. & A. 489. See Elms *v.* Elms, 1 Swab. & Trist. 155; Youse *v.* Forman, 5 Bush. 337. Infra, § 900.

[3] Hobbs *v.* Knight, 1 Curt. 768.

[4] Hobbs *v.* Knight, 1 Curt. 780; Evans *v.* Dallow, 31 L. J. P. & M. 128; Harris, in re, 13 Sw. & Tr. 485.

[5] Price *v.* Powell, 3 H. & N. 341; *S. C. nom.* Price *v.* Price, 27 L. J. Ex. 409. See, also, Williams *v.* Tyley, 1 V. John. 530; In re Harris, 33 L. J. Pr. & Mat. 181; 3 Swab. & Trist. 485, *S. C.*

[6] Clarke *v.* Scrips, 2 Roberts. 563, per Sir J. Dodson; In re Woodward, 2 Law Rep. P. & D. 206; 40 L. J. Pr. & Mat. 17, *S. C.*

[7] Farbing *v.* Weber, 99 Ind. 258; Lang, in re, 60 Wis. 187. See Brunt *v.* Brunt, 3 P. & D. 37; cited infra, § 990.

[8] Taylor, § 984. See In re Brewster, 29 L. J. Pr. & Mat. 69.

well as at common law, any effective, intentional cancellation by the testator destroys the efficiency of a will. Under the statute, if a testator intentionally obliterate a part of the will, this revokes such part,[1] and such obliteration may be by pasting a piece of paper over the portion of the will the testator intended to revoke ; in which case probate may be granted of the will with the covered part in blank. If, however, the legatee's name was untouched, and only the amount of the legacy was covered, the court would consider the case to be one of a dependent relative revocation, and remove the upper part in order to discover the amount originally bequeathed.[2] When the statute prescribes certain conditions of cancellation, these must be strictly followed.[3] It has been already seen that in the absence of any direct evidence the law will presume that any alteration or erasure in a will was made after its execution.[4]

So of cancellation and of obliteration.

§ 898. Under the English Will Act, as well as under the statute of frauds, the *animus revocandi* is indispensable. Hence, where a testator had erased the amount of a legacy, and had inserted a smaller sum, but the alteration took no effect, as it had not been duly executed, the court decreed probate of the will in its original form, since it was clear that the testator intended only a *substitution*, and not a revocation, of the bequests altered.[5]

[1] See supra, § 630; Townley *v.* Watson, 3 Curt. 761, 764, 768, 769; 3 Ec. & Mar. Cas. 17, *S. C.*; McCabe, in re, P. R. 3 P. & D. 94.

The statute of Massachusetts provides that "no will shall be revoked unless by burning, tearing, cancelling, or obliterating the same, with the intention of revoking it by the testator, etc., or by some other will, codicil, or writing," duly executed. In Bigelow *v.* Gillott, 123 Mass. 102, where the testator, after making his will, drew ink lines across all the words in several clauses, with the intention of revoking those clauses, this was ruled to be a valid revocation of those clauses, but not of the whole will. Interlineations made after execution and attestation have, however, been held inoperative, under similar statutes, without reëxecution. Wolf *v.* Ballenger, 62 Ill. 368; Penniman's Will, 20 Minn. 245. See Quinn *v.* Quinn, 1 T. & C. 437; and see supra, § 630.

[2] Hobbs *v.* Knight, 1 Curt. 780; Horsford, in re, L. R. 3 P. & D. 211.

[3] Gugal *v.* Vollmer, 1 Demarest, 484.

[4] Supra, § 630; Cooper *v.* Bockett, 4 Moo. P. C. R. 419; 4 Ec. & Mar. Cas. 685, *S. C.*; Greville *v.* Tylee, 7 Moo. P. C. R. 320.

[5] Brooke *v.* Kent, 3 Moo. P. C. R. 334, 349, 350; Burtenshaw *v.* Gilbert, 1 Cowp. 52, per Ld. Mansfield; Onions *v.* Tyrer, 1 P. Wms. 343; In re Cockayne, Deane Ec. R. 177; In re Parr, 29 L. J. Pr. & Mat. 70; In re Harris, Ibid. 79; 1 Swab. & Trist. 536, *S. C.*; In re Middleton, 34 L. J. Pr. & Mat.

§ 899. When doubt exists as to whether a will which is not to be found was destroyed, it is admissible to introduce declarations of the testator to show that the destruction was intended by him.[1] So such evidence has been received to show that a will, produced as a testator's last will, had been fraudulently secreted by parties interested, after he had believed it to have been destroyed.[2] But ordinarily a will, proved to have once existed, but not found at the testator's death, is presumed to have been destroyed by him.[3]

Parol evidence admissible to show that the destruction of will was intentional, or that its destruction was believed by testator.

§ 900. The cancellation of a will does not necessarily involve its revocation. "The cancelling itself is an equivocal act, and, in order to operate as a revocation, must be done *animo revocandi*. A will, therefore, cancelled through accident or mistake, is not revoked."[4] It has accordingly been held that parol evidence is admissible to show that the tearing of a will in pieces by a testator was not meant by him as a revocation.[5] Even where a testator, under the false impression that his will was invalid, tore it up, but afterwards collected the pieces, and placed them among his valuable papers, it was held, that as the tearing was not done with the intention of revoking a valid will, the will, as thus restored, was to be admitted to probate.[6] So when a testator was shown to have torn a will to

Parol evidence admissible to explain cancellation.

16; 3 Swab. & Trist. 583, *S. C.* See Taylor's Ev. § 985. Rawlins *v.* Rickards, 28 Beav. 370; Ibbott *v.* Bell, 34 Beav. 395; Quinn *v.* Butler, 6 Law Rep. Eq. 225.

[1] Laxley *v.* Jackson, 3 Phillips Ec. 128; Richards *v.* Mumford, 2 Phillimore, 23; Dan *v.* Brown, 4 Cow. 490; Union *v.* Bermes, 44 N. J. L. 269; Tucker *v.* Whitehead, 50 Miss. 594.

[2] Card *v.* Grinman, 5 Conn. 164. See Bill *v.* Thomas, 2 W. Bl. 1043.

[3] Newell *v.* Homer, 120 Mass. 277; citing Davis *v.* Sigourney, 8 Met. 487; Brown *v.* Brown, 8 E. & B. 876; Eckersly *v.* Platt, L. R. 1 P. & D. 281; Finch *v.* Finch, L. R. 1 P. & D. 371; S. P., Betts *v.* Brown, 6 Wend. 173; Bulkley *v.* Redmond, 2 Brad. Sur. 281.

[4] Nichol, J., in Thynne *v.* Stanhope, 1 Addams, 52; citing Lord Mansfield, in Burtenshaw *v.* Gilbert, Cowp. 52.

[5] Doe *v.* Perkes, 3 B. & A. 489; Colberg, in re, 2 Curteis, 832; Clarke *v.* Scripps, 2 Roberts. Ecc. R. 563; *S. C.* 22 Eng. L. & Eq. 627; Elms *v.* Elms, 1 Sw. & Tr. 155; Benson *v.* Benson, 2 Prob. & D. 172; Giles *v.* Warren, 2 Prob. & D. 401; Wolf *v.* Bollinger, 62 Ill. 368; Beaumont *v.* Keim, 50 Mo. 28; Dawson *v.* Smith, 3 Houst. (Del.) 335. See Swinton *v.* Bailey, L. R. 1 Ex. D. 110 (1876). So a destruction under duress will be void. Batton *v.* Watson, 13 Ga. 63.

[6] Giles *v.* Warren, 2 Prob. & D. 401 (1872). And a copy of a first will has been admitted to probate when it was

pieces in an attack of *delirium tremens*, evidence was admitted to show that he afterwards declared that the will was torn when he was mad; and the will was consequently admitted to probate.[1] To the same general effect is a ruling of Appleton, C. J., Kent, Barrows, and Tapley, JJ., in Maine, in 1870, as against Cutting, Walton, Dickerson, and Danforth, JJ., that where a will made in 1854, and presented for probate soon after the testator's death in 1863, appeared to have been torn in fragments and then pasted together, parol evidence was admissible to show that the pasting together was done by himself for the purpose of establishing the will as his own.[2] So the declarations of a testator have been admitted to show that the mutilation of a will was not by his act; or was recalled by him.[3] But the proof of the intent to restore and finally to adopt the will must be clear.[4] So far as concerns the revival of a will already solemnly and effectively revoked, proof of reëxecution is now necessary in England by the will act.[5] But it has been held in Massachusetts that though the cancellation of a will does not by itself revive a prior will, declarations of the testator are admissible to prove that this was his intention at the cancellation.[6]

destroyed by a testator under the erroneous impression that he had substituted for it another valid will. Scott *v.* Scott, 1 Sw. & Tr. 258; Clarkson *v.* Clarkson, 2 Sw. & Tr. 497; Daneer *v.* Crabb, L. R. 3 P. & D. 98. See Weston, in re, L. R. 1 P. & D. 633.

[1] Brunt *v.* Brunt, 3 Prob. & D. 37. Farbing *v.* Weber, 99 Ind. 258. See Sprigge *v.* Sprigge, 1 Prob. & D. 608; Forman's Will, 54 Barb. 274; *S. C.* 1 Tuck. N. Y. 205; Sisson *v.* Conger, 1 Thomp. & C. (N. Y.) 564.

[2] Colagan *v.* Burns, 57 Me. 449. As against the admissibility of the evidence were cited Shailer *v.* Bumstead, 99 Mass. 112; Comstock *v.* Hadlyme, 8 Conn. 254; Waterman *v.* Whitney, 11 N. Y. 157; Durant *v.* Ashmore, 2 Rich. 184.

[3] Whiteley *v.* King, 17 C. B. N. S. 756; 10 Jur. N. S. 1079; Bulkley *v.* Redmond, 2 Brad. Sur. 284; Smock *v.* Smock, 3 Stockt. 157; Youndt *v.* Youndt, 3 Grant (Penn.), 140; Lawyer *v.* Smith, 8 Mich. 412; Steele *v.* Price, 5 B. Mon. 58; Tynan *v.* Paschal, 27 Tex. 286, and cases cited supra, § 896.

[4] Usticke *v.* Rawden, 2 Add. 125; James *v.* Cohen, 3 Curt. 782; Bell *v.* Fothergill, L. R. 2 Pr. & Div. 148; White, in re, 25 N. J. Eq. 501; Havard *v.* Davis, 2 Binn. 406; Jones *v.* Hartley, 2 Whart. 103; Wallace *v.* Blair, 1 Grant (Penn.)., 75.

[5] Taylor's Ev. § 986; citing Harker, in re, 7 Ec. & Mar. Cas. 44; Roberts *v.* Roberts, 2 Sw. & Tr. 337; Rogers *v.* Goodenough, 2 Sw. & Tr. 342; Steel & May, in re, L. R. 1 P. & D. 575; Noble *v.* Phelps, L. R. 2 P. & D. 276.

[6] Pickens *v.* Davis, 134 Mass. 252.

VIII. EQUITABLE MODIFICATIONS OF STATUTE.

§ 901. As we shall hereafter have occasion to see more fully, while parol evidence is admissible to clear ambiguities in written contracts, so as to explain what they really are, it cannot be received, as between the parties to such contracts, to vary their terms.[1] The rule is common to all jurisprudences, nor does it in any sense rest on the statute of frauds. That statute does not, on the one hand, preclude the admission of parol evidence to explain the meaning of a doubtful document; and, indeed, until we know what a writing is, there is nothing on which the statute can operate.[2] On the other hand, the statute adds nothing to the common law rule directing the exclusion of evidence varying the contents of written instruments.[3] At the same time, while the rule is not derived from the statute, the statute gives an additional reason why the rule should be honestly enforced. To vary by parol the terms of a document may often be a fraud on the parties. To empty a document, sheltered by the statute, of its substance, and to insert other conditions not sanctioned by the law, would always be a fraud on the state. Hence it is that the courts, in all cases in which the relations of the statute to parol evidence have come up, have united in holding that when a contract has been solemnized in conformity with the statute, such contract cannot be modified, as to its substance, by parol, unless there has been a part performance of the modified contract set up.[4] Where, for instance, a written contract

Parol evidence not admissible to vary written contract under statute.

[1] Infra, §§ 920 *et seq.*

[2] See cases cited supra, § 863; Reed, Stat. of Frauds, §§ 12 *et seq.*

[3] Infra, § 1025; Boulter, in re, L. R. 4 C. D. 241.

[4] Noble *v.* Ward, 35 L. J. Ex. 81; L. R. 1 Ex. 117; and 4 H. & C. 149, *S. C.*; 36 L. J. Ex. 91; *S. C.* in Ex. Ch.; L. R. 2 Ex. 135, *S. C.*; Evans *v.* Roe, L. R. 7 C. P. 138; Boydell *v.* Drummond, 11 East, 142; *S. C.* 2 Camp. 163; Cox *v.* Middleton, 2 Drew. 209; Caddick *v.* Skedmore, 2 De Gex & J. 56; Ridgway *v.* Wharton, 3 De Gex, M. & G. 677; Chinnock *v.* Ely, 2 Hem. & M. 220; Fitzmaurice *v.* Bayley, 8 E. & B. 664; Clarke *v.* Fuller, 16 C. B. N. S. 24; Dolling *v.* Evans, 36 L. J. Ch. 474; Nesham *v.* Selby, L. R. 13 Eq. 191; Plevins *v.* Downing, L. R. 1 C. B. D. 220; Tyers *v.* Iron Co., L. R. 8 Ex. 315; Swain *v.* Leamans, 9 Wall. 254; Dana *v.* Hancock, 30 Vt. 616; Miles *v.* Roberts, 34 N. H. 245; Lang *v.* Henry, 54 N. H. 57; Brown *v.* Whipple, 58 N. H. 229; Cummings *v.* Arnold, 3 Met. (Mass.) 486; Morton *v.* Deane, 13 Met. (Mass.) 385; Ryan *v.* Hall, 13 Met. (Mass.) 520; Lerned *v.* Wannemacher, 9 Allen, 418; Whittier *v.* Dana, 10 Allen,

contains a series of conditions, some in conformity with the statute, and others not, an oral agreement to vary the latter in even some trifling particular, as, for instance, to have one valuer instead of two, cannot be received in evidence, though that part of the contract might, of itself, have been sustained on mere oral proof.[1] Where a master, to take another English illustration, contracted by letter to pay his clerk a *yearly* salary, and the contract was necessarily in writing, being one which would not be performed within a year from its date, parol evidence was held to be inadmissible, when tendered to show either a contemporaneous or a subsequent oral agreement that the salary should be paid quarterly, or to prove the fact that quarterly payments had usually been made.[2] And in the leading case on this topic, where a vendor had contracted in writing to sell to a purchaser certain lots of land, and to make out a good title to them, the court held that, in an action for the purchase-money, the vendor was not at liberty to show an oral waiver by the purchaser of his right to a good title as to one lot.[3] The parties may be identified by parol;[4] the property described may be so explained;[5] other ambiguities may be cleared by parol;[6] dates may be fixed by parol;[7] plans or

326; Riley *v.* Farnsworth, 116 Mass. 223; Abeel *v.* Radcliff, 13 Johns. 297; Blood *v.* Goodrich, 9 Wendell, 68; Thayer *v.* Rock, 13 Wend. 53; Northrup *v.* Jackson, 13 Wend. 85; Coles *v.* Bowne, 10 Paige, 526; Dow *v.* Way, 64 Barb. 255; Dung *v.* Parker, 52 N. Y. 494 (reversing *S. C.* 3 Daly, 89); Baltzen *v.* Nicolay, 53 N. Y. 467; Reed *v.* Manley, 66 N. Y. 82, overruling *S. C.* 2 Hun, 492 (and sustaining Benton *v.* Pratt, 2 Wend. 385); O'Donnell *v.* Brehen, 36 N. J. L. 267; Musselman *v.* Stoner, 31 Penn. St. 265; Com. *v.* Kreager, 78 Penn. St. 477; Robinson *v.* McNeill, 51 Ill. 225; Frank *v.* Miller, 38 Md. 450; Lecroy *v.* Wiggins, 31 Ala. 13; McGuire *v.* Stevens, 42 Miss. 724; Delventhal *v.* Jones, 53 Mo. 460; Johuson *v.* Kellogg, 7 Heisk. 262. See discnssion in Reed, Stat. Frauds, §§ 11 *et seq.*, §§ 453 *et seq.*

[1] Harvey *v.* Grabham, 5 A. & E. 61, 74; 6 N. & M. 164.

[2] Giraud *v.* Richmond, 4 C. B. 835. See, also, Evans *v.* Roe, L. R. 7 C. P. 138.

[3] Goss *v.* Nugent, 5 B. & Ad. 58; 2 N. & M. 28.

[4] See cases cited § 949; and see Slater *v.* Smith, 117 Mass. 96.

[5] Infra, § 942. Thns parol evidence was received to explain the words "a house in Church Street." Mead *v.* Parker, 115 Mass. 413.

[6] See fully, § 937; and see Waldron *v.* Jacob, Irish R. 5 Eq. 131, where parol evidence was admitted to show the meaning of the words "this place."

[7] See infra, § 977; and see, also, Edmunds *v.* Downs, 2 C. & M. 457; Hartley *v.* Wharton, 11 A. & E. 934; Lobb *v.* Stanley, 5 Q. B. 574; Richardson *v.* Cooper, 25 Me. 450; Gault *v.* Brown, 4 N. H. 113.

schedules may be attached to the contract by parol;[1] the relations of the parties may be explained by parol;[2] ordinary formal incidents may be attached;[3] the time of execution may be extended;[4] but parol proof cannot be received to alter the terms of which the contract consists.

§ 902. It is here that we strike at the distinctive effect, already incidentally noticed, of the statute of frauds, in this particular relation. Aside from the statute, one parol agreement can be substituted for another by consent, and parol is admissible to prove such substitution.[5] When, however, a statute says, "Such a contract shall be executed in a particular way, or it shall not have force," then it is a fraud on the state, as well as a possible fraud upon the parties, to use the form of a contract so sanctioned to cover an agreement the statute prohibits. Hence it has been held, under the statute, that no action can be sustained on a case in which the plaintiff declares specifically on an alleged parol variation of a written agreement.[6] It is not necessary, indeed, that all the details of a contract

Parol contract cannot be substituted for written, under statute.

[1] Horsfall *v.* Hodges, 2 Coop. 114.

[2] Infra, §§ 949–955; Salmon Falls Co. *v.* Goddard, 14 How. 446; Peabody *v.* Speyers, 56 N. Y. 230; and see Sweet *v.* Lee, 3 M. & Gr. 466, per Tindal, C. J.; though see Grant *v.* Naylor, 4 Cranch, 224.

[3] Barry *v.* Coombe, 1 Peters, 650.

As further illustrations of varying contracts under statute by parol, by proving waiver or discharge, see Stearns *v.* Hall, 9 Cush. 31; Norton *v.* Simonds, 124 Mass. 19; Watkins *v.* Hodges, 6 Har. & J. 38; Kribbs *v.* Jones, 44 Md. 396; Negley *v.* Jeffers, 28 Oh. St. 90.

[4] Infra, § 1026. Stearns *v.* Hall, 9 Cush. 31; Stone *v.* Sprague, 20 Barb. 509. In England, however, it has been held inadmissible to vary the contract orally by substituting another day of performance. Stowell *v.* Robinson, 3 Bing. N. C. 928; Marshall *v.* Lynn, 6 M. & W. 109; Stead *v.* Dawber, 10 A. & E. 57; 2 P. & D. 447, *S. C.*; overruling Cuff *v.* Pen, 1 M. & Sel. 21; Warren *v.* Stagg, cited in Littler *v.* Holland, 3 T. R. 591, and Thresh *v.* Rake, 1 Esp. 53. See conflicting cases cited in Reed, Stat. Frauds, §§ 465 *et seq.*; Ogle *v.* Ld. Vane, L. R. 2 Q. B. 275; 7 B. & S. 855, *S. C.*; aff'd in Ex. Ch.; L. R. 3 Q. B. 272; Plevins *v.* Downing, L. R. 1 C. P. D. 220.

[5] See infra, § 1017.

[6] Goss *v.* Nugent, 2 Nev. & M. 33; 5 B. & A. 65; Harvey *v.* Grabham, 5 Ad. & E. 61; Stead *v.* Dawber, 10 Ad. & E. 57; Marshall *v.* Lynn, 6 M. & W. 109; Noble *v.* Ward, L. R. 1 Exch. 117; Ogle *v.* Lord Vane, L. R. 3 Q. B. 272; Smith *v.* Loomis, 74 Me. 503; Dana *v.* Hancock, 30 Vt. 618; Cummings *v.* Arnold, 3 Met. 486; Stearns *v.* Hall, 9 Cush. 35; Whittier *v.* Dana, 10 Allen, 326; Lincoln *v.* Preserving Co., 132 Mass. 129; May *v.* Ward, 134 Mass. 127; Hastings *v.* Lovejoy, 140 Mass. 265; Blood *v.* Goodrich, 9 Wend. 68; Bryan *v.* Hunt, 4 Sneed, 543. Cuff *v.*

should be written; and many matters of indifference may be supplied by parol. But ordinarily, if a stipulation is important enough to the parties to be put in writing, it is important enough to be brought under the operation of the rule announced.[1] It has also been held that where a defendant is shown to have orally agreed to do two or more things, one of which is without and the other of which is within the statute of frauds, the plaintiff cannot recover upon the whole engagement, if his declaration has been framed upon the whole, on the hypothesis of the several conditions embraced in the agreement being inter-dependent.[2] It should at the same time be kept in mind, that if the conditions are independent and severable, then the fact that one is by the statute put out of court does not preclude suit from being brought on the other.[3] The same conclusion results where one of the conditions is severed from the other by being part performed.[4] The rule as above expressed, however, does not preclude a party from setting up in equity a substituted agreement, not good under the statute, when under such an agreement there had been part-performance.[5]

Conveyance may be shown by parol to be in trust

§ 903. Hereafter it will be more fully seen that it is competent to prove by parol, in a court having equity functions, that a conveyance, on its face absolute, is virtually in trust either for the grantor or for a third party;[6] that a resulting trust can be so proved;[7] and that a conveyance

Penn, 1 Maule & S. 21, is virtually overruled, as above stated, by subsequent English cases. See Reed, Stat. of Frauds, §§ 440, 454 *et seq.* In Cummings *v.* Arnold, 3 Metc. (Mass.) 486, a laxer view is expressed.

[1] See observations of Parke, B., in Marshall *v.* Lynn, 6 M. & W. 109. As giving a looser view, see Stewart *v.* Eddowes, L. R. 9 C. P. 311.

[2] Browne, Stat. Frauds, § 420; Cooke *v.* Tombs, 2 Anst. 420; Biddell *v.* Leeder, 1 B. & C. 327; Thomas *v.* Williams, 10 B. & C. 664; Wood *v.* Benson, 12 Cro. & J. 94; Mechelen *v.* Wallace, 7 A. & E. 49; Vaughn *v.* Hancock, 3 M., Gr. & S. 766; Irvine *v.* Stone, 6 Cush. 508; Rand *v.* Mather, 11 Cush. 1; Crawford *v.* Morrell, 8 Johns. 253; Duncan *v.* Blair, 5 Denio, 196; Dock *v.* Hart, 7 Watts & S. 172; Alexander *v.* Ghiselin, 5 Gill, 138; Noyes *v.* Humphreys, 11 Grat. 636.

[3] Mayfield *v.* Wadsly, 3 B. & C. 357; Wood *v.* Benson, 2 Tyrw. 93; Pierce *v.* Woodward, 6 Pick. 206; Mobile Ins. Co. *v.* McMillan, 31 Ala. 720.

[4] Page *v.* Monks, 5 Gray, 492; Trowbridge *v.* Wetherbee, 11 Allen, 364; Hess *v.* Fox, 10 Wend. 436; Dock *v.* Hart, 7 Watts & S. 172.

[5] Infra, § 908.

[6] Infra, §§ 1033–1035; Reed, Stat. Frauds, §§ 965 *et seq.*, 1028; see Harvey *v.* Gardner, 41 Ohio St. 642.

[7] Infra, § 1035; Crawford *v.* Moore, 28 Fed. Rep. 824; Hall *v.* Livingston, 3 Del. Ch. 348.

in fee simple is really but a mortgage.[1] It may be here added that it is now conceded that such a trust may be decreed in the teeth of a sworn answer of the trustee denying the trust.[2] On the other hand, parol evidence is admissible to repel the implication of a trust from letters and other written proof.[3] Even putting aside the position that the statute of frauds is not to be used to perpetrate fraud, the statute goes only to the form, not to the beneficial purpose of the conveyance.[4] But it is settled that the statute, as adopted in England, precludes an express parol creation of a trust in land. And as a general rule, it is inadmissible to prove that a conveyance absolute on its face was a mere trust, unless it be at the same time shown that the grantee's name was introduced by mistake or accident, or by fraud or undue influence on his part, or that the price was paid by the party claiming to be beneficially interested.[5]

or in mortgage.

In Pennsylvania, prior to 1856, parol express trusts were valid.[6] The rule is the same in North Carolina, Virginia, Texas, and was so in Mississippi prior to the Revised Code.[7] In Pennsylvania, since 1856, parol express trusts are invalid.[8] Trusts *ex maleficio* and implied trusts are not within the Act of 1856.[9]

[1] Infra, §§ 1031, 1034; Reed, Stat. Frauds, § 1028.

[2] Baker *v.* Vining, 30 Me. 121; Page *v.* Page, 8 N. H. 187; Boyd *v.* McLean, 1 Johns. Ch. 582; Faringer *v.* Ramsay, 2 Md. 365; Larkins *v.* Rhodes, 5 Port. 195.

[3] Steere *v.* Steere, 5 Johns. Ch. 1.

[4] See Dunn *v.* Dunn, 82 Iud. 421; Karr *v.* Washburn, 56 Wis. 303.

See authorities, infra, § 1034; Reed, Stat. Frauds, § 643; Norton *v.* Mallory, 63 N. Y. 434.

[5] Jones *v.* Van Doran, 18 Fed. Rep. 619; Salter *v.* Bird, 103 Penn. St. 436; Pusey *v.* Gardner, 21 W. Va. 469; see Hollinshead's App., 103 Penn. St. 158.

[6] Murphy *v.* Hubert, 7 Penn. St. 420; Freeman *v.* Freeman, 2 Pars. Eq. 85; Williard *v.* Williard, 56 Penn. St. 124. See, however, Wither's Appeal, 14 S. & R. 185, where Judge Dunear held that express trusts were prohibited by the first section, which was afterwards overruled in Murphy *v.* Hubert, 7 Penn. St. 423. And see Meason *v.* Kaine, 63 Penn. St. 339. The Pennsylvania cases are carefully analyzed in Reed's Stat. Frauds, § 822.

[7] See, more fully, Reed, Stat. Frauds, § 833.

[8] Barnet *v.* Dougherty, 32 Penn. St. 371.

[9] Church *v.* Ruland, 64 Penn. St. 442. As to the construction of the 6th section of Act of 22d April, 1856, limiting the time in which trusts implied, etc., can be asserted, see Clark *v.* Trindle, 52 Penn. St. 495; Best *v.* Campbell, 62 Penn. St. 478; Williard *v.* Williard, supra; Church *v.* Ruland, supra.

Equitable mortgages, by deposit of

§ 903 *a*. A merely equitable interest, *e. g.*, an equitable estate, may be surrendered by parol.[1] And this has been held to be the case with the vendor's lien for purchase-money,[2] and with mechanics' liens in California.[3] A promise to discharge a mortgage is not within the statute.[4] But an assignment of a mortgage as such is an assignment of an interest in land.[5]

Equitable interests may be assigned by parol.

§ 904. It does not follow that because no action can be specifically maintained, under the statute of frauds, on a written contract materially amended by parol, a party who has performed, or is in readiness to perform his part of the amended contract, is without his remedy. He cannot sue upon the amended contract, because, on such contract, under the statute of frauds, no action can be maintained. But he may make out such a case in equity as will induce a chancellor to grant relief on the terms hereafter stated.[6] Or, where the opposing party sues at common law on the original contract, he may be met by proof to the effect that the parties had agreed between themselves by parol that the contract should be executed in a particular way, and that it had either been so executed, or that the defendant was ready to execute it.[7] If, on the other hand, in case of the aggrieved party

Performance, or readiness to perform a contract as amended, may be proved by way of accord and satisfaction.

title-deeds, have never been countenanced in Pennsylvania. Rickert *v.* Madeira, 1 Rawle, 325; Shitz *v.* Diefenbach, 3 Penn. St. 233; Bowers *v.* Oyster, 3 Penn. Rep. (P. & W.) 239.

[1] Shoofstall *v.* Adams, 2 Grant, Penn. 209; Murphy *v.* Hubert, 7 Penn. St. 420; Meason *v.* Kaine, 63 Penn. St. 339; Kelley *v.* Stanberry, 13 Ohio St. 408; Holmes *v.* Holmes, 86 N. C. 205; Infra, §§ 996, 1217.

[2] Dryden *v.* Frost, 3 M. & Cr. 673; Moshier *v.* Meek, 80 Ill. 81; Doggott *v.* Patterson, 18 Tex. 158; *aliter* under Massachusetts statute, Ahrend *v.* Odiorne, 118 Mass. 168.

[3] Ritter *v.* Stevenson, 7 Cal. 389.

[4] Owen *v.* Estes, 5 Mass. 331; but see Horsey *v.* Graham, L. R. 8 C. P. 298; supra, § 863.

[5] See cases cited supra, § 863; Marble *v.* Marble, 5 N. H. 376; Richards *v.* Richards, 9 Gray, 313; Fox *v.* Kimberly, 27 Conn. 316; Binion *v.* Browning, 26 Me. 272; see Brizich *v.* Manners, 9 Mod. 28; supra, § 863.

[6] See supra for other cases, § 856; and see, particularly, infra, §§ 1019, 1033; Reed, Stat. Frauds, §§ 542 *et seq.*; Weir *v.* Hill, 3 Lans. 278; Ingles *v.* Patterson, 36 Wis. 373.

[7] Cummings *v.* Arnold, 3 Met. 489; Lerned *v.* Wannemacher, 9 Allen, 418; Whittier *v.* Dana, 10 Allen, 326; Thomas *v.* Wright, 9 S. & R. 87; Hughes *v.* Davis, 40 Cal. 117. See, however, Stowell *v.* Robinson, 1 Bing. N. C. 928; 5 Scott, 196, and criticism on that case in Browne, Stat. Frauds, § 428; Reed, Stat. Frauds, §§ 440, 454, 458, 466. See, also, infra, § 1033.

in such case bringing suit, the defendant should set up performance according to the terms of the written contract, then the converse of the rule applies, and the plaintiff is at liberty to prove that by parol the parties had agreed to a new mode of performance with which the defendant had not complied; the plaintiff also averring that he was ready to have performed the written contract according to its terms, but that this was dispensed with by the oral agreement.[1] So it may in like manner be proved that damages for non-performance were waived or remitted.[2]

Contract may be reformed on certain conditions.

§ 905. We will hereafter examine at large the circumstances under which equity will order a contract to be reformed so as to express the true understanding of the parties.[3] At present it is sufficient to say that when the proposed reformation of an instrument involves the specific performance of an oral agreement within the statute of frauds, or when the terms sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defence.[4]

Waiver and discbarge of contract under statute can be proved by parol.

§ 906. We shall have hereafter occasion to cite numerous authorities to establish a principle so familiar that it would appear to be a truism, viz., that parties can before performance, by consent, rescind that which they had consented to perform.[5] The real difficulties in cases of this class are when particular solemnities are required to constitute a binding contract. When the parties have bound

[1] Infra, § 909; Thresh *v.* Rake, 1 Esp. 53. See Browne on Frauds, § 425; citing, also, Warren *v.* Stagg, 3 T. R. 591; Emerson *v.* Slater, 22 How. 42; Miles *v.* Roberts, 34 N. H. 245; and see Benj. on Sales, 151. See Brown *v.* Brown, 29 Hun, 498; Heffin *v.* Milton, 69 Ala. 354.

[2] Infra, § 909; Jones *v.* Barkley, 2 Doug. 684; Clement *v.* Durgin, 5 Greenl. 9; Fleming *v.* Gilbert, 3 Johns. R. 530; Dearborn *v.* Cross, 7 Cow. 50.

[3] Infra, § 1019. See, also, McLennan *v.* Johnston, 60 Ill. 306; Reed, Stat. Frauds, §§ 474 *et seq.*

[4] Reed, Stat. Frauds, §§ 484 *et seq.*; Glass *v.* Hulbert, 102 Mass. 31; Kidd *v.* Carson, 33 Md. 37; Billingslea *v.* Ward, 33 Md. 48. See Brightman *v.* Hicks, 108 Mass. 246. And see infra, § 1148. As to Glass *v.* Hulbert, see infra, §§ 1019, 1021, 1024.

[5] See infra, § 1017.

themselves by such solemnities to such a contract, can they without such solemnities unbind themselves? Does the rescinding of a contract require the same guards and formalities as are necessary to constitute the contract? No doubt we have high authority to the effect that it does, and that to loose parties from a contract the statutory solemnities are as necessary as to bind them to such contract.[1] Yet it must always have been felt to be grossly inequitable to permit one party to enforce a contract which both parties have agreed, for a good consideration, though only by parol, to rescind and vacate; and hence it was at an early period held that a parol discharge could be set up, in equity, to defeat a bill for the specific execution of a written contract.[2] Strong proof, indeed, of waiver was expected; but when strong proof was given, then the contract would be decreed to be waived. Whoever asks equity to aid him cannot recover, if it be shown, even though he make out a paper title, that he has no equitable grounds for relief.[3] Subsequently it was held by the Court of Queen's Bench,[4] that the same rule will be applied in courts of law. The statute of frauds, so it was argued by the court, does not say that all contracts shall be in writing, but only that no action shall be brought on a contract of a particular class unless it be in writing. As the statute does not require that the dissolution of contracts of this class should be in writing, such dissolution may be proved so as to defeat an action on the contract.[5] Or, as the reason is elsewhere given, such waiver

[1] See Bell *v.* Howard, 9 Mod. 302.

[2] Bell *v.* Howard, 9 Mod. 302; Buckhouse *v.* Crosly, 2 Eq. Cas. Abr. 32.

[3] Sudg. V. & P. 173.

[4] Goss *v.* Nugent, 5 B. & Ad. 65; 2 Nev. & M. 34. See Price *v.* Dyer, 17 Ves. 356. Boulter, in re, 25 W. R. 101; Reed, Stat. Frauds, §§ 448, 454, 457, 465, 472.

[5] The topic in the text will be noticed more fully in succeeding sections, in which will be found copious citations of American cases, in many of which it will be found that equity doctrines have been adopted under common law forms. See infra, §§ 1017–30.

In Goss *v.* Nugent, 5 B. & Ad. 58, where the point arose, although it was not necessary to decide it, Lord Denman, in commenting on the 3d section of the statute of frauds, said: "As there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing." Afterwards, however, he appears to have doubted the accuracy of his earlier opinion; Harvey *v.* Grabham, 5 A. & E. 74; and in a case still later, in the Common Pleas, Tindal, C. J., showed a disposition to adopt, to its full extent, the rea-

may be proved, even in a court of law, for the reason that he who prevents the performance of a contract cannot afterwards require the contract to be performed. To this effect we have numerous American adjudications.[1] Hence it has been held, that a parol contract for rescission of a written sale of land, when the purchase-money

soning of Lord Hardwicke. Stowell *v.* Robinson, 3 Bing. N. C. 937. It must be remembered that Lord Denman himself is reported to have further qualified his opinion expressed in Goss *v.* Nugent. In Stead *v.* Dawber, 10 A. & E. 57, the case last referred to, the action was on a contract for the sale of goods within the 17th section of the statute of frauds, and the plaintiff declared on a written agreement, by which the goods were to be delivered on a day certain, and then went on to aver an oral agreement that the delivery should be postponed to a later day, and breach the non-delivery on such later day. The defendant pleaded the want of a written agreement; and the point for the court was, whether the oral agreement was to be regarded as a variation of the written agreement, or as the introduction of an immaterial term. The court gave judgment for the defendant on the ground that time was of the essence of the contract, and therefore could not be varied by parol; but it seems also to have been understood that neither could the original contract have been waived by parol. Lord Denman said: "Independently of the statute, there is nothing to prevent the total waiver or the partial alteration of a written contract, not under seal, by parol agreement; and in contemplation of law, such a contract so altered subsists between these parties; *but the statute intervenes, and, in the case of such a contract, takes away the remedy by action.*" This case has been cited with approbation by Parke, B., Marshall *v.* Lynn, 6 M. & W. 109. The Court of Exchequer Chamber afterwards held that a subsequent oral agreement cannot be "allowed to be good," within the 17th section, for any purpose whatever. Noble *v.* Ward, L. R. 1 Ex. 117; 4 H. & C. 149; cf. Moore *v.* Campbell, 10 Exch. 233. Powell's Evidence, 4th ed. 402. See Musselman *v.* Stoner, 31 Penn. St. 265. As concurring with Goss *v.* Nugent, see Greenl. Ev. § 302; 2 Phill. Ev. 363 (Am. ed.). As dissenting, Sugden, V. & P. 171.

Sir J. Stephen, Ev. 159 (1876), after noticing Goss *v.* Nugent, adds: "It seems the better opinion, that a verbal rescission of a contract, good under the statute of frauds, would be good." To this he cites Noble *v.* Ward, L. R. 2 Ex. 135; Pollock on Contracts, 411, note 6, S. P.; Reed, Stat. Frauds, §§ 461 *et seq.*

[1] Marshall *v.* Baker, 19 Me. 402; Medomac Bk. *v.* Curtis, 24 Me. 36. See Brown *v.* Holyoke, 53 Me. 9; Buel *v.* Miller, 4 N. H. 196; Marrahan *v.* Noyes, 52 N. H. 232; Flanders *v.* Fay, 40 Vt. 316; Cummings *v.* Arnold, 3 Met. (Mass.) 494; Bissell *v.* Barry, 115 Mass. 300; Cutter *v.* Cochrane, 116 Mass. 408; Connelly *v.* Devoe, 37 Conn. 570; Fleming *v.* Gilbert, 3 Johns. R. 531; Parker *v.* Syracuse, 31 N. Y. 376; Phelps *v.* Seely, 22 Grat. 573; Murray *v.* Harway, 56 N. Y. 337; Murphy *v.* Dunning, 30 Wis. 296; Bailey *v.* Smock, 61 Mo. 213; Paris *v.* Haley, 61 Mo. 453; Johnston *v.* Worthy, 17 Ga. 420; Browne, Stat. Frauds, § 436.

has not been paid, will be sustained, when possession has not been transferred finally to the vendee.[1]

Equity will relieve in cases of fraud, but not when the fraud consists simply in pleading the statute.

§ 907. Courts of equity, no doubt, will give relief in cases of fraud;[2] but fraud, to entitle such relief to be given, must be something more than that involved in setting up the statute as a defence to a suit upon a parol agreement which the statute requires to be in writing. For a party to put in such a defence, however dishonorable it may be, cannot be such a fraud, in cases of unexecuted agreements, that equity can be called upon to interfere to sweep away the defence. Such interference would be the abrogation of a statute which is not only binding, but on the main wise and beneficial.[3]

But equity will relieve where statute is used to perpetrate fraud.

§ 908. What has been said applies to cases where a party makes a contract in parol, and then sets up the statute as a defence to a suit to compel the execution of the contract. Suppose, however, that A., designing to defraud B., should induce B. to enter into an oral contract, of the class covered by the statute, and then, after B. had performed his part of the contract, that A., to a suit to compel the performance of his part of the contract, should set up the statute. In such a case a Court of Equity, if appealed to, would refuse to become a party to the enforcement of the fraud. And if A. should, by a parol collateral agreement, fraudulently induce B. to execute a written contract, a chancellor would compel A. to perform his parol collateral agreement, though of the class contemplated by the statute.[4]

[1] Arrington *v.* Porter, 47 Ala. 714.

[2] See infra, §§ 931, 1013, and cases cited in Reed, Stat. Frauds, §§ 474 *et seq.*

[3] Reed, Stat. Frauds, §§ 478 *et seq.*, 524, 548. See Montacute *v.* Maxwell, 1 P. Wms. 618; *S. C.* 1 Stra. 618; Clifford *v.* Heald, 141 Mass. 322; Whitridge *v.* Parkhurst, 20 Md. 62; Schmidt *v.* Gatewood, 2 Rich. Eq. 162; Browne, Stat. Frauds, § 439; Bispham's Eq. § 386; Story's Eq. § 768.

[4] See Maxwell's case, 1 Bro. C. C. 408; Babcock *v.* Wyman, 19 How. 289; Walker *v.* Walker, 2 Atk. 99; Cookes *v.* Mascall, 2 Vern. 200; Hunt *v.* Roberts, 40 Me. 187; Buel *v.* Miller, 4 N. H. 196; Crocker *v.* Higgins, 7 Conn. 242; Hodges *v.* Howard, 5 R. I. 149; McBurney *v.* Wellman, 42 Barb. 390; Frazer *v.* Child, 4 E. D. Smith, 153; Arnold *v.* Cord, 16 Ind. 177; Coyle *v.* Davis, 20 Wis. 504; Cousins *v.* Wall, 3 Jones Eq. (N. C.) 43; Cameron *v.* Ward, 8 Ga. 245; Jones *v.* McDougal, 32 Miss. 179; Hidden *v.* Jordan, 21 Cal. 92; Browne, Stat. Frauds, § 447.

§ 909. *A fortiori* is this the case where B., on the faith of the parol agreement, has done, in performance of the same, certain acts which can only be made good by the performance of the contract on the part of A.[1] In Massachusetts, however, this exception is not admitted at common law, though sustained in equity,[2] and it is questioned in North Carolina,[3] Mississippi,[4] Tennessee,[5] Kentucky,[6] and Louisiana.[7] In those states in which the exception is recognized, the parol agreement to be sustained must be definite; the proof must be strong,[8] the acts

So in cases of part performance.

[1] Reed, Stat. Frauds, §§ 542 *et seq.*, 550 *et seq.*, 562 *et seq.*, where the cases are fully given. Savage *v.* Foster, 9 Mod. 37; Kine *v.* Balfe, 2 Ball & B. 314; Dale *v.* Hamilton, 5 Hare, 369; Morphett *v.* Jones, 1 Swanst. 172; Clinan *v.* Locke, 1 Sch. & Lef. 22; Nunn *v.* Fahian, L. R. 1 Ch. App. 35; Caton *v.* Caton, L. R. 1 Ch. App. 137; Purcell *v.* Miner, 4 Wall. 513; Huntley *v.* Huntley, 114 U. S. 394; Bullock *v.* Stcherge, 4 McCr. 184; Newton *v.* Swazey, 8 N. H. 9; Adams *v.* Fullam, 43 Vt. 592; Griffith *v.* Abbott, 56 Vt. 356; Annan *v.* Merritt, 13 Conn. 478; Parkhurst *v.* Van Cortland, 14 Johns. 15; Cagger *v.* Lansing, 43 N. Y. 550; Freeman *v.* Freeman, 43 N. Y. 34; Burdick *v.* Johnson, 14 N. Y. Sup. Ct. 488; Eyre *v.* Eyre, 4 C. E. Green (N. J.) 102; Allen's Est., 1 Watts & S. 383; Moore *v.* Small, 19 Penn. St. 461; Greenlee *v.* Greenlee, 22 Penn. St. 225; Moss *v.* Culver, 64 Penn. St. 414; Sackett *v.* Spencer, 65 Penn. St. 89; Milliken *v.* Dravo, 67 Penn. St. 230; Hart *v.* Carroll, 85 Penn. St. 508; Hamilton *v.* Jones, 3 Gill & J. 127; Gough *v.* Crane, 3 Md. Ch. 119; Anthony *v.* Leftwich, 3 Rand. 255; Wright *v.* Puckett, 22 Grat. 374; Printup *v.* Mitchell, 17 Ga. 558; Ford *v.* Finney, 35 Ga. 358; Rawson *v.* Bell, 46 Ga. 19; Rosser *v.* Harris, 48 Ga. 512; Wimberly *v.* Bryan, 55 Ga. 198; Thayer *v.* Luce, 22 Ohio St. 62; Wheeler *v.* Frankenthal, 78 Ill. 124 (in equity); Warren *v.* Warren, 105 Ill. 568; Railsback *v.* Walke, 81 Ind. 409; Thayer *v.* Reeder, 45 Iowa, 272; Parke *v.* Leewright, 20 Mo. 85; Tatum *v.* Brooker, 51 Mo. 148; Bard *v.* Elston, 31 Kan. 274; Ottenhouse *v.* Burleson, 11 Tex. 87; Arguello *v.* Edinger, 10 Cal. 150; Hoffman *v.* Felt, 39 Cal. 109; Reedy *v.* Smith, 42 Cal. 245; Pledger *v.* Garrison, 42 Ark. 246; Deisher *v.* Stein, 34 Kan. 39. See Lydick *v.* Holland, 33 Mo. 703

[2] Jacobs *v.* R. R., 8 Cush. 224; Parker *v.* Parker, 1 Gray, 409; Adams *v.* Townsend, 1 Metc. 485; Burns *v.* Daggett, 141 Mass. 368. See as to Maine, Stearns *v.* Huhhard, 8 Greenl. 320.

[3] Albea *v.* Griffin, 2 Dev. & Bat. Eq. 9; Dunn *v.* Moore, 3 Ired. Eq. 369; East *v.* Dolihite, 72 N. C. 566.

[4] Beaman *v.* Buck, 9 Sm. & M. 210; Catlett *v.* Bacon, 33 Miss. 282; McGuire *v.* Stevens, 42 Miss. 730; Fisher *v.* Kuhn, 54 Miss. 485.

[5] Ridley *v.* McNairy, 2 Humph. 174; Bloomsteen *v.* Clees, 3 Tenn. Ch. 439; Hays *v.* Worsham, 9 Lea, 892.

[6] Grant *v.* Craigmiles, 1 Bibb. 209; Kay *v.* Curd, 6 B. Mon. 102.

[7] Grafton *v.* Fletcher, 3 Martin La. 488.

[8] Pike *v.* Pettus, 71 Ala. 98.

Before the recent judicature statutes, the only relaxations of the statute which English judges at common law would allow were, first, if a parol

claimed to be part performance must refer to and result from the agreement, and the performance must also be of such a character that execution on the other side would be the only mode by which the complainant could be put right.[1] Going into possession of land under a parol contract, and making *bonâ fide* permanent improvements, have been held to be part performance in this sense.[2] Even possession taken, as an incident of a *bonâ fide* removal, so as to commit the party to the new residence, has, when in direct perform-

agreement respecting lands had been *entirely executed by both parties*, the contract could not afterwards be called in question, should it be necessary to refer to it for any collateral purpose, Griffith *v.* Young, 12 East, 513; Seaman *v.* Price, 2 Bing. 437; 10 Moore, 38, *S. C.*; Green *v.* Saddington, 7 E. & B. 503. See Hodgson *v.* Johnson, E. B. & E. 685, 689, per Ld. Campbell; and, next, if it had been *executed by one party*, and the transaction were of such a nature as to admit of an action for use and occupation, or in *indebitatus assumpsit*, the other party, it was intimated, would not be permitted to defeat his action by setting up the statute. See Lavery *v.* Turley, 6 H. & N. 239; Savage *v.* Canning, 1 I. R. C. L. 434, per C. P.; Ld. Bolton *v.* Tomlin, 5 A. & E. 856; 1 N. & P. 247, *S. C.*; Cocking *v.* Ward, 1 C. B. 858; Kelly *v.* Webster, 12 C. B. 283. This, under the old practice, was the limit to which the courts of common law could go. Under the new English practice, enabling equitable defences to be pleaded in common law courts, we have as yet no adjudications. But in the United States there are few jurisdictions in which the more liberal practice is not adopted by the common law courts. See fully infra, §§ 1019 *et seq.*

[1] See 1 Sugd. V. & P. 8th Am. ed. 226; Reed, Stat. Frauds, §§ 542 *et seq.*; Lacon *v.* Mertins, 3 Atk. 3; Phillips *v.* Thompson, 1 Johns. Ch. 131; Lester *v.* Kinne, 37 Conn. 9; Cole *v.* Potts, 2 Stockt. N. J. 67; Robertson *v.* Robertson, 9 Watts, 32; Frye *v.* Shepler, 7 Barr, 91; Shellhammer *v.* Asbaugh, 83 Penn. St. 24; Hart *v.* Carroll, 85 Penn. St. 508; Wright *v.* Puckett, 22 Grat. 374; Worth *v.* Worth, 84 Ill. 462; Langston *v.* Bates, 84 Ill. 524; Colgrave *v.* Solomon, 34 Mich. 494; Long *v.* Duncan, 10 Kans. 294.

[2] Savage *v.* Carroll, 1 Ball & B. 119; Sutherland *v.* Briggs, 1 Hare Ch. 27; Dowell *v.* Dew, 1 Yo. & Col. 345; Wilton *v.* Harwood, 23 Me. 133; Miller *v.* Tobie, 41 N. H. 84; Davenport *v.* Mason, 15 Mass. 92; Peckham *v.* Barker, 8 Rh. I. 17; Adams *v.* Rockwell, 16 Wend. 285; Freeman *v.* Freeman, 43 N. Y. 34; Richmond *v.* Foote, 3 Lans. 244; Lobdell *v.* Lobdell, 36 N. Y. 327; Casler *v.* Thompson, 3 Green Ch. 59; Wack *v.* Sorber, 2 Whart. 387; Gangwer *v.* Fry, 17 Penn. St. 491; Van Loon *v.* Davenport, 1 Weekly Notes, 320; Perkins *v.* Hadsell, 50 Ill. 216; Laird *v.* Allen, 82 Ill. 43; Whetsell *v.* Church, 110 Ill. 125; Smith *v.* Yocum, 110 Ill. 142; Coe *v.* Johnson, 93 Ind. 418; Savage *v.* Lee, 101 Ind. 514 (but see Alcorn *v.* Harmonson, 2 Blackf. 235); Smith *v.* Smith, 1 Rich. Eq. 130; Cummings *v.* Gill, 6 Ala. 562; Byrd *v.* Odem, 9 Ala. 755; Ridley *v.* McNairy, 2 Humph. 174.

ance of the contract, been deemed enough.[1] Such possession, it should be remembered, must be actual, not merely technical and constructive;[2] must be exclusive;[3] must be subsequent to the agreement;[4] must be with the vendor's knowledge and consent, and not surreptitious or adverse;[5] must be permanent,[6] and must be of a character the loss of which could not be compensated for in damages.[7] And "the evidence must define the boundaries and indicate the quantity of the land."[8]

[1] Butcher *v.* Staply, 1 Vern. 363; Lacon *v.* Mertins, 3 Atk. 3; Eaton *v.* Whitaker, 18 Conn. 229; Smith *v.* Underdunck, 1 Sandf. Ch. 579; Harris *v.* Knickerbocker, 5 Wend. 638; Brown *v.* Jones, 46 Barb. 400; Morrill *v.* Cooper, 65 Barb. 512; Pugh *v.* Good, 3 Watts & S. 56; Moale *v.* Buchanan, 11 Gill & J. 314; Harris *v.* Crenshaw, 3 Rand. 14; Anderson *v.* Chick, 1 Bailey Ch. 118; Palmer *v.* Richardson, 3 Strobh. Eq. 16; Brock *v.* Cook, 3 Porter, 464.

[2] Brawdy *v.* Brawdy, 7 Barr, 157; Moore *v.* Small, 19 Penn. St. 461; Bush *v.* Oil Co., 1 Weekly Notes, 297; Com. *v.* Kreager, 78 Penn. St. 477; Hudnut *v.* Weir, 100 Ind. 501.

[3] Frye *v.* Shepler, 7 Barr, 91; Haines *v.* McGlone, 44 Ark. 79. See Marsh *v.* Davis, 33 Kan. 326.

[4] Gregory *v.* Mighell, 18 Ves. 328; Eckert *v.* Eckert, 3 Penn. R. 332; Atkins *v.* Young, 12 Penn. St. 24; Blakeslee *v.* Blakeslee, 22 Penn. St. 237; Christy *v.* Barnhart, 14 Penn. St. 260; Reynolds *v.* Hewett, 27 Penn. St. 176; Myers *v.* Byerly, 45 Penn. St. 368; Haines *v.* Haines, 6 Md. 435; Mahana *v.* Blunt, 20 Iowa, 142; Anderson *v.* Simpson, 21 Iowa, 399.

[5] Gregory *v.* Mighell, 18 Ves. 328; Purcell *v.* Miner, 4 Wall. 513; Goucher *v.* Martin, 9 Watts, 106; Gratz *v.* Gratz, 4 Rawle, 411; Johnston *v.* Glancy, 4 Blackf. 94; Thomson *v.* Scott, 1 McCord Ch. 32.

[6] Rankin *v.* Simpson, 19 Penn. St. 471; Dougan *v.* Bloucher, 24 Penn. St. 28.

[7] "The rule is well settled, that to take a parol contract for the sale of land out of the operation of the statute of frauds and perjuries, the contract must be distinctly proved; the land must be clearly designated, and open, notorious, and exclusive possession must be taken and maintained under and in pursuance of the contract. Moore *v.* Small, 7 Harr. 469; Frye *v.* Shepler, 7 Barr, 91; Hill *v.* Meyers, 7 Wright, 172.. Every parol contract is within the statute of frauds, except where there has been such part performance as cannot be compensated in damages. Moore *v.* Small, 7 Harris, 469. If the circumstances of the case are not such as to render reasonable compensation for what has been paid or done impossible, then compensation, instead of execution of the contract, is the duty which the law will enforce. Postlethwait *v.* Frease, 7 Casey, 472. A court of equity enforces such a contract only where it has been so far executed that it would be unjust to rescind it. No matter how clear the proof of such contract may be, specific

[8] Woodward, J., Hart *v.* Carroll, 85 Penn. St. 510. See Reed, Stat. Frauds, §§ 590 *et seq.*

§ 910. Mere payment of purchase-money, however, is not sufficient part performance to compel the execution of such a parol contract;[1] unless the condition of the vendee is such that he could not be restored to his former situation by resort to a suit for repayment;[2] in which case payment may be a fact, from which, with other facts, part performance can be inferred.[3] Nor, as we have seen,[4] is marriage considered to be such part performance of a parol marriage settle-

But payment of purchase-money is not enough.

performance thereof will not be decreed where adequate compensation may be made in damages. McKowen *v.* McDonald, 7 Wright, 441. These principles are too familiar to need illustration.

"Whether the evidence is sufficient to take such a contract out of the operation of the statute is a question of law for the court. Irwin *v.* Irwin, 10 C. 525." Woodward, J., Overmyer *v.* Koerner, 2 Weekly Notes, 6.

The sufficiency of possession taken of land under a contract, to be of itself such part performance as to take the contract out of the statute of frauds, has been frequently asserted in Pennsylvania. See Ackerman *v.* Fisher, 57 Penn. St. 457, and other cases cited supra. See, also, as somewhat tempering the positiveness of this doctrine, Farley *v.* Stokes, 1 Pars. Eq. Cases, 422; Bassler *v.* Niesly, 2 S. & R. 352; Workman *v.* Guthrie, 29 Penn. St. 495; Van Loon *v.* Davenport, 2 Weekly Notes, 320.

[1] Reed, Stat. Frauds, §§ 592, 594; Buckmaster *v.* Harrop, 7 Ves. 341; Clinan *v.* Cooke, 1 Sch. & L. 40; Hughes *v.* Morris, 2 De G., M. & G. 356; Purcell *v.* Miner, 4 Wall. 513; Kidder *v.* Barr, 39 N. H. 235; Glass *v.* Hulbert, 102 Mass. 21; Cogger *v.* Lansing, 43 N. Y. 550; Eaton *v.* Whitaker, 18 Conn. 222; Cole *v.* Potts, 2 Stockt. 67; McKee *v.* Phillips, 9 Watts, 85; Parker *v.* Wells, 6 Whart. 153; Allen's Est. 1 Watts & S. 283; Gangwer *v.* Fry, 17 Penn. St. 491; Townsend *v.* Houston, 1 Har. (Del.) 532; Letcher *v.* Crosby, 2 A. K. Marsh. 106; Lefferson *v.* Dallas, 20 Ohio St. 74; Crabill *v.* Marsh, 38 Ohio St. 331; Felton *v.* Smith, 84 Ind. 485; Townsend *v.* Fenton, 32 Minn. 482; Parke *v.* Leewright, 20 Mo. 85; Baker *v.* Wiswell, 17 Neb. 52; Mather *v.* Scoles, 35 Ind. 5; Mialhi *v.* Lassabe, 4 Ala. 712; Hunt *v.* McClellan, 41 Ala. 451; Church *v.* Farrow, 7 Rich. Eq. 378; Hyde *v.* Cooper, 13 So. Car. Eq. 250; Mims *v.* Chandler, 21 S. C. 480; Wood *v.* Jones, 35 Tex. 64. See, *aliter*, Fairbrother *v.* Shaw, 4 Iowa, 570; Narr *v.* Jackson, 58 Iowa, 359; Johnston *v.* Glancy, 4 Blackf. 94.

That mere payment of rent does not take a parol lease out of the statute, see Reed *v.* Blodgett, 59 N. H. 120.

[2] Bispham's Eq. § 385; Reed, Stat. Frauds, §§ 592 *et seq.*; Rhodes *v.* Rhodes, 3 Sandf. Ch. 279; Malius *v.* Brown, 4 Comst. 403; Johnson *v.* Hubbell, 2 Stockt. 332; Dugan *v.* Gittings, 3 Gill, 138; Everts *v.* Agnes, 4 Wis. 343; Morrill *v.* Cooper, 65 Barb. 512. See Lacon *v.* Mertins, 3 Atk. 4; Hales *v.* Bercham, 3 Vern. 618; Main *v.* Melborn, 4 Ves. 724; Jones *v.* Peterman, 3 S. & R. 543; Frieze *v.* Glenn, 2 Md. Ch. 361.

[3] Reed, Stat. Frauds, § 590.

[4] Supra, § 882.

ment as will make such settlement operative.[1] It is also to be remembered that the exception of part performance, as a ground for taking a parol contract out of the statute, is cognizable in equity only on ground of the fraud that would be perpetrated if specific redress were not given; the wrong not being cognizable at common law, though cognizable in those systems of jurisprudence which permit equitable remedies to be administered under common law form.[2]

Where written contract in conformity with statute is prevented by fraud, equity will relieve.

§ 911. Parol evidence is also admissible to prove that the party aggrieved was ready to execute a written instrument in conformity with the statute, but was prevented by the fraud of the other party; and in such case, a parol contract, the formal execution of which was thus prevented, will be enforced.[3]

When parol contract is admitted in answer, it may be equitably enforced.

§ 912. Where a parol contract, in a suit for its specific performance, is admitted by the defendant, and the defence of the statute is waived by him, the parol contract is held to be taken out of the statute, and may be enforced by a chancellor, or a court administering equity remedies.[4] The same effect has been assigned to a *pro confesso* decree.[5] But against strangers and creditors coming in to resist a decree for specific execution, even such an

[1] Montacute *v.* Maxwell, 1 P. Wms. 618; Dundas *v.* Dutens, 1 Ves. Jun. 196; 2 Cox, 235; Caton *v.* Caton, L. R. 1 Ch. App. 147; Hammersly *v.* De Biel, 12 Cl. & F. 65; Finch *v.* Finch, 10 Ohio St. 501; Hatcher *v.* Robertson, 4 Strobh. Eq. 179.

[2] Reed, Stat. Frauds, § 548; O'Herlihy *v.* Hedges, 1 Sch. & L. 123; Kelley *v.* Webster, 12 C. B. 383; Lane *v.* Shackford, 5 N. H. 132; Pike *v.* Morey, 32 Vt. 37; Norton *v.* Preston, 15 Me. 16; Adams *v.* Townsend, 1 Met. (Mass.) 485; Eaton *v.* Whitaker, 18 Conn. 231; Jackson *v.* Pierce, 2 Johns. R. 223; Abbott *v.* Draper, 4 Denio, 52; Wentworth *v.* Buhler, 3 E. D. Smith, 305; Walter *v.* Walter, 1 Whart. 292; Henderson *v.* Hays, 2 Watts & S. 148; Hunt *v.* Coe, 15 Iowa, 197; Johnson *v.* Hanson, 6 Ala. 351; Davis *v.* Moore, 9 Rich. S. C. 215.

[3] See Story's Eq. Juris. § 768; Bispham's Eq. § 386; Montacute *v.* Maxwell, 1 P. Wms. 618.

[4] Smith's Manuel of Eq. 252; Browne, Stat. Frauds, § 476; Gunter *v.* Halsey, Ambl. 586; Whitechurch *v.* Bevis, 2 Browne Ch. 566; Atty.-Gen. *v.* Sitwell, 1 Yo. & Col. 583; Harris *v.* Knickerbocker, 5 Wend. 638; Artz *v.* Grove, 21 Md. 456; Argenbright *v.* Campbell, 3 Hen. & Mun. 144; Ellis *v.* Ellis, 1 Dev. Eq. 341; Hollingshead *v.* McKenzie, 8 Ga. 467; McGowen *v.* West, 7 Mo. 569. See Reed, Stat. Frauds, §§ 561, 579, 632.

[5] Newton *v.* Swazey, 8 N. H. 9; Whiting *v.* Goult, 2 Wis. 552; Esmay *v.* Groton, 18 Ill. 483. Reed, Stat. Frauds, §§ 521 *et seq.*

admission and refusal to set up the statutes cannot take a parol agreement out of the statute.[1]

Whether the title to lands can be transferred by estoppel under the statute is hereafter discussed.[2]

IX. CONFLICT OF LAWS.

Lex fori in such cases, when peremptory, prevails.

§ 913. As is shown in another work,[3] when the *lex fori* peremptorily prescribes that suits of a particular class are not to be sustained unless evidence of a particular kind be produced, this binds the *judex fori*, no matter what may have been the laws of the place where the cause of action originated, or the law of the place where it took effect. When, however, there is no such peremptory provision, then the following distinctions are to be kept in mind:

(1) A contract made by parties domiciled in a particular state, in which state such contract is to be performed, will be regarded by foreign courts as subject to the law of such state.

(2) The mere fact that a contract is entered into in a particular state does not by itself subject such contract to the law of such state.

(3) Nor does the mere fact that a contract conflicts with the statute of frauds in the state of performance by itself vacate the contract in the state where the parties were domiciled.[4]

(4) When the statute relates to the transfer of property having a permanent local site, the *lex situs* prevails.[5]

[1] Winn *v.* Albert, 2 Md. Ch. 169; Albert *v.* Winn, 2 Md. 66.

[2] Infra, § 1148.

[3] Whart. Conf. of Laws, 2d ed., § 690. See also supra, § 316, as to foreign rules of evidence.

[4] See Whart. Conf. of Laws, §§ 691 *et seq.*, where the above distinctions are sustained; Reed, Stat. Frauds, §§ 16 *et seq.*

[5] Ibid.

CHAPTER XII.

DOCUMENTS MODIFIED BY PAROL.

I. General Rules.

Parol evidence not admissible to vary documents as between parties, § 920.

New ingredients cannot be thus added, § 921.

Auctioneers' memoranda, § 922.

Dispositive documents may be varied by parol as to strangers, § 923.

Whole document must be taken together, § 924.

Distinction between "primary" and "technical" untenable, § 924.

Written entries are of more weight than printed, § 925.

Informal memoranda are excepted from rule, telegrams, § 926.

Parol evidence admissible to show that document was not executed, or was only conditional, or was rescinded, § 927.

And so to show that it was conditioned on a non-performed contingency, § 928.

But plain conditions cannot be varied except on proof of fraudulent imposition, § 929.

Want of due delivery, or delivery as an escrow, may be proved by parol, § 930.

Fraud or duress in execution may be shown by parol, and so of insanity, § 931.

And so of trust, § 931 *a*.

But complainant must have a strong case, § 932.

So as to concurrent mistake, § 933.

But not mistake of one party, § 934.

So of illegality, § 935.

Between parties, intent cannot be proved to affect written meaning, § 936.

Otherwise as to ambiguous terms, § 937.

Declarations of intent need not have been contemporaneous, § 938.

Evidence admissible to bring out true meaning, § 939.

For this purpose extrinsic circumstances may be shown, § 940.

Acts admissible for the same purpose, § 941.

Ambiguous descriptions of property may be explained, § 942.

General designation of property may be thus particularized, § 943.

Parol evidence admissible to distinguish objects, § 944.

Erroneous particulars may be rejected as surplusage, § 945.

Ambiguity as to objects may be so explained, § 946.

Ambiguous measurements and numbers may be thus explained, § 947.

Parol evidence admissible to prove "dollar" means Confederate dollar, § 948.

Parol evidence admissible to identify parties, § 949.

Variation of names by parol, § 949 *a*.

To enable undisclosed principal to sue or be sued, he may be proved by parol, § 950.

But person signing as principal cannot set up that he was agent, § 951.

Suretyship on writing may be shown by parol, § 952.
Other cases of distinction and identification, § 953.
Evidence of writer's use of language admissible to solve ambiguities, § 954.
Party may be examined as to intent or understanding, § 955.
Patent ambiguities cannot be explained by parol, § 956.
"Patent" is "subjective," and "latent" "objective," § 957.
Usage cannot be proved to vary dispositive writings, § 958.
Parties may override usage by consent, § 959.
Proof of submission to a conflicting usage is inadmissible, § 960.
Otherwise in case of ambiguities, § 961.
Usage is to be brought home to the party to whom it is imputed, § 962.
When usage is that of a class, party must be proved to belong to the class, § 963.
Usage may be proved by one witness, § 964.
Usage is to be proved to the jury, and must be reasonable and not conflicting with *lex fori*, § 965.
When no proof exists of usage, meaning is for court, § 966.
Power of agent may be construed by usage, § 967.
Usage received to explain broker's memoranda, § 968.
Customary incidents may be annexed to contract, § 969.
But not when conflicting with writing, § 970.
Course of business admissible in ambiguous cases, § 971.
Opinion of expert inadmissible as to construction of document; but otherwise to decipher and interpret, § 972.
Parol evidence admissible to rebut an equity, § 973.
And so to rebut a rebuttable presumption, § 974.
Opinion of witnesses as to libel admissible, § 975.
Dates not necessarily part of document, § 976.
Dates presumed to be true, but may be varied by parol, § 977.
Exception to this rule, § 978.
Time may be inferred from circumstances, § 979.

II. SPECIAL RULES AS TO RECORDS, STATUTES, AND CHARTERS.

Records cannot be varied by parol, § 980.
And so of statutes and charters, § 980 *a*.
Otherwise as to acknowledgment of sheriffs' deeds, § 981.
Record imports verity, § 982.
But on application to court, record may be corrected by parol, § 983.
For relief, petition should be specific, § 984.
Fraudulent record may be collaterally impeached, § 985.
When silent or ambiguous, record may be explained by parol, § 986.
Town and similar records subject to same rules, § 987.
Former judgment may be shown to relate to a particular case, § 988.
Nature of cause of action may be proved, § 989.
So of hour of legal procedure, § 990.
So of collateral incidents of records, § 991.

III. SPECIAL RULES AS TO WILLS.

Wills cannot be varied by parol. Intent must be drawn from writing, § 992.
Proof of intent inadmissible to explain patent ambiguities, § 993.
Evidence inadmissible to modify obvious meaning as to devisee, § 994.
And so are declarations qualifying terms, § 995.
When primary meaning is inapplicable to any ascertainable object evidence of secondary meaning is admissible, § 996.

When terms are applicable to several objects, evidence admissible to distinguish, § 997.
In ambiguities, all the surroundings, family, and habits of the testator may be proved, § 998.
All the extrinsic facts are to be considered, § 999.
When description is only partly applicable to each of several objects, then declarations of intent are inadmissible, § 1001.
Evidence admissible as to other ambiguities, § 1002.
Abbreviations may be explained, § 1003.
Testator's own writings admissible among extrinsic facts, § 1003.
Erroneous surplusage may be rejected, § 1004.
Otherwise as to words of limitation or description, § 1005.
Patent ambiguities cannot be resolved by parol, § 1006.
Ademption of legacy may be proved by parol, § 1007.
Parol proof of mistake of testator inadmissible, § 1008.
Fraud and undue influence may be so proved, § 1009.
Testator's declarations primarily inadmissible to prove fraud or compulsion, § 1010.
But admissible to prove mental condition, § 1011.
Parol evidence admissible to sustain will when attacked, § 1012.
Probate of will only *primâ facie* proof, § 1013.

IV. Special Rules as to Contracts.

Prior conference merged in written contract, § 1014.
Parol may prove contract partly oral, § 1015.
Oral adoption and acceptance of written contract may be so proved, § 1016.
Rescission of one contract and substitution of another may be so proved, § 1017.
And so of facts showing that the contract never became operative, or became so on condition, § 1017 *a*.
Exception at law as to writings under seal, § 1018.
Parol evidence admissible to reform a contract, § 1019.
Deeds may be so reformed, § 1020.
Reformation granted in cases of concurrent mistake, § 1021.
Parol evidence not admissible to contradict document, § 1022.
Reformation must be specially asked, § 1023.
Under statute of frauds parol contract cannot be substituted for written, § 1025.
Subsequent extension, variation, or abrogation, provable by parol, § 1026.
Parol evidence inadmissible to prove unilateral mistake of fact, § 1028.
And so of mistake of law, § 1029.
Obvious mistake of form may be proved by parol, § 1030.
Conveyance may be shown to be in trust, § 1031.
Or a mortgage, § 1032.
But evidence must be plain and strong, § 1033.
Admission of such evidence does not conflict with statute of frauds, § 1034.
Resulting trust may be proved by parol, § 1035.
Caution when alleged trustee is deceased, § 1037.
Person fraudulently obtaining or retaining title may be treated as trustee, § 1038.
Particular recitals may estop, § 1039.
Otherwise as to general recitals, § 1040.
Recitals do not bind third parties, § 1041.
Recitals of purchase-money open to dispute, § 1042.
Not admissible against strangers, § 1043.

Consideration may be proved or disproved by parol, § 1044.
Seal imports consideration, but may be impeached on proof of fraud or mistake, § 1045.
Consideration in contract cannot *primâ facie* be disputed by those claiming under it, though other considerations may be proved in rebuttal of fraud, § 1046.
When fraud is alleged, stranger may disprove consideration, § 1047.
To disprove fraud *bonâ fides* is admissible, § 1048.
Bonâ fide purchasers and judgment vendees may assail consideration, § 1049.
V. Special Rules as to Deeds.
Deeds not open to variation by parol proof, § 1050.
Party or privy cannot contradict averments, § 1051.
Acknowledgment may be disputed by parol, § 1052.
Defective acknowledgment may be explained by parol, § 1053.
Between parties, deeds may be varied on proof of ambiguity and fraud, § 1054.
Deeds may be attacked by *bonâ fide* purchasers and judgment vendees, § 1055.
And so as to mortgagee, § 1056.
Deed may be shown to be in trust, § 1057.
(As to recitals, see §§ 1036–1042.)
VI. Special Rules as to Negotiable Paper.
Negotiable paper not susceptible of parol variations, § 1058.
Blank indorsement may be explained, § 1059.
Relations of parties with notice may be varied by parol, § 1060.
And so of relations of successive indorsers, § 1060 *a*.
And so may consideration, § 1060 *b*.
Real parties may be brought out by parol, § 1061.
Ambiguities in such paper may be explained, § 1062.
VII. Special Rules as to Other Instruments.
Releases cannot be contradicted by parol, § 1063.
Receipts can be so contradicted, § 1064.
Exceptions as to insurance receipts, § 1065.
Receipts may be estoppels as to third parties, and when contractual may conclude the parties, § 1066.
Bonds may be shown to be conditioned on contingencies, § 1067.
Subscriptions cannot be modified as to third parties by parol, § 1068.
Fraud may be a defence, § 1069.
Bills of lading are open to explanation, § 1070.
Insurance applications may be explained by parol, 1071.

I. GENERAL RULES.

Parol evidence generally not admissible to vary documents between parties.

§ 920. Parol evidence, in obedience to a rule which has been already frequently stated, cannot be received to vary the terms of a document. It is important, however, in determining the force of this rule, to distinguish between documents which are uttered dispositively, *i. e.*, for the purpose of disposing of rights; and those uttered non-dispositively, *i. e.*, not for the purpose of disposing of

rights.[1] A non-dispositive, or, to adopt Mr. Bentham's term, a "casual" document, is more open to parol variation than is a document which is dispositive, or, as Mr. Bentham calls it, "predetermined." A casual or non-dispositive document (*e. g.*, a letter or memorandum thrown off hurriedly in the ease and carelessness of familiar intercourse, without intending to institute a contract, and which is offered, not to prove a contract, but to establish a non-contractual incident)[2] is peculiarly dependent upon extraneous circumstances; is often inexplicable unless such circumstances are put in evidence; and employs language, which, so far from being made up of phrases selected for their conventional business and legal limitations, is marked by the writer's idiosyncrasies, and sometimes comprises words peculiar to himself. But whether such documents are informally or formally constituted, they agree in this, that so far as concerns the parties to the case in which they are offered they were not prepared for the purpose of disposing of the rights of the party from whom they emanate. *Dispositive* documents, on the other hand, are deliberately prepared, and are usually couched in words which are selected for the purpose, because they have a settled legal or business meaning. Such documents are meant to bind the party uttering them in both his statements of fact and his engagements of future action; and they are usually accepted by the other contracting party (or in case of wills, by parties interested), not in any occult sense, requiring explanation or correction, but according to the legal and business meaning of the terms.[3] It stands to reason, therefore, that parol evidence is not as a rule to be received to vary the terms of documents so prepared and so accepted, though it is otherwise when such documents are offered, not dispositively, between the parties, but non-contractually, by or against strangers. So far as concerns the parties or privies to a dispositive

[1] See infra, §§ 1078, 1083.

[2] See McCrea *v.* Purmort, 16 Wend. 460; Sourse *v.* Marshall, 23 Ind. 194; Stone *v.* Wilson, 3 Brev. (S. C.) 228. As to letters and other documents receivable to prove non-contractual incidents, see infra, §§ 1122 *et seq.*

[3] The distinction between dispositive and non-dispositive (or casual) documents is recognized by Sir J. Stephen in substance, though not in terms, when he tells us that "oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, *if such memorandum was not intended to have legal effect as a contract or other disposition of property.*" Steph. Ev. art. 90.

document, valid in itself, its terms cannot ordinarily be varied by parol.[1]

[1] Preston *v.* Merceau, 2 W. Bl. 1249; Goss *v.* Nugent, 5 B. & Ad. 64; Adams *v.* Wordley, 1 M. & W. 374; Hunt *v.* Rousmanier, 8 Wheat. 174; Van Ness *v.* Washington, 4 Pet. 232; Shankland *v.* Washington, 5 Pet. 390; Van Buren *v.* Digges, 11 How. 461; Partridge *v.* Ins. Co., 15 Wall. 593; Bailey *v.* R. R., 17 Wall. 96; Gavinzel *v.* Crump, 22 Wall. 308; Moran *v.* Prather, 23 Wall. 499; Brown *v.* Spofford, 95 U. S. 474; Singer Man. Co. *v.* Hester, 2 McCrary, 417; White *v.* Boyce, 21 Fed. Rep. 228; Eveleth *v.* Wilson, 15 Me. 109; Peterson *v.* Grover, 20 Me. 363; Ticonic Bk. *v.* Johnson, 21 Me. 426; Whitney *v.* Lowell, 33 Me. 318; Whitney *v.* Slayton, 40 Me. 224; Bell *v.* Woodman, 60 Me. 465; Morrill *v.* Robinson, 71 Me. 24; Bromley *v.* Elliot, 38 N. H. 287; Smith *v.* Gibbs, 48 N. H. 335; Bradley *v.* Bentley, 8 Vt. 243; Bond *v.* Clark, 35 Vt. 577; Brandon *v.* Morse, 48 Vt. 322; Joseph *v.* Bigelow, 4 Cush. 82; Myrick *v.* Dame, 9 Cush. 248; Finney *v.* Ins. Co., 8 Met. 348; Cook *v.* Shearman, 103 Mass. 21; Colt *v.* Cone, 107 Mass. 285; McFarland *v.* R. R., 115 Mass. 103; Barnstable Bk. *v.* Ballou, 119 Mass. 487; Black *v.* Bachelder, 120 Mass. 171; Ward *v.* Commis., 122 Mass. 394; Fay *v.* Gray, 124 Mass. 509; Beckley *v.* Munson, 13 Conn. 299; Glendale Woollen Co. *v.* Ins. Co., 21 Conn. 19; Drake *v.* Starks, 45 Conn. 96; La Farge *v.* Rickert, 5 Wend. 187; Spencer *v.* Tilden, 5 Cow. 144; Hull *v.* Adams, 1 Hill, N. Y. 601; Baker *v.* Higgins, 21 N. Y. 397; Clark *v.* Ins. Co., 7 Lans. 323; Long *v.* R. R., 50 N. Y. 76; Collender *v.* Dinsmore, 55 N. Y. 200; Mott *v.* Richtmyer, 57 N. Y. 49; Van Bokkelen *v.* Taylor, 62 N. Y. 105; Van Syckll *v.* Dalrymple, 32 N. J. Eq. 826; Perrine *v.* Cheeseman, 11 N. J. L. 174; Rogers *v.* Colt, 21 N. J. L. 704; Carlton *v.* Wine Co., 33 N. J. Eq. 466; Heilner *v.* Imbrie, 6 Serg. & R. 401; Albert *v.* Ziegler, 29 Penn. St. 50; Collins *v.* Baumgardner, 52 Penn. St. 461; Kirk *v.* Hartman, 63 Penn. St. 97; Martin *v.* Berens, 67 Penn. St. 459; Hagey *v.* Hill, 75 Penn. St. 108; Penns. Canal Co. *v.* Betts, 1 Weekly Notes, 368; Weiler *v.* Hottenstein, 102 Penn. St. 499; Woodruff *v.* Frost, 2 N. J. L. 342; Young *v.* Frost, 5 Gill, 287; Batturs *v.* Sellers, 6 Har. & J. 249; Criss *v.* Withers, 26 Md. 553; Hays *v.* Ins. Co., 36 Md. 398; Farrow *v.* Hays, 51 Md. 498; Balt. Build. Soc. *v.* Smith, 54 Md. 187; Hunting *v.* Enmart, 55 Md. 265; Hill *v.* Peyton, 21 Grat. 386; McLean *v.* Ins. Co., 29 Grat. 361; Little Kanawha *v.* Rice, 9 W. Va. 190; Serviss *v.* Stockstill, 30 Ohio St. 418; Irwin *v.* Ivers, 7 Ind. 308; Davis *v.* R. R., 84 Ind. 36; Schreiber *v.* Butler, 84 Ind. 576; Treatman *v.* Fletcher, 100 Ind. 105; Frazer *v.* Frazer, 42 Mich. 276; Seekler *v.* Fox, 51 Mich. 92; McClure *v.* Jeffrey, 8 Ind. 79; Fankboner *v.* Fankboner, 20 Ind. 62; Abrams *v.* Pomeroy, 13 Ill. 133; Harlow *v.* Boswell, 15 Ill. 56; Robinson *v.* Magarity, 28 Ill. 423; Winnesheik Ins. Co. *v.* Holzgrafe, 53 Ill. 516; Johnson *v.* Pollock, 58 Ill. 181; McCormick *v.* Huse, 66 Ill. 515; Mann *v.* Smyser, 76 Ill. 365; Cease *v.* Cockle, 75 Ill. 484; Conwell *v.* R. R., 81 Ill. 232; Warren *v.* Crew, 22 Iowa, 315; Atkinson *v.* Blair, 38 Iowa, 266; Mann *v.* School Dist., 52 Iowa, 130; Kimball *v.* Bryan, 56 Iowa, 432; Van Vechten *v.* Smith, 59 Iowa, 173; Thompson *v.* Stewart, 60 Iowa, 223; Dickson *v.* Harris, 60 Iowa, 727; Irish *v.* Dean, 39 Wis. 562; Schultz *v.* Coon,

§ 921. In respect to documents prepared by parties for the purpose of expressing in writing terms on which they have reciprocally agreed, the rule which has been stated has an additional sanction. Hence comes the conclusion that new ingredients cannot be by parol added to such documents.[1] Thus, articles of property cannot be added by parol to those specified in a bill of sale[2] or in a deed.[3] So, as an additional consideration to a written contract for the grant of a right of way to a railroad company, it cannot be proved by parol that the company agreed to fill up a sluice upon the land.[4] In a suit, also, on a written agreement for the sale of "25,000 pale brick for three dollars per *m*, and 50,000 hard brick for four dollars per

New ingredients cannot be added.

51 Wis. 416; Winona *v.* Thompson, 24 Minn. 199; Gillespie *v.* Sawyer, 15 Neb. 536; Lennard *v.* Vischer, 2 Cal. 37; Ruiz *v.* Norton, 4 Cal. 359; Lemaster *v.* Burckhart, 2 Bibb. 25; Ward *v.* Ledbetter, 1 Dev. & B. Eq. 496; Chamness *v.* Crutchfield, 2 Ired. Eq. 148; Etheridge *v.* Palin, 72 N. C. 213; Mayer *v.* Adrian, 77 N. C. 83; Falkoner *v.* Garrison, 1 McCord, 209; Wynn *v.* Cox, 5 Ga. 373; Davis *v.* Moody, 15 Ga. 175; Freeman *v.* Bass, 34 Ga. 355; Whitehead *v.* Park, 53 Ga. 575; Smith *v.* Odom, 63 Ga. 499; Duff *v.* Ivy, 3 Stew. 140; Kennedy *v.* Kennedy, 2 Ala. 571; Adams *v.* Garrett, 12 Ala. 229; West *v.* Kelly, 19 Ala. 253; Whitehead *v.* Lane, 72 Ala. 39; Tennessee R. R. *v.* East Ala. R. R., 73 Ala. 426; Elliott *v.* Connell, 13 Miss. 91; Dabadie *v.* Poydras, 3 La. An. 153; Boner *v.* Mahle, 3 La. An. 600; Barthet *v.* Estebene, 5 La. An. 315; Laycock *v.* Davidson, 11 La. An. 328; Ferguson *v.* Glaze, 12 La. An. 767; Shreveport *v.* LeRosen, 18 La. An. 577; Porter *v.* Sandridge, 32 La. An. 449; Singleton *v.* Fore, 7 Mo. 515; Peers *v.* Davis, 29 Mo. 184; Bunce *v.* Beck, 43 Mo. 266; Helmrichs *v.* Gehrke, 56 Mo. 79; Huse *v.* McQuade, 52 Mo. 388; Baker *v.* Ferris, 61 Mo. 389; Koehring *v.* Muemminghoff, 61 Mo. 403; Richardson *v.* Comstock, 21 Ark. 69; Pickett *v.* Ferguson, 45 Ark. 177; Trammell *v.* Pilgrim, 20 Tex. 158; Donley *v.* Bush, 44 Tex. 1; Boel *v.* Wadygman, 54 Tex. 589; Belcher *v.* Mulholl, 57 Tex. 17. For the argument for excluding proof of intent, see infra, § 936. On the general topic of interpretation, see Lieber's Legal and Political Hermeneutics.

[1] Infra, §§ 1014 *et seq.*; Hale *v.* Handy, 26 N. H. 206; Kimball *v.* Bradford, 9 Gray, 243; Frost *v.* Blanchard, 97 Mass. 155; Dudley *v.* Vose, 114 Mass. 34; Galpin *v.* Atwater, 29 Conn. 93; La Farge *v.* Rickert, 5 Wend. 187; Lyon *v.* Miller, 24 Penn. St. 392; Howard *v.* Thomas, 12 Ohio St. 201; Johnson *v.* Pierce, 16 Ohio St. 472; Snyder *v.* Koons, 20 Ind. 389; Freeman *v.* Bass, 34 Ga. 355; Drake *v.* Dodworth, 4 Kans. 159.

[2] Osborn *v.* Hendrickson, 7 Cal. 282; Angomar *v.* Wilson, 12 La. An. 857.

[3] Teller *v.* Eckert, 4 How. U. S. 289; Bond *v.* Fay, 12 Allen, 86; Wood *v.* Commis., 122 Mass. 394.

[4] Purinton *v.* R. R., 46 Ill. 297.

m cash," parol evidence is inadmissible to show that the parties intended the delivery to be in parcels, payment for each parcel to be due on its delivery;[1] nor can a written agreement to deliver wood be modified by parol proof that the wood was to be paid for as delivered in parcels.[2] It is inadmissible, to take another illustration, in a suit on a lease for water-works, conveying, with two exceptions, the entire control of the water, to prove by parol that it was intended to have introduced another exception in favor of another party.[3] So where a shipper of goods takes from the carrier a bill of lading or other voucher giving the terms of transportation, the writing, in the absence of fraud or concurrent mistake, must be regarded as the final expression of the will of the parties, not open to variation by parol.[4]

So as to auctioneer's conditions of sale.

§ 922. Auctioneer's conditions of sale may be taken as affording another illustration of the rule before us. Where the printed conditions of sale at an auction, signed by the auctioneer, described the time and place of sale, and the number and kind of timber sold, but said nothing about the weight, evidence of the auctioneer's statements at the sale was held inadmissible to prove that a certain weight had been warranted. "There is no doubt," said Lord Ellenborough, C. J., "that the parol evidence was properly rejected. The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There is no doubt that the warranty as to the quantity of the timber would vary the agreement contained in the written conditions of sale."[5] On the other hand, *unsigned* conditions of sale are only in the nature of a personal memorandum, which may be varied at any time before the sale by an express notice to a purchaser.[6] And informal catalogue descriptions of articles whose price is below the limit of the statute

[1] Baker *v.* Higgins, 21 N. Y. 397.
[2] Brandon *v.* Morse, 48 Vt. 322.
[3] Hovey *v.* Newton, 7 Pick. 29.
[4] Long *v.* R. R., 50 N. Y. 76. See fully §§ 1014 *et seq.*
[5] Powell *v.* Edmunds, 12 East, 6.
[6] Eden *v.* Blake, 13 M. & W. 614.

of frauds may be amended by parol at the sale.[1] And so, generally, as to informal memoranda.[2]

Dispositive documents may be varied as to strangers by parol.

§ 923. In a dispositive document, so far as concerns the parties to it, the settled terms, as we have seen, cannot be varied by parol, because these terms were mutually accepted for the purpose of disposing of rights in certain relations. It may happen, however, that a document may be dispositive as to the parties, and non-dispositive as to all other persons. The party uttering a document (*e. g.*, a deed or a power of attorney or a promissory note) prepares it deliberately in respect to all persons who through it may enter into business relations with him; but other persons are not contemplated by him, nor is the writing meant to bind him as to such persons who would in no way be bound to him. In respect to strangers, therefore, documents have usually no binding force; and hence it has been held that a stranger, against whom a deed or other writing is brought to bear on trial, may show by parol evidence mistakes in such writing. The rule forbidding the variation of writings by parol applies only to parties and privies; and nothing in the rule protects writings, not records, or public documents, from attack by strangers.[3] Even a party executing such a writing may prove by parol its mistake, when the issue is with a third person.[4]

[1] Infra, § 926.

[2] Whart. on Cont. § 661.

[3] Supra, § 176; infra, §§ 1078, 1155; R. *v.* Cheedle, 3 B. & Ad. 838; R. *v.* Olney, 1 M. & Sel. 387; R. *v.* Wickham, 3 A. & E. 517; Barreda *v.* Silsbee, 21 How. 146; Woodman *v.* Eastman, 10 N. H. 359; Edgerly *v.* Emerson, 23 N. H. 555; Furbush *v.* Goodwin, 25 N. H. 425; Badger *v.* Jones, 12 Pick. 371; Spaulding *v.* Knight, 116 Mass. 148; Rose *v.* Taunton, 119 Mass. 99; New Berlin *v.* Norwich, 10 Johns. R. 229; Thomas *v.* Truscott, 53 Barb. 200; McMasters *v.* Ins. Co., 55 N. Y. 233; Dempsey *v.* Kipp, 61 N. Y. 471; Lowell Man. Co. *v.* Safeguards, 88 N. Y. 391; Brown *v.* Thurber, 77 N. J. 613; Krider *v.* Lafferty, 1 Wharton R. 314; Fant *v.* Sprigg, 50 Md. 551; Reynolds *v.* Magness, 2 Ired. L. 26; Williams *v.* Glenn, 92 N. C. 253; McLurd *v.* Clark, 92 N. C. 312; Cunningham *v.* Milner, 56 Ala. 522; Tutwiler *v.* Munford, 68 Ala. 124; Smith *v.* Conrad, 15 La. An. 579; Blake *v.* Hall, 19 La. An. 49; Sourse *v.* Marshall, 23 Ind. 194; McDill *v.* Dunn, 43 Ind. 315; Lapping *v.* Duffy, 65 Ind. 229; Burnes *v.* Thompson, 91 Ind. 146; Needles *v.* Hanifax, 11 Ill. Ap. 303; Long *v.* Battle Creek, 39 Mich. 323; Stowell *v.* Eldred, 39 Wis. 614; Clifford *v.* Baessman, 40 Wis. 597; Smith *v.* Moynihan, 44 Cal. 54; People *v.* Anderson, 44 Cal. 65; Hussman *v.* Wilke, 50 Cal. 250. See, for other cases, infra, §§ 1041, 1043, 1047–48, 1078, 1155. And see Cullen *v.* Bimm, 37 Ohio St. 236.

[4] Van Eman *v.* Stanchfield, 10 Minn. 255; Strader *v.* Lambeth, 7 B. Mon. 589.

§ 924. Before the question of variation by parol comes up, the whole context of the document in litigation must be considered.[1] If a word in one place be ambiguous, the ambiguity may be solved by recurrence to another part of the document in which the word is substantially defined.[2] For instance, if the word "close" be in dispute, in construing a will, evidence may be received, if the word was only used once, to show that, in the county where the property was situate, it denoted a farm; but if the word were found in other parts of the will, in any one of which this enlarged meaning could not be applied to it, such evidence would be rejected, as the court would then see that the testator had used the word in its ordinary sense, as denoting an inclosure.[3] Or, to borrow another illustration, the word "month," which denotes at law a lunar month, may be shown by its use in other portions of the same document to mean a calendar month.[4] It has also, in application of the same rule, been held that in aid of ambiguities in the disposing parts of a deed, the recitals may furnish a test for discovering the real intention of the parties, and for the determining the true meaning of the language employed.[5]

Whole document must be considered.

When documents are interdependent, they are to be construed together.[6]

It has sometimes been said that words are to be determined in their primary sense,[7] unless it appear that they are used in a tech-

"It has been held that a comptroller's deed for the non-payment of a tax due the state is not even *primâ facie* evidence of the facts giving him the right to sell, such as the assessment and non-payment of the tax, although they are recited in the deed, and this deed is in compliance with the statute. These facts must have existed to give a right to sell; but they are not established by the deed. They must be made out by independent proof. Tallman *v.* White, 2 N. Y. 66; Williams *v.* Payton, 4 Wheat. 77; Beekman *v.* Bigham, 5 N. Y. 366." Hunt, J., Mutual Ins. Co. *v.* Tisdale, 91 U. S. 245. See supra, § 176.

[1] Supra, § 619; infra, § 1103.

[2] Bateman *v.* Roden, 1 Jones & L. 356.

[3] Taylor's Ev. § 1032; Richardson *v.* Watson, 4 B. & Ad. 787, 799, per Parke, J.; 1 N. & M. 575, *S. C.*

[4] Lang *v.* Gale, 1 M. & Sel. 111; R. *v.* Chawton, 1 Q. B. 247.

[5] Lee *v.* Pain, 4 Hare, 218.

[6] Infra, § 1103; Beer *v.* Aultman, 32 Minn. 190.

[7] Mallan *v.* May, 13 M. & W. 517; Robertson *v.* French, 4 East, 135; Ford *v.* Ford, 6 Hare, 490; Gray *v.* Pearson, 6 H. of Lords Cas. 106; Abbott *v.* Middleton, 7 H. of L. Cas. 68; Gordon *v.* Gordon, L. R. 5 H. L. 254.

nical sense, in which case the latter sense is to control.[1] But as most difficulties of construction arise from words having several senses, it is a *petitio principii* to say that a particular sense is primary, and is therefore to prevail. The only course is to collect the sense from the whole document, and if this cannot be done, to resort to parol proof, in the mode hereafter prescribed.

Distinction between "primary" and "technical" untenable.

§ 925. It often happens that a conflict may exist between the written and the printed conditions of a contract executed on a printed form, in which the blanks are filled up in writing. If so, it is not to be forgotten that parties using a printed form are often careless as to its terms, signing it as a matter of course; and, independently of this, it is to be supposed that written conditions, specially introduced by them, would peculiarly exhibit their intention.[2] "If," said Lord Ellenborough, "the instrument consists partly of a printed formula and partly of written words, and any reasonable doubt is felt as to the meaning of the whole, the written words are entitled to have greater weight than those which are printed."[3] To this, however, Crompton, J., in 1864,[3] adds: "I do not find it anywhere laid down that, unless we can see some inconsistency, we can reject the printed words because there are lines filling up the blanks." And Blackburn, J., says further: "When there are mere formal and general words which are always put into contracts and are customary terms, and there are other special and peculiar words, I think that when one is to overpower the other and have most weight, that probably we should say that the special terms which a man has invented for himself and put into the contract have been more considered and more thought of than those merely ordinary words, and no doubt these printed forms are customary, and consequently the written terms would be more considered by him; and if they conflict and cannot be reconciled, then the written terms, those more special terms thought of by himself, may be considered

Written entries of more weight than printed.

[1] Shore *v.* Wilson, 9 Cl. & F. 525; Doe *v.* Perratt, 6 M. & Gr. 342.

[2] Robertson *v.* French, 4 East, 136; per Ellenborough, C. J., Young *v.* Grote, 4 Bing. 253. See Magee *v.* Lovell, L. R. 7 C. P. 113.

[3] Gumm *v.* Tyrie, 33 L. J. N. S. Q. B. 108, 111; 6 B. & S. 298; Jessell *v.* Bath, L. R. 2 Ex. 267.

to be more thought of, and consequently to have more weight by him."[1]

Informal memoranda excluded from operation of rule. Telegrams.

§ 926. We shall hereafter see that receipts,[2] bills of lading,[3] and subscription papers[4] are, as between the parties, withdrawn from the operation of the rule; such writings being memoranda, hastily given, and by business usage treated as provisional. That they may be explained and contradicted by parol proof is hereafter abundantly shown; and the same liberty exists as to informal, shorthand memoranda.[5] Thus in selling a chattel whose value is under the minimum of the statute of frauds, an auctioneer is not bound by the description of the article contained in the unsigned printed catalogue; but if, when the article was put up to auction, he publicly stated in the hearing of the purchaser that the description was incorrect, he will be entitled to a verdict for the price on giving parol proof of such statement.[6] Again, where a person, after having agreed to hire a horse, had given the owner a card, on which he had written in pencil, "Six weeks at two guineas, W. H.," the owner was allowed to prove by parol evidence an additional term of the contract, namely, that all accidents occasioned by the shying of the horse should be at the risk of the hirer.[7] The occupation and payment of rent of a tenement, also, may be proved orally on an issue of settlement (the fact there being whether the tenant paid rent), although there was a written lease giving other terms.[8] And the meaning of the words "in trust," in a bank book, may be in like manner explained.[9] From the brevity and elliptical form to which telegrams are reduced, they are peculiarly open to explana-

[1] To same effect see Joyce *v.* Ins. Co., L. R. 7 Q. B. 583; Dudgeon *v.* Pembroke, L. R. 2 Ap. Ca. 284. See, also, Alsager *v.* Dock Co., 14 M. & W. 799; Whart. on Cont. §§ 639 *et seq.*

[2] Infra, § 1064.

[3] Infra, § 1070.

[4] Infra, § 1068.

[5] Lockett *v.* Necklin, 2 Ex. R. 93; Palmer, in re, 21 Ch. D. 47; Amonett *v.* Montague, 63 Mo. 201; Sharp *v.* Radenburgh, 70 Ind. 547; Union Trust Co. *v.* Parsons, 98 Ind. 174; Adams *v.* Sullivan, 100 Ind. 8; Bennett *v.* Frany, 55 Tex. 145; Walters *v.* Vanderveer, 17 Kans. 425.

[6] Eden *v.* Blake, 13 M. & W. 614. See supra, § 922.

[7] Jeffrey *v.* Walton, 1 Stark. R. 267.

[8] R. *v.* Hull, 7 B. & C. 611.

[9] Powers *v.* Prov. Inst., 124 Mass. 377. See infra, § 937. So as to deposit tickets in bank. Weissinger *v.* Bank, 10 Lea, 330; and to bills of parcels, Irwin *v.* Thompson, 27 Kan. 643.

tion by parol.[1] And the same may be said of railway tickets which are subject to explanation by usage, and by the reasonable rules of the company.[2]

§ 927. The first question to determine, as to construing a document, is whether there is a document to construe. Hence it is always admissible to show by parol that a document was conditioned on an event that never occurred.[3] In other words, parol evidence is not admissible to vary the terms of a written contract, but it is to show that no

Parol evidence admissible to show document was not executed, or

[1] Beach *v.* R. R., 37 N. Y. 457. Infra, § 1016 ff.

[2] Johnson *v.* R. R., 46 N. H. 213; Cheney *v.* R. R., 11 Met. 121; Lake Shore R. R. *v.* Rosenzweig, 113 Penn. St. 519; Crawford *v.* R. R., 26 Ohio St. 580.

[3] Whart. on Cont. § 679; Davis *v.* Jones, 17 C. B. 625; Rogers *v.* Hadley, 2 H. & C. 227; Lindlay *v.* Lacy, 17 C. B. (N. S.) 587; Pym *v.* Campbell, 6 E. & B. 370; Gudgen *v.* Bessett, 6 E. & B. 986; Lister *v.* Smith, 3 Sw. & T. 282; Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109; Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. 222; Stanton *v.* Miller, 65 Barb. 58; Barker *v.* Prentiss, 6 Mass. 434; Rennell *v.* Kimball, 5 Allen, 356; Hildreth *v.* O'Brien, 10 Allen, 104; Robertson *v.* Evans, 3 S. C. 330; Greenawalt *v.* Kohne, 85 Penn. St. 369; Butler *v.* Smith, 35 Miss. 457; Kalamazoo *v.* Macalister, 40 Mich. 84; Treadwell *v.* Reynolds, 47 Cal. 171. Infra, § 934. "Parol evidence is clearly admissible to show the circumstances under which the contract was made, and the relation of the plaintiff and the defendant to it, and to each other in respect to it." *Per cur.* in Humfrey *v.* Dale, 7 E. & B. 266; and see L. Blackburn in River Wear *v.* Adamson, L. R. 2 Ap. Co. 763; 1 Q. B. D. 546; and *per cur.* in Lewis *v.* R. R., L. R. 3 Q. B. D. 195; Leake on Contr. 2d ed. 209.

"Parol evidence," argues Archibald, J., in a case determined in the High Court of Justice in November, 1875 (Clever *v.* Kirkman, 24 W. R. 159; 33 L. T. 672), "is not admissible to qualify or vary a written document, but it is to establish a contemporaneous agreement, postponing the date of the operation of a written agreement, which is in terms apparently absolute. Surely, then, parol evidence is admissible to show that the document was never intended to operate as an agreement at all; that the parties never accepted the document as the record of any contract. No doubt such evidence must be looked at most scrupulously, and the jury must be perfectly satisfied that what on the face of it is a valid, binding contract was never so intended by the man who drew it up. . . . . Parol evidence is admissible to show that there never was, in fact, any agreement at all. This is what Chief Justice Earle says in Pym *v.* Campbell, 6 E. & B. 370: 'The distinction is between admitting parol evidence to vary an agreement, and to show that what purports to be an agreement has in truth never become so.' Rogers *v.* Hadley, 2 H. & C. 227, is not so strong in its facts, but the same doctrine is as clearly laid down. So again in Wake *v.* Harrop, 6 H. & N. 768, the same law is laid down; while Mackinnon's case, L. R. 4 C. P. 784, is stronger than any."

was only conditional, or was rescinded.

contract ever existed of which they were the terms.[1] Parol evidence is admissible, therefore, to adopt one of Sir J. Stephen's exceptions,[2] to prove "the existence of any separate or oral agreement, constituting a condition precedent to the attaching of any obligation under any contract, grant, or disposition of property."[3] Hence it may therefore be shown by extrinsic proof that a deed within the statute of frauds, and duly signed, was not intended to operate as a binding conveyance.[4] But a condition subsequent, contradicting the document, cannot be so proved.[5] Parol evidence is also admissible to prove the rescission of a contract.[6]

Parol evidence admissible to prove that document was conditioned on a non-performed condition.

§ 928. If a document be signed by one party, in consequence of a parol agreement by the other party, which parol agreement is not performed, then it follows, from what has been said, that the party so signing may set up, as against the other party, the non-performance of the parol agreement.[7] So it is admissible, in an action against a landlord for breach of contract, for the tenant to prove that he had been induced to sign the lease in consideration of the landlord's verbal promise that a barn should be built upon the land before harvest.[8] And parol proof has been

[1] See to this effect Hill *v.* Miller, 76 N. Y. 32; Black *v.* Lamb, 1 Bears. (N. J.) 108; Leppoo *v.* Bank, 32 Md. 136; Kalamazoo Co. *v.* McAlister, 40 Mich. 84; Blake *v.* Coleman, 22 Wis. 415. See, however, Wemple *v.* Knopf, 15 Minn. 440. More fully, infra, § 1067.

[2] Evidence, art. 90.

[3] To this he cites Pym *v.* Campbell, 6 E. & B. 370; Wallis *v.* Littell, 11 C. B. (N. S.) 369; S. P., Michels *v.* Olmstead, 14 Fed. Rep. 219; Clarke *v.* Adams, 83 Penn. St. 309; Westman *v.* Krumweide, 30 Minn. 313.

A party may show that the object of a written agreement was different from what its language, if alone considered, would indicate. He may also show that the written instrument was executed in part performance only of an entire oral agreement, or that the obligation of the instrument has been discharged by the execution of a parol agreement collateral thereto. Juilleard *v.* Chaffee, 92 N. Y. 529. Whether an agent signed a document in his own right is to be determined by parol. Young *v.* Schuler, 11 Q. B. D. 651.

[4] Jervis *v.* Barridge, L. R. 8 Ch. 351; Hussey *v.* Payne, L. R. 4 Ap. Ca. 311; Deshon *v.* Ins. Co., 11 Met. 199; Wilson *v.* Powers, 131 Mass. 539. Supra, §§ 863–906.

[5] Supra, § 920; Miller *v.* Fletcher, 27 Grat. 403. See infra, § 929.

[6] See infra, § 1017; see Van Syckel *v.* Dalrymple, 32 N. J. Eq. 233, 826.

[7] See Barclay *v.* Wainwright, 86 Penn. St. 191, authorities cited, §§ 908, 927, 931.

[8] Shughart *v.* Moore, 78 Penn. St. 469. In this case the court said:

"The cases of Weaver *v.* Wood, 9 Barr, 220, and Powelton Coal Co. *v.*

received to show that a sale under a written instrument was to be by sample ;[1] and to establish a condition, attached to a sale, that the vendor would not ply his trade in the same neighborhood.[2] And so, generally, when one party prevents the other from performance the latter is excused for non-performance.[3]

§ 929. It is true that this exception must be strictly guarded. It is inadmissible, for instance, for a party, sued on a writing for the payment of money on a particular day, to prove a parol contemporaneous agreement that the time of payment should be extended to a subsequent day, unless there be in this respect a fraudulent imposition by the creditor on the debtor, or a mutual mistake.[4] So it is inadmissible, in a suit on a policy of insurance, where the limits of the voyage are specifically expressed, for the insurer to put in evidence a parol agreement that the risk was not to commence until the vessel reached an intermediate port.[5] Again, where the lease of a mine settles a price for the coal mined, it is inadmissible to prove by parol that the lessee agreed to mine all that he could, the lease containing no such provision, and fraud or mutual mistake not being set up.[6]

But plain written conditions cannot be varied, unless on proof of fraudulent imposition.

But the interposition of fraud, actual or constructive, makes such proof legitimate.[7] If it be adequately established that a party was induced to sign a contract by fraudulent parol representations that

McShain, 25 P. F. Smith, 238, are full to the point that the offer in evidence complained of in the first assignment of error ought to have been received. These cases settle, beyond all question, that, when a promise is made by one party in consideration of the execution of a written instrument by the other, it may be shown by parol evidence. It is no answer to this to say that the jury may have found for the defendant on the evidence, upon the ground that the plaintiff had prevented the defendant from fulfilling his contract to build the barn. How can we say that this was the point upon which the verdict was rendered, when both points were distinctly submitted, and when a very material part of the plaintiff's evidence upon one of them was excluded from the consideration of the jury?"

[1] Pike *v.* Fay, 101 Mass. 134.

[2] Pierce *v.* Woodward, 6 Pick. 206.

[3] U. S. *v.* Peck, 102 U. S. 64.

[4] Spartali *v.* Benecke, 10 C. B. 212 ; Field *v.* Lelean, 6 H. & N. 627 ; Spring *v.* Lovett, 11 Pick. 417 ; Allen *v.* Furbish, 4 Gray, 504 ; Coughenour *v.* Suhre, 71 Penn. St. 464. See, as to promissory notes, infra, §§ 1059–1062.

[5] Leslie *v.* De la Torre, 12 East, 583. See Weston *v.* Emes, 1 Taunt. 115 ; Ins. Co. *v.* Mowry, 96 U. S. 547. Infra, § 1177.

[6] Lyon *v.* Miller, 24 Penn. St. 392.

[7] Cathavin *v.* Davis, 4 Mackey, 146.

the contract was only to be contingently operative, then, upon such party himself doing equity, he will be protected from the enforcement of such contract. And the relief that would be given in this respect by a chancellor will be given by a common law court administering equitable remedies.[1] In fact, the qualification, "unless there be fraud," is usually introduced into the statement of the rule, that parol evidence is inadmissible to prove that a written instrument cannot be made dependent on an unwritten condition.[2]

Want of due delivery may be proved by parol, or delivery as an escrow.

§ 930. It may be proved by parol that the document, if meant to operate *inter vivos*, was never duly delivered, for this lies at the root of the question as to whether the document, in such case, is operative. Hence it may be shown by parol that a writing was not delivered, remaining an escrow;[3] or, as has been seen, that it was not to go into effect until an event which never happened.[4] A party, however, who acknowledges delivery cannot, without proof of fraud, contradict the acknowledgment, on the ground that the instrument was but an escrow,[5] though the averment of time of delivery may be varied by parol.[6] Waiver by consent of specific prerequisites may also be proved by parol.[7] Negotiable paper, however, cannot be qualified by evidence of this class, so as to affect innocent third parties,[8] nor bonds, when the proof contradicts the averments of the instrument, unless there be proof of fraud or con-

[1] See infra, §§ 931, 1019; Union Mut. Ins. Co. *v.* Wilkinson, 13 Wal. 222. But see Ins. Co. *v.* Mowry, 96 U. S. 544.

[2] Pickering *v.* Dowson, 4 Taunt. 779; Fancett *v.* Currier, 115 Mass. 20; Wharton *v.* Douglass, 76 Penn. St. 276.

[3] Whart. on Contracts, § 679; Murray *v.* Stair, 2 B. & C. 82; *S. C.* 3 D. & R. 278; Stanton *v.* Miller, 65 Barb. 58; Beall *v.* Poole, 27 Md. 645. See Snow *v.* Orleans, 126 Mass. 453; Ford *v.* James, 2 Abb. N. Y. App. 159; Demesmey *v.* Gravelin, 56 Ill. 93; Roberts *v.* Mullenix, 10 Kans. 22; cf. Brannan *v.* Bingham, 26 N. Y. 482; Miller *v.* Fletcher, 27 Grat. 403; Gibson *v.* Parlee, 2 Dev. & Bat. L. 530.

[4] See supra, §§ 927-28; infra, §§ 1019, 1067; Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. 222. See Morrison *v.* Lovejoy, 6 Minn. 319; and see infra, § 1067. As indicating the limits to which common law courts will go, see Abrey *v.* Crux, L. R. 5 C. P. 37; Adams *v.* Wordley, 1 M. & W. 374; Foster *v.* Jolly, 1 C. M. & R. 703; Woodbridge *v.* Spooner, 3 B. & Ald. 233.

[5] Cocks *v.* Barker, 49 N. Y. 107.

[6] Johnston *v.* McRary, 5 Jones (N. C.) L. 369; Treadwell *v.* Reynolds, 47 Cal. 171. Infra, § 976.

[7] Pechner *v.* Ins. Co., 65 N. Y. 195; infra, § 1017, and cases cited infra, § 931.

[8] See infra, § 1058.

current mistake.[1] Possession of a deed, it may be added, is presumptive proof of delivery.[2]

§ 931. It is also always admissible for a party to show that his execution of the contract was induced by fraud or compulsion. Before the rules excluding parol testimony to vary documents can be applied, we must determine whether a document legally exists.[3] That it exists must ordinarily be shown by parol, and the proof of such existence may be attacked by proof that the execution of the document was coerced by duress,[4] or elicited by fraud,[5] or

Fraud or duress may be shown by parol, and so as to insanity.

[1] Infra, § 1057; Black *v.* Shreve, 13 N. J. Eq. (2 Beas.) 455; Fulton *v.* Hood, 34 Penn. St. 365; Geddy *v.* Stainback, 1 Dev. & B. Eq. 475.

[2] Gilbert *v.* Bulkley, 5 Conn. 262; Philadelphia R. R. *v.* Howard, 13 Howard, 307; Warren *v.* Miller, 38 Me. 108; Reed *v.* Douthit, 62 Ill. 348. Infra, § 1313.

[3] Black *v.* R. R., 111 Ill. 361, where this position is adopted.

[4] Inst. 482; Bull N. P. 172; Collins *v.* Blantern, 2 Wils. 341; *S. C.* 1 Smith's L. C. 310; Paxton *v.* Popham, 9 East, 421; Hibbard *v.* Mills, 46 Vt. 243; Foley *v.* Greene, 14 R. I. 618; Knapp *v.* Hyde, 60 Barb. 80; Miller *v.* Miller, 68 Penn. St. 486; Feller *v.* Green, 26 Mich. 70; Seiber *v.* Price, 26 Mich. 518; King *v.* Williams, 65 Iowa, 167; Cadwallader *v.* West, 48 Mo. 483; Davis *v.* Fox, 59 Mo. 125; Davis *v.* Luster, 64 Mo. 43; Moore *v.* Rush, 30 La. An. 1157; Bane *v.* Detrick, 52 Ill. 19; Thurman *v.* Burt, 53 Ill. 129; Spaids *v.* Barrett, 57 Ill. 289; Bosley *v.* Shanner, 26 Ark. 280; Diller *v.* Johnson, 37 Tex. 47; Cook *v.* Moore, 39 Tex. 255; Olivari *v.* Menger, 39 Tex. 76.

Proof of a threat of imprisonment will establish duress; and there need be no proof of actual violence. Whatever would prove an assault may prove duress. See Whart. Crim. Law, § 97; Robinson *v.* Gould, 11 Cush. 57; Taylor *v.* Jacques, 106 Mass. 291; Foshay *v.* Ferguson, 5 Hill, N. Y. 154; and so of threats to a wife of prosecution for embezzlement. Eadie *v.* Slimmer, 26 N. Y. 9; Singer Co. *v.* Rawson, 50 Iowa, 637; and so of threatening in the same way the prosecution of a near relative. Sharon *v.* Gager, 46 Conn. 189; and see cases in Whart. on Cont. §§ 144 *et seq.* But a mere threat to prosecute does not have this effect. Plant *v.* Gunn, 2 Woods C. C. 372; Harmon *v.* Harmon, 61 Me. 227.

[5] Foster *v.* Mackinnon, L. R. 4 C. P. 704; Kain *v.* Old, 2 B. & C. 634; Filmer *v.* Gott, 4 Bro. P. C. 230; Robinson *v.* Vernon, 7 C. B. N. S. 231; Rogers *v.* Hadley, 2 H. & C. 227; Dobell *v.* Stephens, 3 B. & C. 623; Hotson *v.* Browne, 9 C. B. N. S. 442; Haigh *v.* Kaye, L. R. 7 Ch. 469; Barwick *v.* English Joint Stock Bk., L. R. 2 Ex. 259; Swift *v.* Winterbotham, L. R. 8 Q. B. 244; Selden *v.* Myers, 20 How. 506; Conley *v.* Nailor, 118 U. S. 127; Prentiss *v.* Russ, 16 Me. 30; Lull *v.* Cass, 43 N. H. 62; Montgomery *v.* Pickering, 116 Mass. 227; Franchot *v.* Leach, 5 Cow. 508; Koop *v.* Handy, 41 Barb. 454; Cobb *v.* Hatfield, 46 N. Y. 533; Kinney *v.* Kiernan, 49 N. Y. 164; Meyer *v.* Huneke, 55 N. Y. 412; Chapman *v.* Rose, 56 N. Y. 137; Christ *v.* Diffenbach, 1 Serg. & R. 464; Camp-

that, through the other party's fraud, material parts of the contract were omitted or altered.[1] For it is a settled principle of equity,—a principle absorbed in the common law of many jurisdictions,—that where one party is drawn into a contract by the other's fraud, he has his option of avoiding or enforcing the contract. Not only the parties to the agreement are thus affected, but the taint reaches all who are concerned in the fraud, and applies not only where statements are made which are false in fact, but where, although false in fact, they are believed to be true by the person making them, if such person, in the due discharge of his duty, ought to have known, or formerly knew and ought to have remembered, that they were false.[2] It is scarcely necessary to add that proof of im-

bell *v.* McClenachan, 6 Serg. & R. 171; Maute *v.* Gross, 56 Penn. St. 250; Horn *v.* Brooks, 61 Penn. St. 407; Wharton *v.* Douglass, 76 Penn. St. 273; Williams *v.* Williams, 63 Md. 371; Burtners *v.* Keran, 24 Grat. 42; Van Buskirk *v.* Day, 32 Ill. 260; Mitchell *v.* McDougall, 62 Ill. 498; Gage *v.* Lewis, 68 Ill. 613; Wray *v.* Wray, 32 Ind. 126; Woodruff *v.* Garner, 39 Ind. 246; Smith *v.* Boruff, 75 Ind. 412; Baldwin *v.* Burrows, 95 Ind. 81; Martindale *v.* Parsons, 98 Ind. 174; Childs *v.* Dobbins, 61 Iowa, 109; Gibbs *v.* Linaburg, 22 Mich. 479; Kellogg *v.* Steiner, 29 Wis. 626; Deakins *v.* Alley, 9 Lea, 494; McLean *v.* Clark, 47 Ga. 24; Turner *v.* Turner, 44 Mo. 535; Jamison *v.* Ludlow, 3 La. An. 492; Thomas *v.* Kennedy, 24 La. An. 209; Plant *v.* Condit, 22 Ark. 454; Grider *v.* Clopton, 27 Ark. 244; Cook *v.* Moore, 39 Tex. 255; Isenhoot *v.* Chamberlain, 59 Cal. 630. See Munson *v.* Nichols, 61 Ill. 111, a case where a wrong document was surreptitiously substituted.

[1] Buck *v.* Appleton, 14 Me. 284; Phyfe *v.* Wardell, 2 Edw. N. Y. 47; Partridge *v.* Clarke, 4 Penn. St. 166; Fisher *v.* Deibert, 54 Penn. St. 460; Powelton *v.* McShain, 75 Penn. St. 245; Chetwood *v.* Brittain, 1 Green Ch. N. J. 438; Shotwell *v.* Shotwell, 24 N. J. Eq. 378; Wesley *v.* Thomas, 6 Har. &. J. 24; Rohrabacher *v.* Ware, 37 Iowa, 85; Wade *v.* Saunders, 70 N. C. 270; Kennedy *v.* Kennedy, 2 Ala. 571; Blanchard *v.* Moore, 4 J. J. Marsh. 471. So as to forgery of documents. State *v.* Gonce, 79 Mo. 600; Snyder *v.* Jennings, 15 Neb. 872.

In Jackson *v.* Morter, 82 Penn. St. 291, it was held that fraudulent representations made by a purchaser at sheriff's sale, whereby others are dissuaded from bidding, constitute sufficient ground for setting the sale aside, even after the acknowledgment of the sheriff's deed, provided the application is made in time.

[2] "With respect to the character or nature of the misrepresentation itself, it is clear that it may be positive or negative; that it may consist as much in the suppression of what is true as in the assertion of what is false; and it is almost needless to add that it must appear that the person deceived entered into the contract on the faith of it. To use the expression of the Roman law (much commented upon in the argument before me), it must be a representation *dans locum contractui*, that is, a representation giving occa-

becility, or of drunkenness of one of the contracting parties, may be received as tending to show fraud in the other party.[1]

sion to the contract, the proper interpretation of which appears to me to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which, it is reasonable to infer, that he would not have entered into it; or the suppression of a fact, the knowledge of which, it is reasonable to infer, would have made him abstain from the contract altogether." Lord Romilly, M. R., in Pulsford *v.* Richards, 17 Beav. 95. Cf. Smith *v.* Kay, 7 H. L. Cas. 750.

"It is certainly permissible to give evidence of a verbal promise made by one of the parties, at the time of the making of a written contract, where such promise was used as an inducement to obtain the execution thereof. Campbell *v.* McClenachan, 6 S. & R. 171. This rule is put upon the ground that the attempt afterwards to take advantage of the omission from the contract of such promise is a fraud upon the party who was induced to execute it upon such promise, and hence he will be permitted to show the truth of the matter. Clark *v.* Partridge, 2 Barr, 13; Renshaw *v.* Gans, 7 Barr, 117; Dutton *v.* Tilden, 1 Harris, 49." Gordon, J., Powelton C. Co. *v.* McShain, 75 Penn. St. 245.

"The rule at common law was that fraud could not be pleaded or given in evidence as a defence to an action on a specialty, unless it vitiated the execution of the instrument, and that the defendant, in such an action, was not allowed to show that he was induced to execute it by fraudulent representation as to the nature or value of the consideration. This rule, however, is materially modified by our statute relating to negotiable instruments, by which it is provided that in actions upon bonds for the payment of money or the performance of covenants, as well as upon bills and notes, it may be set up as a defence that the instrument was executed without any good or valuable consideration, or that the consideration has failed in whole or in part.

"Under this statute it is competent to show that the defendant was induced to execute the instrument by false and fraudulent representations, as that is one mode of showing a failure of consideration. White *v.* Watkins, 23 Ill. 482; Greathouse *v.* Dunlap, 3 McLean, 304; Case *v.* Bangton, 11 Wend. 108; Leonard *v.* Bates, 1 Blackford, 172; Fitzgerald *v.* Smith, 1 Ind. 310; Chambers *v.* Gaines, 2 Greene, 320. And, for this purpose, it may be shown that the consideration expressed in the instrument is not the real consideration which induced its execution, but that it was, in fact,

[1] Affleck *v.* Affleck, 3 Sm. & G. 394; Molton *v.* Camroux, 4 Excheq. 17; Rhodes *v.* Bate, L. R. 1 Ch. 252; Hovey *v.* Chase, 52 Me. 305; Staples *v.* Wellington, 58 Me. 453; Farnam *v.* Brooks, 9 Pick. 220; Bond *v.* Bond, 7 Allen, 1; Warnock *v.* Campbell, 25 N. J. Eq. 485; La Rue *v.* Gilkyson, 4 Barr, 375; Beals *v.* See, 10 Barr, 56; Case *v.* Case, 26 Mich. 484; Baldwin *v.* Dunton, 40 Ill. 188; Wiley *v.* Ewalt, 66 Ill. 26; Phelan *v.* Gardner, 43 Cal. 306; Parker *v.* Davis, 8 Jones, N. C. 460. See Chitty on Cont. 112; Story on Contracts, § 27; and for details of cases, 1 Wh. & St. Med. Jur. (1873) §§ 9–11.

And so of trust.

§ 931 *a*. Parol evidence, as will hereafter be more fully seen, is admissible to show that an engagement on its face absolute is in trust or subject to overriding equities.[1]

But in such case complainant must do equity and have a strong case.

§ 932. The party seeking to avoid a contract on the ground of fraud must himself be free from all suspicion of fraud, must have been reasonably free from negligence, must act promptly, and must return or offer to return any advantages he may have secured from the contract.[2] Thus where a party signs a paper without either reading it, or, if he cannot read, asking to have it read to him, he can-

entirely different. G. W. Ins. Co. *v.* Rees, 29 Ill. 272. In that case, speaking of the statute referred to, and admitting parol evidence to explain the consideration, it was said: 'It is impossible that this statute can be made effective in any other way than by receiving such proofs; and in receiving them, the old rule, that written contracts cannot be varied by parol, becomes, in all such cases, ineffective.

"'The ruling of this court, therefore, in Lane *v.* Sharpe, 3 Scam. 566, and in all subsequent cases founded upon that, is to be considered as having no application to a case where no consideration, or a partial or total failure of consideration, is properly pleaded in an action brought upon an instrument of writing for the payment of money or property, or the performance of covenants, or conditions to an obligee or payee.'

"No necessity is now perceived to overrule that case, or modify the rule there announced." Scholfield, J., Gage *v.* Lewis, 68 Ill. 613. That a release fraudulently obtained is a nullity, see Eagle Co. *v.* Defries, 94 Ill. 598.

[1] Infra, § 1031 ff.; Brick *v.* Brick, 98 U. S. 511; Goddard *v.* Rawson, 130 Mass. 971; Reeve *v.* Dennett, 137 Mass. 315; Wadsworth *v.* Glynn, 131 Mass. 320; Woolley *v.* Newcombe, 87 N. Y. 605; Marsh *v.* McNair, 99 N. Y. 174; Booth *v.* Robinson, 55 Md. 419; Wendlinger *v.* Smith, 75 Va. 309; Coffman *v.* Coffman, 79 Va. 504; Hill *v.* Goodrich, 39 Mich. 439; Elder's Appeal, 39 Mich. 47; Hyler *v.* Nolan, 45 Mich. 357; Wing Co. *v.* Moe, 62 Wis. 240; Garretson *v.* Bitzer, 57 Iowa, 469; Davenport Bank *v.* Baker, 57 Iowa, 197; Walker *v.* Camp, 63 Iowa, 627; Rice *v.* Troup, 62 Miss. 186; Brewster *v.* Davis, 56 Tex. 478. Thus a sale may be proved to be a bailment. Lyon *v.* Lemen, 106 Ind. 567; Allen *v.* Bryson, 67 Iowa, 591.

[2] Infra, § 1019; Sanborn *v.* Batchelder, 51 N. H. 426; Manahan *v.* Noyes, 52 N. H. 232; Bruce *v.* Davenport, 1 Abb. (N. Y.) App. 233; Spurgin *v.* Traub. 65 Ill. 170; Lane *v.* Latimer, 41 Ga. 171.

When an educated person, who, by very simple means, might have ascertained what are the contents of a deed, is induced to execute it by a false representation of such contents, it is doubtful whether he may not, by executing it negligently, be estopped between himself and a person who innocently acted upon the faith of the deed being a valid one. Per Mellish, L. J., Hunter *v.* Walters, L. R. 7 Ch. 75. See Androscoggin Bank *v.* Kimball, 10 Cush. 373, quoted infra, § 1243.

not obtain relief.[1] The evidence of fraud, in order to vacate a solemnly executed instrument, must be, it need scarcely be added, clear and strong;[2] and this rule is the more important since the passage of the statute enabling parties to testify in their own cases.[3]

§ 933. We have just seen that parol evidence of fraud, duress, and insanity is admissible to invalidate a writing, on a case being clearly shown. In the same light may be viewed contracts based on concurrent mistake. In fact, for a party to seek to take advantage of a contract based on a concurrent mistake is itself a fraud, which equity will correct.[4]

Concurrent mistake may be proved to invalidate document.

§ 934. Mistake by one party alone, however, is no ground for reformation, though, when there is fraud, it may sustain an application for rescission;[5] and even where the mistake is concurrent, the complainant must have a strong case and be ready to do equity.[6] And in all cases of this class, the fraud or concurrent mistake must be clearly shown.[7]

But not mistake of one party.

§ 935. On the same reasoning it may be proved that the contract embodied by the writing is illegal and therefore void. If void, it is not a contract; to exclude parol evidence because it is a contract is to assume the very point in litigation.[8] Nor can any form of instrument of indebt-

Illegality of document may be proved by parol.

[1] Hallenbeck *v.* De Witt, 2 Johns. R. 404; Greenfield's Est., 14 Penn. St. 489; Weisenberger *v.* Ins. Co., 56 Penn. St. 442; 2 Kent's Com. 646; 1 Story's Eq. § 200 *a*. Infra, § 1243.

[2] See infra, § 1019.

[3] Faucett *v.* Currier, 109 Mass. 79; *S. C.* 115 Mass. 27; Martin *v.* Berens, 67 Penn. St. 459. In Penns. R. R. *v.* Shay, 82 Penn. St. 198, Sharswood, J., said: "It has more than once been held that it is error to submit a question of fraud to the jury upon slight parol evidence to overturn a written instrument. The evidence of fraud must be clear, precise, and indubitable, otherwise it should be withdrawn from the jury. Stine *v.* Sherk, 1 W. & S. 195; Irwin *v.* Shoemaker, 8 W. & S. 75; Dean *v.* Fuller, 4 Wright, 474. Since parties are allowed to testify on their own behalf, it has become still more necessary that this important rule should be strictly adhered to and enforced."

[4] See fully infra, § 1021; Brioso *v.* Ins. Co., 4 Daly (N. Y.), 246; Bryce *v.* Ins. Co., 55 N. Y. 240; Nelson *v.* Davis, 40 Ind. 366; Hearst *v.* Pujol, 44 Cal. 230; Bridwell *v.* Brown, 48 Ga. 179; Miller *v.* Davis, 10 Kans. 541.

[5] Infra, § 1021.

[6] See infra, §§ 1019 *et seq.*

[7] Supra, § 933; infra, § 1022.

[8] Collins *v.* Blantern, 2 Wils. 341; 1 Smith's L. C. 310; Benyon *v.* Littlefold, 3 M. & Gord. 94; Doe *v.* Ford, 3 A. & E. 649; Totten *v.* U. S., 92 U. S. 105; Shackford *v.* Newington, 46 N. H. 415; Wyman *v.* Fiske, 3 Allen,

edness preclude a debtor from setting up usury.[1] But the implication of usury may be rebutted by showing that the reservation of excess was a mistake in fact.[2]

Intent cannot be proved to affect written meaning.

§ 936. Intention declared orally is not necessarily that which controls a party in executing an instrument. Many persons are chary in expressing their real intentions. Others like to hint at tentatory schemes, which they have no fixed purpose of realizing; others may wish to mislead, sometimes from policy, sometimes from crookedness. Old and childless persons, who have wills to make, for instance, are apt to throw out expressions of intended bounty which they are so far from effectuating that it is a common observation that the will that is promised is not the will that is made. Then, again, my intention a moment ago, and that which I declared as my intention, may not be my intention now. The mind changes rapidly; caprice, or a new though sudden light, may bring about an immediate and real change of my purposes. Or, supposing my mind remains unchanged, to permit my private intention to overrule the natural and obvious meaning of my written engagement would be to give to secret mental reservations an ascendency destructive of fair business dealing. And even supposing there be no such taint possible, to permit the treacherous medium of memory as to conversation to supersede the more exact and authoritative medium of a written statement, would be to subordinate the superior to the inferior mode of proof. For these and other reasons the courts have united, with limitations to be hereafter expressed, in holding that the obvious meaning of a dispositive document cannot be varied by proof of the writer's intent.[3]

238; Pratt *v.* Langdon, 97 Mass. 97; Martin *v.* Clarke, 8 R. I. 389; Leppoc *v.* Bank, 32 Md. 136; Bowman *v.* Torr, 3 Iowa, 571; Williams *v.* Donaldson, 8 Iowa, 109; Corbin *v.* Sistrunk, 19 Ala. 203; Fletcher's Succession, 11 La. An. 59; Lazare *v.* Jacques, 15 La. An. 598; Newsom *v.* Thighen, 30 Miss. 414. Hence it is admissible to prove that a written contract in form of a sale was really the security for a usurious loan. Ferguson *v.* Sutphen, 8 Ill. 547.

[1] Chamberlain *v.* McClurg, 8 Watts & S. 31.

[2] Griffin *v.* N. J. Co., 11 N. J. Eq. (3 Stock.) 49.

[3] Shore *v.* Wilson, 9 Cl. & F. 525, 556, 565; Peel, in re, L. R. 2 P. & D. 46; Hunt *v.* Rousmanier, 8 Wheat. 174; Shankland *v.* Washington, 5 Pet. 390; Elder *v.* Elder, 10 Me. 80; Eveleth *v.* Wilson, 15 Me. 109; Wiggin *v.* Goodwin, 63 Me. 389; Fitts *v.* Brown, 20 N. H. 393; Delano *v.* Goodwin, 48 N. H.

§ 937. Yet, where a description in a document is equally applicable to two or more objects, the declarations of the author may be received to explain to which of these objects the description refers. Intention, thus proved, is subject to the drawbacks mentioned in the last section. It may have changed since its last expression; it may not have been sincere;[1] yet it is to be considered in determining what the language in controversy really means. This, it should be remembered, is the issue. The issue is not the secret meaning of the parties. That is something which we have no means of determining, and which is so complex, and often so transient and subtile, even if conceivable, that we might have no means of executing it could it be ascertained. We are restricted, therefore, to the interpretation of the language used; and proof of intention is only admissible when, in cases of ambiguity, proof of intention enables us to discover what the language means.[2] "You cannot vary the terms

Otherwise as to ambiguous terms.

203; Ripley *v.* Paige, 12 Vt. 353; Fitzgerald *v.* Clark, 6 Gray, 393; Perkins *v.* Young, 16 Gray, 389; Fitchburg *v.* Lunenburg, 102 Mass. 358; Cook *v.* Shearman, 103 Mass. 21; Elliott *v.* Weed, 44 Conn. 19; Sayre *v.* Peck, 1 Barb. 464; Spencer *v.* Tilden, 5 Cow. 144; Long *v.* R. R., 50 N. Y. 76; Perrine *v.* Cheeseman, 6 Halst. 174; Huffman *v.* Hummer, 2 C. E. Green N. J. 269; Heilner *v.* Imbrie, 6 Serg. & R. 401; Ellmaker *v.* Ins. Co., 5 Penn. St. 183; Wier *v.* Dougherty, 27 Penn. St. 182; Albert *v.* Ziegler, 29 Penn. St. 50; Lloyd *v.* Farrell, 48 Penn. St. 73; Kirk *v.* Hartman, 63 Penn. St. 97; Wesley *v.* Thomas, 6 Har. & J. 24; McClernan *v.* Hall, 33 Md. 293; Stevens *v.* Hay, 8 Ind. 277; Oiler *v.* Bodkey, 17 Ind. 600; Woodall *v.* Greater, 51 Ind. 539; Abrams *v.* Pomeroy, 13 Ill. 133; Robinson *v.* Magarity, 28 Ill. 423; McCloskey *v.* McCormick, 37 Ill. 66; McCormick *v.* Huse, 66 Ill. 315; Hartford Ins. Co. *v.* Webster, 69 Ill. 392; Pilmer *v.* Branch Bank, 16 Iowa. 321; Ward *v.* Ledbetter, 1 Dev. & B. Eq. 496; Delaney *v.* Anderson, 54 Ga. 586; Turner *v.* Wilcox, 54 Ga. 593; Kennedy *v.* Kennedy, 2 Ala. 571; Sanford *v.* Howard, 29 Ala. 684; Selby *v.* Friedlander, 22 La. An. 281; Herndon *v.* Henderson, 41 Miss. 584; Cocke *v.* Bailey, 42 Miss. 81; Peers *v.* Davis, 29 Mo. 184; Joliffe *v.* Collins, 21 Mo. 338; State *v.* Lefaivre, 53 Mo. 470; Ruiz *v.* Norton, 4 Cal. 359; Price *v.* Allen, 9 Humph. 703; Harrell *v.* Durrance, 9 Fla. 490.

[1] See on this point Whart. on Contracts, § 659.

[2] Doe *v.* Hiscocks, 5 M. & W. 363; Tutgay *v.* Sampson, 30 L. T. 262; Chicago *v.* Sheldon, 9 Wall. 50; Atlantic R. R. Co. *v.* Bank, 19 Wall. 548; Gray *v.* Harper, 1 Story R. 574; Reed *v.* Ins. Co., 95 U. S. 23; Fenderson *v.* Owen, 54 Me. 374; Stone *v.* Aldrich, 43 N. H. 52; Lowry *v.* Adams, 22 Vt. 160; Farmers' Bk. *v.* Whinfield, 24 Wend. 419; Howlett *v.* Howlett, 56 Barb. 467; Gage *v.* Jaqueth, 1 Lans. 207; Dent *v.* Ins. Co., 49 N. Y. 390; Von Keller *v.* Schulting, 50 N. Y. 108; Stapenhorst *v.* Wolff, 35 N. Y. Sup. Ct. 25; Collender *v.* Dinsmore, 55 N. Y. 200; Conover *v.* Wardell, 20 N. J. Eq. 266; Havens

of a written instrument by parol evidence; that is a regular rule: but if you can construe an instrument by parol evidence, when that instrument is ambiguous, in such a manner as not to contradict, you are at liberty to do so."[1] Thus where on the face of a document it is doubtful whether a memorandum at its foot is part of it, evidence of the intention of the parties is admissible to solve the doubt.[2] An omitted inventory, also, referred to in a deed, may be supplied by extrinsic proof;[3] and a short-hand memorandum or abbreviation may be by parol expanded.[4] So where, on the face of a writing, it is doubtful whether a principal or an agent is primarily liable, parol proof may be received to settle the doubt.[5] So where the issue is whether a bequest of stock is specific or pecuniary, evidence may be received of the state of the testator's funded property.[6]

v. Thompson, 26 N. J. Eq. 383; Armstrong *v.* Burrows, 6 Watts, 266; Coleman *v.* Grubb, 23 Penn. St. 393; Helme *v.* Ins. Co., 61 Penn. St. 107; Caley *v.* R. R., 80 Penn. St. 363; Quigley *v.* De Haas, 98 Penn. St. 292; Fryer *v.* Patrick, 42 Md. 51; Davis *v.* Shaw, 42 Md. 410; Ins. Co. *v.* Troop, 22 Mich. 146; Am. Ex. Co. *v.* Schier, 55 Ill. 140; West. R. R. *v.* Smith, 75 Ill. 597; Greene *v.* Day, 34 Iowa, 328; Poindexter *v.* Cannon, 1 Dev. Eq. 373; Terrell *v.* Walker, 69 N. C. 244; Jenkins *v.* Cooper, 50 Ala. 419; Baldwin *v.* Winslow, 2 Minn. 213; St. Louis Gas Co. *v.* St. Louis, 46 Mo. 121; Wood *v.* Augustine, 61 Mo. 46; Simpson *v.* Kimberlin, 12 Kans. 579; Waymack *v.* Heilman, 26 Ark. 449; Goodrich *v.* McClary, 3 Neb. 123.

Where an order is "to be paid out of the last payment," extrinsic evidence is admissible to show the meaning of these words. Proctor *v.* Hartigan, 139 Mass. 554. Parol evidence has been received to explain a grant to M. of a lot "extending to storm-tide mark of the Atlantic Ocean," where the bank, as carried out by alluvial deposits, was by M.'s grantees inclosed, occupied, improved, and conveyed in parcels. Camden and Atlantic Land Co. *v.* Lippincott, 45 N. J. L. 405.

[1] Goldshede *v.* Swan, 1 Ex. 158, Parke, B.; Shovington *v.* Smith, 8 Wal. 1.

[2] Verzan *v.* McGregor, 23 Cal. 339.

[3] England *v.* Downs, 2 Beav. 523.

[4] Kinney *v.* Flynn, 2 R. I. 319; Jaqua *v.* Witham Co., 106 Ind. 545. See infra, § 972.

"Spitting of blood," in application for a life insurance, can be explained by parol. Singleton *v.* Ins. Co., 66 Mo. 63.

An entry in a bank book of a deposit, "in trust," may be shown, as to third parties, to have been for the depositor's own use. Powers *v.* Prov. Inst., 124 Mass. 377; citing Brabrock *v.* Savings Bk., 104 Mass. 228; Clark *v.* Clark, 108 Mass. 522.

[5] Higgins *v.* Senior, 8 M. & W. 834; Trueman *v.* Loder, 11 A. & E. 589; Beckman *v.* Drake, 9 M. & W. 79; Lerned *v.* Johns, 9 Allen, 419; Ohio R. R. *v.* Middleton, 20 Ill. 629; and other cases cited infra, §§ 949 *et seq.*

[6] Atty.-Gen. *v.* Grote, 2 Russ. & Myl. 699, per Lord Eldon; Wigr. Wills, 201, *S. C.*; Boys *v.* Williams, 2 Russ. & Myl. 689, per Ld. Brougham; Horwood *v.* Griffith, 23 L. J. Ch. 465; 4 De Gex, M. & G. 709, *S. C.*; Taylor, § 1083.

Where, also, the defendant agreed to pay "$1700 lawful money of the United States, *and* $500 *in an order on W. and T.*," it was held that it was admissible to prove that the order for $500 was for sashes, blinds, etc., in which W. and T. dealt.[1] As we shall hereafter see,[2] the rule before us is eminently applicable where signs or terms of art are employed.[3] "Where characters, marks, or technical terms are used in a particular business, unintelligible to persons unacquainted with such business, and occur in a written instrument, their meaning may be explained by parol evidence, if the explanation is consistent with the terms of the contract."[4] At the same time, the court, in determining the meaning of a word that has both a primary and obvious, and a secondary and remote, signification, will not admit technical evidence from experts as to the secondary meaning of the word unless satisfied that it is to be construed in its secondary sense.[5]

§ 938. When declarations of intention are admissible, under the restrictions above stated, it is not necessary that they should be contemporaneous.[6] It is elsewhere shown that declarations of a deceased predecessor in title are admissible to affect his successors,[7] and that declarations of deceased relatives are admissible in questions of pedigree.[8] But independent of these limitations, it is the better opinion that the declarations of a deceased person, subsequently to the execution of a document, signed by him, are admissible, in aid of construction, in all cases in which contemporaneous declarations would be received;[9] and so, also, has it been held as to previous

Declarations of intention need not be contemporaneous.

[1] Hinnemann *v.* Rosenback, 39 N. Y. 98.

[2] Infra, § 972.

[3] Infra, §§ 938, 953, 961, 972.

[4] Allen, J., Collender *v.* Dinsmore, 55 N. Y. 206; citing Dana *v.* Fiedler, 2 Ker. 40; Barnard *v.* Kellogg, 10 Wallace, 383; Robinson *v.* U. S., 13 Ibid. 363; Wails *v.* Bailey, 49 N. Y. 464; Attorney-General *v.* Shore, 11 Simons, 616. See, to same effect, Sweet *v.* Lee, 3 Man. & Gr. 452; Webster *v.* Hodgkins, 5 Fost. 128; Farmers' Bk. *v.* Day, 13 Vt. 36; Stone *v.* Hubbard, 7 Cush. 595; Keller *v.* Webb, 125 Mass. 88; Colwell *v.* Lawrence, 38 Barb. 643; Hite *v.* State, 9 Yerg. 357. Infra, § 972.

[5] Holt *v.* Collyer, 16 Ch. D. 718; 44 L. T. 214.

[6] Though see Thomas *v.* Thomas, 6 T. R. 671.

[7] Infra, § 1156.

[8] Supra, § 201.

[9] Doe *v.* Allen, 12 A. & E. 455.

declarations.[1] But such declarations must relate to the specific writing in dispute.[2]

Evidence admissible to bring out true meaning of writings.

§ 939. To explain the meaning of a writing in the true sense, and with this limit, is simply to develop the real meaning of the document.[3] In ordinary cases, this office is performed by the attaching to words their proper meaning.[4] Hence punctuation may be supplied by aid of parol evidence as to intent;[5] words that are blurred or defaced may be deciphered by aid of the same evidence;[6] foreign words may be translated by interpreters,[7] abbreviations expanded by persons familiar with the objects described,[8] and terms of art defined by experts.[9] It is in accordance with the same principle that ambiguities, in reference either to the persons affected by the document or to the thing passed by it, may be explained by parol evidence.[10]

[1] Doe *v.* Hiscocks, 5 M. & W. 369.

[2] Whitaker *v.* Tatham, 7 Bing. 628. Infra, § 1079.

[3] See distinctions taken in Whart. on Contracts, §§ 634 *et seq.*

[4] See supra, § 937.

[5] Gauntlett *v.* Carter, 17 Beav. 586. See Doe *v.* Martin, 4 T. R. 65; Graham *v.* Hamilton, 5 Ired. L. 428. Infra, § 972.

[6] Fenderson *v.* Owen, 54 Me. 372. Infra, § 972.

[7] Supra, §§ 174, 407, 493.

[8] Whart. Crim. Law, § 405; Hite *v.* State, 9 Yerg. 357. Infra, § 972.

[9] See supra, § 435; infra, § 972; Pollen *v.* Le Roy, 30 N. Y. 549.

[10] Bank of U. S. *v.* Dunn, 6 Pet. 51; Peisch *v.* Dickson, 1 Mason, 9; Heckscher *v.* Binney, 3 Wood. & M. 333; Brock *v.* Brock, 98 U. S. 504; Fenton *v.* U. S., 17 Ct. of Cl. 138; Haven *v.* Brown, 7 Greenl. 421; Patrick *v.* Grant, 14 Me. 233; Gallagher *v.* Black, 44 Me. 99; George *v.* Joy, 19 N. H. 544; Hall *v.* Davis, 36 N. H. 569; Holmes *v.* Crossett, 33 Vt. 116; Sutton *v.* Bowker, 5 Gray, 416; Chester Emery Co. *v.* Lucas, 112 Mass. 424; Willis *v.* Hulbert, 117 Mass. 151; Hotchkiss *v.* Barnes, 34 Conn. 27; Ely *v.* Adams, 19 Johns. R. 313; Galen *v.* Brown, 22 N. Y. 37; Von Keller *v.* Schulting, 50 N. Y. 108; Block *v.* Ins. Co., 42 N. Y. 393; Clinton *v.* Ins. Co., 45 N. Y. 454; Dent *v.* Steamship Co., 49 N. Y. 390; Oliver *v.* Phelps, 20 N. J. L. 180; Suffern *v.* Butler, 21 N. J. E. 410; Com. *v.* Blaine, 4 Binn. 186; Russel *v.* Werntz, 24 Penn. St. 337; Chalfant *v.* Williams, 35 Penn. St. 212; Quigley *v.* De Haas, 98 Penn. St. 292; Crawford *v.* Morris, 5 Grat. 90; Masters *v.* Freeman, 17 Ohio St. 323; Barrett *v.* Stow, 15 Ill. 423; Clark *v.* Powers, 45 Ill. 283; Weber *v.* Anderson, 73 Ill. 439; Facey *v.* Otis, 11 Mich. 213; Ins. Co. *v.* Sharp, 22 Mich. 146; Corbett *v.* Berryhill, 29 Iowa, 157; Scott *v.* Blaze, 29 Iowa, 168; Greene *v.* Day, 34 Iowa, 328; Crawford *v.* Jarrett, 2 Leigh, 630; Wilson *v.* Robertson, 7 J. J. Marsh. 78; Terrell *v.* Walker, 66 N. C. 244; Milling *v.* Crankfield, 1 McCord, 258; Bowen *v.* Slaughter, 24 Ga. 338; Crawford *v.* Brady, 35 Ga. 184; Paysant *v.* Ware, 1 Ala. 160; Morrison *v.* Taylor, 21 Ala. 779; Gunn *v.* Clendenin, 68

§ 940. Extrinsic circumstances, also, in cases of ambiguity, are of value in elucidating the true meaning.[1] The Court and jury, in interpreting what the writer meant, must put themselves, as far as evidence can enable them to do so, in his position.[2] Thus in a case already cited, where

Extrinsic evidence to prove true construction.

Ala. 294; Shuetze *v.* Bailey, 40 Mo. 69; Kimball *v.* Brawner, 47 Mo. 398; St. Louis Gas Light Co. *v.* St. Louis, 46 Mo. 121; McPike *v.* Allman, 53 Mo. 551; Shewalter *v.* Pirner, 55 Mo. 218; Hancock *v.* Watson, 18 Cal. 137; Piper *v.* True, 36 Cal. 606; and see fully infra, §§ 942–950. So facts of public notoriety relating to a contract are to be presumed to be known to the parties, and these facts may be used in construing ambiguous terms. Woodruff *v.* Woodruff, 52 N. Y. 53. Infra, § 1243.

[1] Brock *v.* Brock, 98 U. S. 504; U. S. *v.* Peck. 102 U. S. 64; Emery *v.* Webster, 42 Me. 204; Grant *v.* Lathrop, 23 N. H. 67; French *v.* Hayes, 42 N. H. 30; Aldrich *v.* Aldrich, 135 Mass. 153; Hotchkiss *v.* Barnes, 34 Conn. 27; Knight *v.* Worsted Co., 2 Cush. 271; Phelps *v.* Bostwick, 22 Barb. 314; Halstead *v.* Meeker, 15 N. J. L. 136; Frederick *v.* Campbell, 14 S. & R. 293; Bollinger *v.* Eckert, 16 S. & R. 422; Carmony *v.* Hoober, 5 Penn. St. 305; Martin *v.* Berens, 67 Penn. St. 462; Clarke *v.* Adams, 83 Penn. St. 309; Ratcliffe *v.* Allison, 3 Rand. 537; Hammam *v.* Keigwin, 39 Tex. 34.

The question being which of two horses the defendant agreed to deliver to the plaintiff in exchange for a chattel of the plaintiff's, evidence that the plaintiff's chattel was, and was known by the parties to be, worth much less than the more valuable horse, is admissible. Norris *v.* Spofford, 127 Mass. 85.

[2] Shore *v.* Wilson, 9 Cl. & F. 556; per Parke, B.; Guy *v.* Sharpe, 1 Myl. & K. 602, per Lord Brougham; Sweet *v.* Lee, 3 M. & Gr. 466, per Tindal, C. J.; Drummond *v.* Atty.-Gen., 2 H. of L. Ca. 862, by Lord Brougham; Simpson *v.* Margetson, II Q. B. 32, by Lord Denman; Taylor's Ev. § 1082.

"I apprehend that there are two descriptions of evidence . . . . which are clearly admissible 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 when 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 an appropriate meaning, either generally or by local usage, or amongst particular classes. . . .

"This description of evidence is admissible 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." Parke, B., Shore *v.* Wilson, 9 Cl. & F. 555.

Where a boundary, if being as claimed by the defendant, would have run directly through a dwelling-house unmentioned in the applicatory deed, parol evidence was received of the construction given by the subsequent acts of the parties. Lovejoy *v.* Lovett, 124 Mass. 270.

it was doubtful what articles a written order was for, it was held admissible to prove the business of the party drawn on.[1] So, where in a partition between heirs, a right of way is assigned to one of them, and it is doubtful which of two ways was intended by the deed, extrinsic proof as to the character of the ways is admissible, to solve the doubt.[2] Evidence, also, of surrounding circumstances is admissible, to show that a guarantee was intended to be a continuing one.[3] So, such evidence has been received to explain the meaning of the phrase, "across a country," in a steeple-chase transaction;[4] that "a thousand" means a hundred dozen;[5] and that a contract to pay an actor so much a week was a contract to pay only during the theatrical season.[6] So, in a case elsewhere cited,[7] extrinsic evidence was received to explain the phrase, "Godly preachers of Christ's Holy Gospel," and to show that, according to the usage of a sect to which the grantor belonged, the grant was intended for that sect; and evidence, also, is admissible to show that "Gottesdienst," in a contract between two congregations for the building of an edifice to be built in common, does not cover Sunday schools.[8] It has been held, also, admissible to introduce proof of extrinsic facts to explain the local meaning of "good" or "fine" barley,[9] to indicate the amount implied in a contract to buy "your wool" from a party;[10] and, generally, in all cases where the signification of a particular phrase is unsettled and variable in its nature, and where it is liable to have different senses attached to it in different places, to elucidate such meaning. But it is essential in such cases that the sense thus sought should be of a public and popular kind; and it will not be allowable to show that a party used the term in a sense opposed to its local and conventional usage. Thus, where a testatrix was in the habit of treating certain shares as "double shares," evidence of this was not allowed to influence the

[1] Hinnemann *v.* Rosenback, 39 N. Y. 98.

[2] French *v.* Hayes, 43 N. H. 30.

[3] Heffield *v.* Meadows, L. R. 5 C. P. 595.

[4] Evans *v.* Pratt, 3 M. & G. 759.

[5] Smith *v.* Wilson, 3 B. & Ad. 278. See, as a case where parol evidence is admissible to explain figures, Slater *v.* Cave, 12 Ohio St. 80.

[6] Grant *v.* Maddox, 15 M. & W. 737.

[7] Shore *v.* Wilson, 9 Cl. & F. 555.

[8] Gass's App., 73 Penn. St. 39. This and analogous cases are discussed in Whart. on Contracts, § 635.

[9] Hutchinson *v.* Bowker, 3 B. & Ad. 278.

[10] Macdonald *v.* Longbottom, 28 L. J. Q. B. 293; 29 L. J. Q. B. 256.

construction of her will, Page Wood, V. C., saying, "I must take things to be as I find them, and cannot allow particular expressions, said to have been made use of by this testatrix, to prevail, when they are not the general language universally applicable to the subject-matter."[1] It must be remembered, however, that "A written

[1] Millard *v.* Bailey, L. R. 1 Eq. 382; 35 L. J. Ch. 312; Powell's Evidence (4th ed.) 420.

In connection with the positions of the text, the following opinions will be of value:—

"It is a rule of interpretation that the intention of the parties to a contract is to be ascertained by applying its terms to the subject-matter. The admission of parol testimony for such purpose does not infringe upon the rule which makes a written instrument the proper and only evidence of the agreement contained in it. Thus, for the purpose of identifying the subject-matter to which the written contract relates, parol testimony of that which was in the minds of the parties, and to which their attention was directed at the time, may be given. It may be shown that a sample, to which the terms of the contract are applicable, was exhibited or referred to in the negotiation, and other statements of the parties then made may be resorted to. The sense in which the parties understood and used the terms expressed in the writing is thus best ascertained. Accordingly, it has been recently held, in an action upon a written contract relating to advertising charts, that verbal representations as to the material of which the chart was to be made, and the manner in which it would be published, although promissory in their character, were admissible. Stoops *v.* Smith, 100 Mass. 63; Hogins *v.* Plympton, 11 Pick. 97; Miller *v.* Stevens, 100 Mass. 518." Colt, J., Swett *v.* Shumway, 102 Mass. 367.

"In Macdonald *v.* Longbottom, 1 E. & E. 978, the defendant, by a written contract, had purchased of the plaintiffs, who were farmers, a quantity of wool, which was described in the contract simply as 'your wool.' Some time previously a conversation had taken place, in which the plaintiffs stated that they had a quantity of wool, consisting partly of their own clip, and partly of wool they had contracted to buy of other farmers. In an action for not accepting the wool, this conversation was held admissible in evidence, for the purpose of explaining what the parties meant by the term 'your wool.' Mumford *v.* Gething, 7 C. B. (N. S.) 305, will be found equally to the point. In Thorington *v.* Smith, 8 Wall. 1, it was adjudged competent to show, by the contemporaneous understanding of the parties, that the term 'dollars' meant Confederate dollars. I will not follow further the cases, but will content myself by quoting the general rule in question as defined by Tindal, C. J., in Shore *v.* Wilson, 9 Clark & F. 566, that definition being in these words, namely: 'The true interpretation 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 an exception, or perhaps 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

instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read, nor can they be ambiguous merely because the court which is called upon to explain them may be 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."[1]

Acts may be received as expository of ambiguity.

§ 941. Acts of the writer of an ambiguous document, being less liable to misinterpretation than oral expressions of intention, and more likely to exhibit the writer's real purpose, have been received, as to ancient documents, without the limitations just noticed as bearing on oral expression of intention. Thus, in a leading case on this point,[2] the House of Lords held that proof of the application of the funds of an ancient charity by the original founder, and first trustee, was strong evidence of intention, and might be so treated by the court in construing the grant. So, in a subsequent case,[3] Lord Chancellor Sugden, while acknowledging that he could not receive evidence of declarations of the founder of an ancient charity, as explanatory of his grant, held that it was admissible to inquire as to what acts such founder had done in relation to the charity. "Tell me," said this eminent judge, "what you have done under such a deed, and I will tell you what that deed means."[4] In a similar case, Tindal, C. J., held admissible "the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed."[5] It may further be laid down[6] that all ancient instruments

the language may be investigated and ascertained by evidence *dehors* the instrument itself.'" Beasley, C. J., Sandford & Wright *v.* R. R. Co., 37 N. J. 3. See observations of Church, C. J., in Reynolds *v.* Ins. Co., 47 N. Y. 605.

[1] Wigram on Wills, 2d ed. 130.

[2] Atty.-Gen. *v.* Brazenose College, 2 Cl. & F. 295.

[3] Atty.-Gen. *v.* Drummond, 1 Dru. & War. 353, 366, 375, 376; aff. on appeal, Drummond *v.* Atty.-Gen., 2 H. of L. Cas. 837.

[4] 1 Dru. & War. 368.

[5] Shore *v.* Wilson, 9 Cl. & Fin. 569; Atty.-Gen. *v.* Sidney Sussex Coll., 38 L. J. Ch. 657, 659, 660, per Ld. Hatherly, C.; Law Rep. 4 Ch. App. 722, 732, *S. C.*; Atty.-Gen. *v.* May of Bristol, 2 Jac. & W. 121, per Ld. Eldon.

[6] Taylor's Ev., § 1090.

of every description may, in the event of their containing ambiguous language, but in that event alone, be interpreted by evidence of the mode in which property dealt with by them has been held and enjoyed.[1] To the same end evidence of contemporaneous, and even of uniform modern usage, may be received for the purpose of construing ancient grants and charters.[2] And in all cases the acts of the parties are received to give their common interpretation of ambiguous terms.[3]

Ambiguity as to property may be explained by parol.

§ 942. In application of the rule already stated,[4] parol evidence as to the extrinsic condition of the grantor's property, or as to the intentions of the parties, is admissible in order to explain ambiguous designations of property in deeds, or contracts for sale.[5] So parol evidence of

[1] Weld *v.* Hornby, 7 East, 199, per Ld. Ellenborough; Waterpark *v.* Fennell, 7 H. of L. Cas. 650; Donegall *v.* Templemore, 9 Ir. Law R. N. S. 374; Atty.-Gen. *v.* Parker, 3 Atk. 577, per Ld. Hardwicke; R. *v.* Dulwich College, 17 Q. B. 600; Atty.-Gen. *v.* Murdoch, 1 De Gex, M. & G. 86. In Atty.-Gen. *v.* St. Cross Hospital, 17 Beav. 435, 464, 465, Sir J. Romilly, M. R., held, that no presumption could be made against the clear ostensible purpose of the foundation, though it were supported by a usage of 150 years. See Atty.-Gen. *v.* Clapham, 4 De Gex, M. & G. 591. See Wadley *v.* Bayliss, 5 Taunt. 752; recognized by Cresswell, J., in Doe *v.* Beviss, 7 Com. B. 511; Atty.-Gen. *v.* Boston, 1 De Gex & Sm. 519, 527; Doe *v.* Beviss, 7 Com. B. 456; Stammers *v.* Dixon, 7 East, 200.

[2] Chad *v.* Tilsed, 2 B. & B. 403; Doe *v.* Beviss, 7 C. B. 456; Beaufort *v.* Swansea, Ex. R. 413; Shepherd *v.* Payne, 16 C. B. (N. S.) 132; Bradley *v.* Pilots, 2 E. & B. 427; Brune *v.* Thompson, 4 Q. B. 543; Sadlier *v.* Biggs, 4 H. of L. Cas. 435; Waterpark *v.* Fennell, 7 H. of L. Cas. 650.

[3] Stone *v.* Clark, 1 Met. 378; Lovejoy *v.* Lovett, 124 Mass. 270.

[4] Supra, § 939.

[5] Atkinson *v.* Cummins, 9 How. 479; Darling *v.* Dodge, 36 Me. 370; Emery *v.* Webster, 42 Me. 204; French *v.* Hayes, 43 N. H. 30; Wright *v.* Worsted Co., 2 Cush. 271; Old Col. R. R. *v.* Evans, 6 Gray, 25; Kimball *v.* Bradford, 9 Gray, 243; Stevenson *v.* Erskine, 99 Mass. 367; Putnam *v.* Bond, 100 Mass. 58; Ganley *v.* Looney, 100 Mass. 359; Pike *v.* Fay, 101 Mass. 134; Chester Co. *v.* Lucas, 112 Mass. 424; Grinnell *v.* Tel. Co., 113 Mass. 299; McFarland *v.* R. R., 115 Mass. 300; Bartlett *v.* Gas Co., 117 Mass. 533; Fitz *v.* Comey, 118 Mass. 100; Cleverly *v.* Cleverly, 124 Mass. 314; Brainerd *v.* Cowdry, 16 Conn. 1; Hotchkiss *v.* Barnes, 34 Conn. 27; Drew *v.* Swift, 46 N. Y. 204; Den *v.* Cubberly, 12 N. J. L. 308; Halsteed *v.* Meeker, 15 N. J. L. 136; Fuller *v.* Carr, 33 N. J. L. 157; Jackson *v.* Perrine, 35 N. J. L. 137; Carmony *v.* Hoober, 5 Penn. St. 305; Russell *v.* Werntz, 24 Penn. St. 337; Brownfield *v.* Brownfield, 20 Penn. St. 55; Huss *v.* Morris, 63 Penn. St. 372;

boundaries and locations, and of the intention of the parties at the time, may be received to explain ambiguous terms;[1] and so may

Gump's App., 65 Penn. St. 476; Tattman *v.* Barrett, 3 Houst. 226; Dorsey *v.* Hammond, 1 Har. & J. 201; Groff *v.* Rohrer, 35 Md. 327; Herbert *v.* Wise, 3 Call. 240; Elliott *v.* Harton, 28 Grat. 766; Graham *v.* Hamilton, 5 Ired. L. 428; Edwards *v.* Tipton, 77 N. C. 222; Wharton *v.* Eborn, 88 N. C. 344; Clements *v.* Pearce, 63 Ala. 284; Mariner *v.* Rodgers, 26 Ga. 220; Bell *v.* Brumby, 53 Ga. 643; Doe *v.* Jackson, 9 Miss. 494; Rollins *v.* Claybrook, 22 Mo. 405; Jennings *v.* Briseadine, 44 Mo. 332; Means *v.* De la Vergne, 50 Mo. 343; McPike *v.* Allman, 53 Mo. 551; Shewalter *v.* Pirner, 55 Mo. 218; Schreiber *v.* Osten, 50 Mo. 513; Burleson *v.* Burleson, 28 Tex. 383; Reed *v.* Ellis, 68 Ill. 206; Kamphouse *v.* Kaffner, 73 Ill. 453; Slater *v.* Breese, 36 Mich. 77; Jenkins *v.* Sharpff, 27 Wis. 472; Pinney *v.* Thompson, 3 Iowa, 74; Baker *v.* Talbot, 6 T. B. Mon. 182; Reamer *v.* Nesmith, 34 Cal. 624; Ward *v.* McNaughton, 43 Cal. 159; Altschul *v.* San Francisco, 43 Cal. 171, and cases cited in following notes.

When a sale is by sample, parol evidence of the character of the sample is admissible. "If the sale was made by sample, the description of the sample was competent upon the question whether the article tendered corresponded with that offered for sale. Hogins *v.* Plympton, 11 Pick. 97. So also, the description given verbally by the defendant's agent, and the corresponding descriptions of the article delivered, were competent upon the question whether they were the same article. Stoops *v.* Smith, 100 Mass. 63. But such evidence must be confined to the question of identity in kind, and not extended to comparisons in degree or quality. It is admissible only when the writing does not distinctly define the article to be delivered, so as to enable its identity to be seen upon the face of the transaction." Wells, J., Pike *v.* Fay, 101 Mass. 136.

"It is always competent to identify by parol the subject-matter of a grant. It is not important to inquire whether the parol evidence is competent for the purpose of raising a latent ambiguity, ... or whether it is evidence offered for the purpose of identifying the subject-matter of the grant, or for the purpose of applying the description of the grant to the surfaces of the earth." Lord, J. Cleverly *v.* Cleverly, 124 Mass. 317. See infra, § 1002.

In determining the boundary of a way described as running from a certain point, "thence on a straight line to the shop of K.," oral evidence was held admissible to show that at the date of the bond an outside platform constituted a part of the shop. Dunham *v.* Gannett, 124 Mass. 151.

[1] Deery *v.* Cray, 10 Wall. 263; Hodges *v.* Strong, 10 Vt. 247; Allen *v.* Bates, 6 Pick. 460; Waterman *v.* Johnson, 13 Pick. 261; Gerrish *v.* Towne, 3 Gray, 82; Hoar *v.* Goulding, 116 Mass. 132; Dunham *v.* Gannett, 124 Mass. 151; Thomson *v.* Wilcox, 7 Lansing, 376; Blackman *v.* Doughty, 10 Vroom, 402; Carroll *v.* Norwood, 1 Har. & J. 167; Midlothian *v.* Finney, 18 Grat. 304; Hutton *v.* Arnett, 51 Ill. 198; Bybee *v.* Hageman, 66 Ill. 519; Harris *v.* Doe, 4 Blackf. 369; Beal *v.* Blair, 33 Iowa, 318; Bessen *v.* Kurz, 66 Wis. 449; Hood *v.* Mathers, 2 A. K. Marsh. 553; Maguire *v.* Baker, 57 Ga. 109; Kim-

evidence of notoriety to the same effect.[1] Thus an agreement in writing to convey "the wharf and flats occupied by T. and owned by H.," may be applied, by parol evidence, to two lots of land, only one of which bounded on the sea, and was separated from the other by a street, it appearing that both, at the time of the agreement, were owned by H. and occupied by T. for landing and storing wood and lumber, and had been originally one lot.[2] Statements, also, of a deceased vendor of land, made at the time of sale, to indicate the property sold, are admissible to aid in its identification.[3] The same principle involves proof as to the position of lines, stakes, and stones, referred to boundaries, when there is doubt as to such position;[4] though boundary lines, definitely settled by a deed, cannot be varied by parol, if such lines are ascertainable.[5] And parol evidence of disappeared monuments and stakes referred to in a conveyance is admissible.[6]

§ 943. A vague or imperfect designation of property may be in this way explained.[7] Thus, where a fine had been levied for twenty acres of land and twelve messuages in Chelsea, it was held permis-

ball *v.* Brawner, 47 Mo. 398; McLeroy *v.* Duckworth, 13 La. An. 410; Colton *v.* Seavey, 22 Cal. 496; O'Farrell *v.* Harney, 57 Cal. 125.

But evidence is permissible only where there is an ambiguity in the description or uncertainty in its application to the premises granted, or where the location operates as an estoppel *in pais*. Baldwin *v.* Shannon, 43 N. J. L. 596.

[1] Bancam *v.* George, 65 Ala. 259.

[2] Gerrish *v.* Towne, 3 Gray, 82.

[3] Parrott *v.* Watts, 37 L. T. 755.

[4] Wing *v.* Burgis, 13 Me. 111; Abbott *v.* Abbott, 51 Me. 575; Gerrish *v.* Towne, 3 Gray, 82; Pettit *v.* Shephard, 32 N. Y. 97; Massengill *v.* Boyles, 4 Humph. 205; Reed *v.* Shenck, 2 Dev. L. 415; Colton *v.* Seavey, 22 Cal. 496.

"When uncertainty arises in the application of a description, evidence is received of all the facts and circumstances of the transaction, and of the position and character of the land, for the purpose of ascertaining the real intention of the parties. Natural or artificial objects may be recognized as bounds or monuments by proof that they were recognized and accepted as such by the grantor and grantee." Devens, J., Barrett *v.* Murphy, 140 Mass. 142. See supra, § 185 ff.

[5] Linscott *v.* Fernald, 5 Greenl. 496; Liverpool Wharf *v.* Prescott, 4 Allen, 22; Clark *v.* Baird, 9 N. Y. 183; Waugh *v.* Waugh, 28 N. Y. 94; Wynne *v.* Alexander, 7 Iredell L. 237. Infra, § 1156 *a*.

[6] Robinson *v.* Kiue, 70 N. Y. 147; citing Wendell *v.* People, 8 Wend. 190; Drew *v.* Swift, 46 N. Y. 204.

[7] Thus it is generally agreed that on the issue what land was embraced in an agreement to convey, the situation of the parties and the circumstances under which the agreement was made, may be considered as bearing on the expressed intention. Aldrich *v.* Aldrich, 135 Mass. 153.

sible to show that, though the conusor's estate at Chelsea was under twenty acres, he had nineteen houses on it; and further proof was received as to what particular part of the property was intended to be included in it.[1] So again, to take a familiar illustration, if an estate be conveyed by the designation of Blackacre, parol evidence is receivable to show what property is known by that name.[2] Indeed it is essential, where a testator devises a house purchased of A., or a farm in the occupation of B., to introduce extrinsic evidence to explain what house was purchased of A., or what farm was in B.'s occupation, before it can be shown what is devised.[3] Hence parol evidence is admissible to prove what is included in the expression, "known by the name mill-spot," in a deed of land.[4] So parol evidence may be received to show that the term "farm," in a deed, included a particular fenced lot.[5] So in an action on a policy of insurance of goods in a brick building, "known as D. & Co.'s car factory," parol evidence is admissible to show to what building the terms in question refer.[6] And on a written agreement to lease "the Adams House, situate on Washington Street, in Boston," parol evidence is admissible to show that in this agreement it was not intended to include the separate shops forming the whole of the ground floor except the entrance to the hotel.[7] And, generally, property may be identified by parol.[8]

General designation of property may be thus particularized.

§ 944. We may therefore generally say that when a description in a deed or other document is applicable to two or more objects, parol evidence is admissible to distinguish between the objects, as well as to identify that intended by the parties.[9] It is admissible, also, to identify or

Parol evidence admissible to distinguish objects.

[1] Doe *v.* Wilford, 1 C. & P. 284; R. & M. 88; Denn *v.* Wilford, 2 C. & P. 173; Taylor, § 1036.

[2] Ricketts *v.* Turquand, 1 H. of L. Cas. 472.

[3] Sanford *v.* Raikes, 1 Mer. 653, per Sir W. Grant; Clayton *v.* Ld. Nugent, 13 M. & W. 207, per Rolfe, B.

[4] Woods *v.* Sawin, 4 Gray, 322.

[5] Madden *v.* Tucker, 46 Me. 367. So where "A.'s claim against B." is recited, and there are several such claims, evidence is admissible to show to which the recital refers. Wilson *v.* Horne, 37 Miss. 477.

[6] Blake *v.* Ins. Co., 12 Gray, 265.

[7] Sargent *v.* Adams, 3 Gray, 72.

[8] Caldwell *v.* Carthege, 40 Ohio St. 453; Scheible *v.* Slagle, 89 Ind. 323; Chambers *v.* Wilson, 60 Iowa, 339; Dunkart *v.* Rinehart, 89 N. C. 354; Humes *v.* Bernstein, 72 Ala. 546; Campbell *v.* Short, 35 La. An. 447.

[9] Brooks *v.* Aldrich, 17 N. H. 443; George *v.* Joy, 19 N. H. 544; Melvin *v.* Fellows, 33 N. H. 401; Bell *v.* Wood

distinguish, under like circumstances, property described in a *fi. fa.*, or in a sheriff's deed.[1] But, as we have seen, parol evidence is not admissible to add articles to those already specified as passing in an assignment.[2]

Erroneous particulars in description may be rejected on parol proof.

§ 945. Suppose that in a dispositive document, which contains an adequate description of a specific object, there is introduced an erroneous particular, can such erroneous particular be rejected as surplusage, if it be proved that there exists an object, and one object only, answering the body of the description? Now, in view of the fact that there are few cases in which, if we undertake minutely to describe an object, we do not, while maintaining a general accuracy, introduce some erroneous detail, our answer to the question just put should be in the affirmative. And so has it been frequently held,[3] though it has been added that "if the premises be

ward, 46 N. H. 315; Locke *v.* Rowell, 47 N. H. 46; Rugg *v.* Hale, 40 Vt. 138; Rhodes *v.* Castner, 12 Allen, 130; Doolittle *v.* Blakesley, 4 Day, 265; Bennett *v.* Pierce, 28 Conn. 315; Brinkerhoff *v.* Olp, 35 Barb. 27; Almgren *v.* Dutilh, 5 N. Y. 28; Clark *v.* Wethey, 19 Wend. 320; Rich *v.* Rich, 16 Wend. 663; Burr *v.* Ins. Co., 16 N. Y. 267; Patton *v.* Goldsborough, 9 Serg. & R. 47; Bertsch *v.* Lehigh Co., 4 Rawle, 130; Barnhart *v.* Pettit, 22 Penn. St. 135; Aldridge *v.* Eshleman, 46 Penn. St. 420; Carrington *v.* Goddin, 13 Grat. 587; Morgan *v.* Spangler, 14 Ohio St. 102; Schlief *v.* Hart, 29 Ohio St. 150; Venable *v.* McDonald, 4 Dana (Ky.), 336; Myers *v.* Ladd, 26 Ill. 415; Marshall *v.* Gridley, 46 Ill. 247; Stewart *v.* Chadwick, 8 Iowa, 463; Sargeant *v.* Solberg, 22 Wis. 132; Spears *v.* Burton, 31 Miss. 547; Hardy *v.* Matthews, 38 Mo. 121; Senterfit *v.* Reynolds, 3 Rich. (S. C.) 128; Hughes *v.* Sandal, 25 Tex. 162. See Collins *v.* Rush, 7 S. & R. 147; Scott *v.* Sheakly, 3 Watts, 50; Ins. Co. *v.* Sailer, 67 Penn. St. 108; Harvey *v.* Vandegrift, 1 Weekly Notes, 629, to the effect that identity in such case may be a question of fact.

[1] Abbott *v.* Abbott, 51 Me. 575; McGregor *v.* Brown, 5 Pick. 170; Lodge *v.* Barnett, 46 Penn. St. 477; Matthews *v.* Thompson, 3 Ohio, 272; Doe *v.* Roe, 20 Ga. 189; Webster *v.* Blount, 39 Mo. 500.

[2] Supra, §§ 920-1; Driscoll *v.* Fiske, 21 Pick. 503; Taylor *v.* Sayre, 24 N. J. L. 647.

[3] Doe *v.* Galloway, 5 B. & Ad. 43; Goodtitle *v.* Southern, 1 M. & Sel. 219; Slingsby *v.* Grainger, 7 H. of L. Cas. 282; West *v.* Lawdray, 11 H. of L. Cas. 375; Day *v.* Trig, 1 P. Wms. 286; Selwood *v.* Mildmay, 3 Ves. 306; Miller *v.* Travers, 8 Bing. 244; Doe *v.* Chichester, 4 Dow. P. C. 65; McMurray *v.* Spicer, L. R. 5 Eq. 527; Hardwick *v.* Hardwick, L. R. 16 Eq. 168; Barber *v.* Wood, L. R. 4 Ch. D. 885; Aikman *v.* Cummings, 9 How. 470; Brown *v.* Huger, 21 How. 305; McPherson *v.* Foster, 4 Wash. C. C. 45; Esty *v.* Baker, 50 Me. 331; Peaslee *v.* Gee, 19 N. H. 273; Bailey *v.* White, 41 N. H. 343; Park *v.* Pratt, 38 Vt. 552; Kellogg *v.* Smith,

described in general terms, and a particular description be added, the latter controls the former."[1] It is clear, also, that such particularization cannot be rejected if introduced into the writing by way of limitation.[2] But where a contract for the sale of land has been fully executed, and the purchase-money paid, the vendee cannot recover damages for a deficiency in the quantity of land without actual proof of fraud or mutual mistake, when the boundaries of the land are accurately stated, and where the quantity is given as "so many acres, *be the same more or less*;"[3] and it is held that in such a case the mere fact that the discrepancy between the quantity called for by the deed and the actual measurement is great, is not of itself sufficient to prove fraud or mistake.[4] It has, however, been ruled

9 Cush. 375; Davis *v.* Rainsford, 17 Mass. 207; Sargent *v.* Adams, 3 Gray, 72; Putnam *v.* Bond, 100 Mass. 58; Loomas *v.* Jackson, 19 Johns. 449; Drew *v.* Swift, 46 N. Y. 207; Opdyke *v.* Stephens, 4 Dutch. (N. J.) 89; Mackentile *v.* Savoy, 17 S. R. 104; Brown *v.* Willey, 42 Penn. St. 369; Lodge *v.* Barnett, 46 Penn. St. 484; Hildebrand *v.* Fogle, 20 Ohio, 147; Evansville *v.* Page, 23 Ind. 527; Slater *v.* Breese, 36 Mich. 77; Reed *v.* Schenck, 2 Dev. L. 415; Miller *v.* Cherry, 3 Jones (N. C.), Eq. 29; Massengill *v.* Boyles, 4 Humph. 205; Stanley *v.* Green, 12 Cal. 162; Colton *v.* Seavey, 22 Cal. 496. See supra, § 412; infra, §§ 996–1001; and see 3 Wash. Real Prop. 4th ed. 403.

[1] Parke, J., Doe *v.* Galloway, 5 B. & Ad. 43. See Bagley *v.* Morrill, 46 Vt. 94; Drew *v.* Swift, 46 N. Y. 209; White *v.* Williams, 48 N. Y. 344.

[2] Taylor *v.* Parry, 1 M. & Gr. 623.

[3] See infra, § 1028.

[4] Kreiter *v.* Bomberger, 82 Penn. St. 59. In this case Sharswood, J., said: "The rule was stated by Mr. Justice Sergeant, in Galbraith *v.* Galbraith, 6 Watts, 112, in these words: 'An examination of the numerous decided cases in our own reports will, I think, show that, in the common case between vendor and vendee, in a conveyance of a tract of land bounded by adjoining owners, and described as containing so many acres, *be the same more or less*, at a certain price per acre, where there is no stipulation for admeasurement, nor any *mala fides* proved, redress cannot, after the bargain is closed, be given to either party for a surplus or deficiency subsequently appearing.' This rule was adopted and confirmed in Hershey *v.* Keembortz, 6 Barr, 128. Chief Justice Gibson adding: 'The vendor is answerable, in respect of the quantity, only for *mala fides*.' There are, indeed, many dicta that the difference in the quantity may be so great as to be evidence itself of fraud or deceit, or of great misapprehension between the parties,—and then equity will relieve. Though no case is to be found of an actual application of this doctrine in favor of the vendee, or to show what must be the extent of the difference to raise the presumption; yet, perhaps, it may be fairly conceded that, in an action to enforce the payment of purchase-money, a deduction under such circumstances will be allowed. Such is the weight of extra-judicial opinions. Boar *v.* McCormick, 1 S. & R. 166; Glen *v.* Glen, 4 S. & R. 488; Bailey *v.* Snyder, 13 S. & R. 160; McDowell *v.* Cooper, 14 S. & R. 296; Ash-

that where, through mutual mistake or fraud, there is an excess of land conveyed, equitable assumpsit may be maintained to recover the value of the excess.[1]

§ 946. Ambiguous expressions as to extrinsic or other objects may be explained by parol proof; but when the meaning of the ambiguous terms is thus supplied, the court must judge of the whole document in subordination to its legal sense as thus completed.[2] The contract cannot be varied; its obscure expressions may be explained, but this for the purpose not of moulding, but of developing the true sense.[3] Thus,

Ambiguity as to objects may be explained.

com *v.* Smith, 2 P. R. 219; Frederick *v.* Campbell, 13 S. & R. 136; Haggerty *v.* Fagan, 2 P. R. 533; Coughenour's Adm'r *v.* Stauft, 27 P. F. Smith, 191.

"The third class of cases, to which the one now under consideration belongs, is where the contract is fully executed and the purchase-money paid. We are of the opinion that in this class the transaction cannot be ripped up without actual proof of fraud or mutual mistake. Upon this question the greatness of the difference may be evidence, but not sufficient of itself. There must be other circumstances. Cases of this class very rarely arise. I can find but one instance in our books. That is the case of Large *v.* Penn, 6 S. & R. 488. There the difference was very great in reference to the extent of the premises. The quantity conveyed was described as $2\frac{3}{4}$ acres, and without the words 'more or less;' the actual quantity was 1 acre 148 perches. Yet the vendee was denied relief."

[1] See cases cited infra, § 1028; Jordan *v.* Cooper, 3 S. & R. 564; Bank *v.* Galbraith, 10 Barr, 490; Jenks *v.* Fritz, 7 W. & S. 201; Fisher *v.* Deibert, 54 Penn. St. 460; Schettiger *v.* Hopple, 3 Grant, 56; Beck *v.* Garrison, cited infra, § 1028.

[2] Infra, §§ 996 *et seq.* Whart. on Cont. § 630; Doe *v.* Hiscocks, 7 M. & W. 367; Doe *v.* Martin, 4 B. & Ad. 771; R. *v.* Wooldale, 6 Q. B. 549; MacDonald *v.* Longbottom, 1 E. & E. 977; Devonshire *v.* Neill, 2 L. R. Ir. 132; Horne *v.* Chatham, 64 Tex. 37; Robinson *v.* Douthit, Ibid. 101. As to extension of contracts by parol, see infra, § 1026.

[3] Purcell *v.* Burns, 39 Conn. 429; Cole *v.* Wendel, 8 Johns. 116; Dodge *v.* Patten, 18 Barb. 193; Dana *v.* Fiedler, 12 N. Y. 40; Filkins *v.* Whyland, 24 N. Y. 338; Clinton *v.* Ins. Co., 45 N. Y. 454; Hill *v.* Miller, 76 N. Y. 32; Perry *v.* Bank, 77 N. Y. 304; Den *v.* Cubberly, 12 N. J. L. 308; Sandford *v.* R. R., 37 N. J. L. 1; Thayer *v.* Torrey, 37 N. J. L. 339; McCullough *v.* Wainright, 14 Penn. St. 171; Clarke *v.* Adams, 83 Penn. St. 309; Paul *v.* Owings, 32 Md. 403; Warfield *v.* Booth, 33 Md. 63; Crawford *v.* Jarrett, 2 Leigh, 630; Sexton *v.* Windell, 23 Grat. 534; Knick *v.* Knick, 75 Va. 12; Chicago Dock *v.* Kinzie, 93 Ill. 415; Duling *v.* Johnson, 32 Ind. 155; Crooks *v.* Whitford, 47 Mich. 283; Haver *v.* Tenney, 36 Iowa, 80; Ames *v.* Lowry, 30 Minn. 283; Richards *v.* Schlegelmich, 65 N. C. 150; Goldsmith *v.* White, 68 Ga. 334; Paysant *v.* Ware, 1 Ala. 160; Acker *v.* Bender, 33 Ala. 230; Gann *v.* Clendinnen, 68 Ala. 294; Chambers *v.* Ringstaff, 69 Ala. 140; Meyer *v.* Mitchell, 77 Ala. 312; Schuetze *v.* Bailey, 40 Mo. 69; Washington Ins. Co. *v.* St.

where a deed, among other things, conveyed all the "zinc" in a certain tract, excepting an ore called "franklinite," and when a contest arose as to whether a particular vein was "zinc" or "franklinite," parol evidence was held admissible to show the meaning of "zinc."[1] Where, also, the defendant agreed to pay the plaintiff a certain sum for inserting a business card in his advertising chart, when it should be "published," parol evidence was held admissible to explain the style and character of the "chart," so as to determine the meaning of the word "published."[2] Again: where a physician sold his "good-will" in practice to another, evidence was admitted to show in what vicinity this practice was maintained.[3] So where there is a guarantee of general indebtedness, the details of such indebtedness can be shown by parol.[4]

Ambiguous measurement and numbers may be explained by parol.

§ 947. Measurement as to boundaries and numbers, when ambiguous, may be explained by parol.[5] Thus, under a contract to sell by measurement, the returns of such measurement may be proved by parol.[6] So where B. agreed in writing to receive from S. sixty shares of bank stock, on which $10 per share had been paid, and to

Mary's, 52 Mo. 480; Coe *v.* Ritter, 86 Mo. 277; Rugely *v.* Goodloe, 7 La. An. 295; Piper *v.* True, 36 Cal. 606; Ellis *v.* Crawford, 39 Cal. 523; Franklin *v.* Mooney, 2 Tex. 452.

"There is no question that latent ambiguities may be explained by parol evidence, and that such evidence may also be resorted to for the purpose of identifying the premises and applying the calls of the deed, in suits for rectification and specific performance, and in other actions and proceedings affecting title." Scholfield, J., Lyman *v.* Gedney, 114 Ill. 410. As to latent ambiguities, see infra, § 956.

[1] New Jersey Co. *v.* Boston Co., 15 N. J. Eq. 418. See supra, § 939. As to terms of art, see infra, § 972.

[2] Stoops *v.* Smith, 100 Mass. 63.

[3] Warfield *v.* Booth, 63 Md. 63.

[4] Day *v.* Leal, 14 Johns. R. 404; Morrison *v.* Myers, 11 Iowa, 538; Snodgrass *v.* Bank, 25 Ala. 161; Vardeman *v.* Lawson, 17 Tex. 10.

[5] See infra, § 961 *a*. Where there is a conflict as to measurement of land, arising from a difference between the calls and the courses and distances, articles of agreement in pursuance of which the deed was executed may be admitted in evidence, to show the intent of the parties. Koch *v.* Dunkel, 90 Penn. St. 264.

Where the meaning of the word "perch" is in contest, parol evidence was admissible to show that the parties, in their negotiation, estimated a perch at twenty-five cubic feet. Baldwin Quarry Co. *v.* Clements, 38 Ohio St. 587; Ward *v.* Bennett, 46 Wis. 407; as to boundaries see Lovejoy *v.* Lovett, 124 Mass. 270; Stevens *v.* Wait, 112 Ill. 544. As to figures see Slater *v.* Cave, 12 Ohio St. 80; Hyde Park *v.* Andrews, 87 Ill. 229.

[6] Hill *v.* McDowell, 14 Johns. R. 175. See infra, § 961 *a*. As to measurement by "scaling," see Busch *v.* Kilboone, 40 Mich. 297.

deliver S. his note for $667, to pay the balance in cash, and to pay five per cent. in advance; it was held, the nominal value of each share being $50, that parol evidence was admissible to show whether it was understood by the parties that the five per cent. advance should be paid on each share only, or on the nominal amount.[1] On a contract, also, for the purchase of a certain number of "casks," parol evidence of the size of the casks is admissible.[2]

§ 948. One of the most interesting applications of the principle before us arises from the confusion of currency during the late civil war. In construing contracts made in the Confederate States during the war, the consideration of which was so many "dollars," to make the term "dollars" mean a standard widely apart from that which the parties intended would be a perversion of justice. It has consequently been held admissible, in such cases, to show what was the currency the parties had in view.[3] Where, however, there is no parol proof offered, the presumption is, that the lawful currency of the United States was intended.[4]

Parol evidence admissible to prove "dollar" meant "Confederate dollar."

§ 949. A latent ambiguity as to the parties to a contract may be removed by showing who are the real parties in interest,[5] "as where

[1] Cole *v.* Wendel, 9 Johns. R. 116. Contemporaneous writings also are admissible to aid in the construction of an ambiguous contract. Wilson *v.* Randall, 67 N. Y. 338. See infra, §§ 962, 971, 1015.

[2] Keller *v.* Webb, 125 Mass. 88.

[3] Thorington *v.* Smith, 8 Wall. 9–12; Atlantic R. R. Co. *v.* Bank, 19 Wall. 548; Bryan *v.* Harrison, 76 N. C. 360; Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259; Craig *v.* Pervis, 14 Rich. Eq. (S. C.) 150; Chalmers *v.* Jones, 23 S. C. 463; Hightower *v.* Maull, 50 Ala. 495; Carmichael *v.* White, 11 Heisk. 262; Stewart *v.* Smith, 59 Tenn. 231; Donley *v.* Tindall, 32 Tex. 43. But see Oliver *v.* Shoemaker, 35 Mich. 464; Taylor *v.* Bland, 60 Tex. 29. That the term "current funds" may be explained, see Davis *v.* Glenn, 76 N. C. 427.

[4] The Confederate Note Case, 19 Wall. 557.

[5] Whart. on Cont. § 803; Teed *v.* Elworthy, 14 East, 210; Moller *v.* Lambert, 2 Camp. 548; Maugham *v.* Sharpe, 17 C. B. N. S. 443; Lancey *v.* Ins. Co., 56 Me. 562; Bradstreet *v.* Rich, 72 Me. 233; Bartlett *v.* Remington, 59 N. H. 364; Foster *v.* McGraw, 64 Penn. St. 464; Mobberly *v.* Mobberly, 60 Md. 376; Richmond R. R. *v.* Snead, 19 Grat. 354; Scammon *v.* Campbell, 75 Ill. 223; Adams Co. *v.* Boskowitz, 107 Ill. 660; Bancroft *v.* Grover, 23 Wis. 463; Fallon *v.* Kehoe, 38 Cal. 44; Ellis *v.* Crawford, 39 Cal. 523. See Grant *v.* Grant, Law Rep. 2 P. & D. 8; 39 L. J. Pr. & Mat. 17, *S. C.*; 39 L. J. C. P. 140, S. P. in another proceeding; Law Rep. 5 C. P. 380, *S. C.*; aff'd in Ex. Ch. 39 L. J. C. P. 272; and Law Rep. 5 C. P. 727; Serviss *v.* Stockstill, 30

a person uses the name of a nominal partner, or where he trades in the name of himself and son,[1] or, conversely, where two or more persons use the name of one of them."[2] So, where the Christian name of a vendee is left blank, this may be supplied by parol.[3] Where, also, a writing on its face *primâ facie* creates a joint tenancy, it may be shown by the acts and dealings of the parties, though not, it seems, by declarations of intention, that a tenancy in common is what the writing, as rightly construed, creates.[4] It may be shown, also, that a joint indebtedness was intended to be joint and several.[5] So, if a man should make an ambiguous settlement on his children, evidence will be received as to the state of his family, and the circumstances in which he is placed as to the property disposed of.[6] It may be shown by parol that a depositor in a bank is the absolute owner of money entered to his credit as "trustee."[7] Parol evidence, also, has been received to show that a grantor executed a deed by other than his real name;[8] and to identify grantee or assignee,[9] provided the writing be not thereby contradicted.[10] It has, on the same principle, been held that extrinsic evidence is admissible to prove who is the buyer and who the seller in a memorandum or note under the 17th section of the statute of frauds,[11] and who is the person referred to in a libel.[12]

Ambiguity as to parties may be explained by identification.

Ohio St. 418; Mayer *v.* Adrian, 77 N. C. 83; Barkley *v.* Tarrant, 20 S. C. 574; Chambers *v.* Falkner, 65 Ala. 448; Wyandotte *v.* Church, 30 Kan. 620. That an assumed or fictitious name can be explained by parol, see Leake, Cont. 2d ed. 446–7; Richardson's Case, L. R. 19 Eq. 588; Gould *v.* Barnes, 3 Taunt. 504.

[1] Spurr *v.* Cass, L. R. 5 Q. B. 686; Kell *v.* Nainby, 10 B. & C. 20.

[2] Leake, 2d ed. 447; Cooke *v.* Seeley, 2 Ex. 746.

[3] 3 Wash. Real Prop. § 566; Fletcher *v.* Mansun, 5 Ind. 269. See Leach *v.* Dodson, 64 Tex. 185.

[4] Harrison *v.* Barton, 30 L. J. Ch. 213, by Wood, V. C.

[5] Beresford *v.* Browning, L. R. 1 C. D. 30.

[6] Atty.-Gen. *v.* Drummond, 1 Dru. & W. 367, Sugden, C.

[7] Powers *v.* Institution for Savings, 124 Mass. 377.

[8] Nixon *v.* Cobleigh, 52 Ill. 387; Aultman *v.* Richardson, 7 Neb. 1.

[9] Langlois *v.* Crawford, 59 Mo. 456. Thus, where the grantee is I. S., and there are two persons of that name, a father and son, parol evidence is admissible to show who is grantee. Simpson *v.* Dix, 131 Mass. 179.

[10] Leake, Cont. 2d ed. 446; Robinson *v.* Rudkins, 26 L. J. Ex. 56; State *v.* Nashville, 2 Tenn. Ch. 755.

[11] Newell *v.* Radford, L. R. 3 C. P. 52. See Whart. on Agency, §§ 719 *et seq.*

[12] Infra, § 975.

§ 949 *a*. The question of variation of names by parol is discussed, in connection with dispositive documents, in other sections,[1] and so of the presumption arising from identity of names.[2] Questions arising as to names in criminal pleading are discussed in another volume.[3]

Variation of names by parol.

§ 950. The most common illustration of the exception last stated is where evidence is received to prove that P. is the real principal to a contract executed by A., who is in fact only P.'s agent. The instrument in such case is not varied by parol evidence, but parol evidence is introduced to make the instrument effective by showing who is the person whom the instrument binds or privileges. The question is, who is A.; and for the purpose either of enabling P. to bring suit on the instrument, or to be sued on the instrument by T., parol evidence is admissible to show that A. is the agent of P.[4]

Thus to enable undisclosed principal to sue or be sued, he may be proved by parol.

[1] Supra, § 701; infra, §§ 997, 999, 1014 ff.

[2] Supra, § 701; infra, § 1273.

[3] Whart. Cr. Pl. §§ 94 *et seq*. See, also, 22 Cent. L. J. 220, 244. That a wrong Christian name can be corrected, see Cleveland *v*. Burnham, 64 Wis. 347.

[4] Garrett *v*. Handley, 4 B. & C. 664; Higgins *v*. Senior, 8 M. & W. 834; Fowler *v*. Hollins, L. R. 7 Q. B. 616; Hutton *v*. Bullock, L. R. 9 Q. B. 572; Truman *v*. Loder, 11 A. & E. 589; Beckham *v*. Drake, 9 M. & W. 79; 2 H. L. Cas. 579; Elbing Act. Ges. *v*. Claye, L. R. 8 Q. B. 317; Calder *v*. Dobell, L. R. 6 C. P. 486; Ford *v*. Williams, 21 How. 207; Bradlee *v*. Glass Co., 16 Pick. 347; Commercial Bank *v*. French, 21 Pick. 486; Bank of N. A. *v*. Hooper, 15 Gray, 567; Lerned *v*. Johns, 9 Allen, 419; Nat. Life Ins. Co. *v*. Allen, 110 Mass. 398; Jones *v*. Ins. Co., 14 Conn. 501; Taintor *v*. Prendergast, 3 Hill, 72; Gates *v*. Brower, 9 N. Y. 205; Coleman *v*. Bank, 53 N. Y. 393; Oelrichs *v*. Ford, 21 Md. 489; Anderson *v*. Shoup, 17 Ohio St. 128; Ohio R. R. *v*. Middleton, 20 Ill. 629; Wolfley *v*. Rising, 12 Kans. 535; Nutt *v*. Humphrey, 32 Kans. 100; Hopkins *v*. Lacouture, 4 La. R. 64; May *v*. Hewitt, 33 Ala. 161; Briggs *v*. Munchon, 56 Mo. 467; Sauer *v*. Brinker, 77 Mo. 289; Smith *v*. Moynihan, 44 Cal. 53; Engine Co. *v*. Sacramento, 47 Cal. 494.

"The rule does not preclude a party who has entered into a written contract with an agent from maintaining an action against the principal, upon parol proof that the contract was made in fact for the principal, where the agency was not disclosed by the contract, and was not known to the plaintiff when it was made, or where there was no intention to rely upon the credit of the agent to the exclusion of the principal. Such proof does not contradict the written contract. It superadds a liability against the principal to that existing against the agent. That parol evidence may be introduced in such a case to charge the principal, while it would be inadmissible to discharge the agent, is well settled by authority." Andrews, J., Coleman *v*. First Nat. Bank of Elmira, 53 N. Y. 393.

§ 951. Yet it is not admissible for an agent, signing an instrument in his own name, to defend himself when sued by proof that he acted in the matter only as agent,[1] though he may prove agency in connection with an agreement by the other contracting parties that he should be regarded only as agent.[2] Nor does the right by parol evidence to charge a principal,[3] or to enable him to sue on a contract, extend to suits on sealed instruments or negotiable paper, when innocent third parties are concerned.[4]

But person signing as principal cannot set up that he was only agent.

The distinction to be kept in mind is, that while parol evidence cannot be received to discharge a party, it may be received when its effect is to show that another party, namely, the principal, is bound.[5] Parol evidence may also be received to show that an

In Barry *v.* Ransom, 12 N. Y. 464, Denio, J., in speaking of the rule, says: "It is a valuable principle, which we would be unwilling to draw in question, but we think it is limited to the stipulations between the parties actually contracting with each other by the written instrument."

Where the vendees are "an association of persons," who are not named, evidence of who composed the association is admissible, as is evidence of the interest of each. Pratt *v.* California Mining Co., 24 Fed. Rep. 869; *S. C.* 9 Sawyer, C. Ct. 354.

[1] Wharton on Agency, § 298; Higgins *v.* Senior, 8 M. & W. 834; 2 Smith's Lead. Cases, note to Thompson *v.* Davenport; Royal Ex. Ass. *v.* Moore, 2 New R. 63; Sowerby *v.* Butcher, 2 C. & M. 371; Magee *v.* Atkinson, 2 M. & W. 440; Jones *v.* Littledale, 6 A. & E. 486; Bradlee *v.* Glass Co., 16 Pick. 347; Bank of N. A. *v.* Hooper, 15 Gray, 567; Babbett *v.* Young, 51 N. Y. 238; Bryan *v.* Brazil, 52 Iowa, 350.

[2] Williams *v.* Robbins, 16 Gray, 77; Pease *v.* Pease, 35 Conn. 131; Miles *v.* O'Hara, 1 S. & R. 32; but see Nash *v.* Town, 5 Wall. 689; Williams *v.* Christie, 4 Duer, 39; Chappell *v.* Dann, 21 Barb. 17. See Rogers *v.* Hadley, 2 H. & C. 249; Wake *v.* Harrop, 30 L. J. 273; 31 L. J. 451.

[3] Thus it has been held in Rhode Island that parol evidence is not admissible to show that A. is the real principal to a sealed instrument instead of B., and that B. is only agent. Providence *v.* Miller, 11 R. I. 272.

[4] Whart. on Ag. §§ 290, 411, 504; Emly *v.* Lye, 15 East, 7; Lefevre *v.* Lloyd, 5 Taunt. 749; Siffkin *v.* Walker, 2 Camp. 308; Leadbitter *v.* Farrer, 5 M. & S. 345; Beckham *v.* Drake, 9 M. & W. 79; Hancock *v.* Fairfield, 30 Me. 299; Bradlee *v.* Glass Man., 16 Pick. 347; Stackpole *v.* Arnold, 11 Mass. 27; Bank of N. A. *v.* Hooper, 5 Gray, 567; Dessau *v.* Bours, 1 McAll. 20; Pentz *v.* Stanton, 10 Wend. 276; Anderson *v.* Shoup, 17 Ohio St. 128; Hiatt *v.* Simpson, 8 Ind. 256; Lander *v.* Castro, 43 Cal. 497; Bogan *v.* Calhoun, 19 La. An. 472. See as to negotiable paper fully, infra, §§ 1058–60.

[5] Taylor's Ev. § 1055; Higgins *v.* Senior, 8 M. & W. 844, 845. That in the absence of custom making a broker personally liable, he is not personally liable when signing as such, see Southwell *v.* Bowditch, 1 C. P. D. 374; C. A., reversing 1 C. P. D. 100.

agent, dealing for an undisclosed principal, has made himself personally liable.[1] So, a person who appears in a contract as agent may be shown to be the real principal, in the event of his being sued by the party with whom he contracted.[2] In equity, however, as we have seen, the plaintiff in such a case may, if the evidence be to such effect, be regarded as having estopped himself, by an agreement upon sufficient consideration, from proceeding against the defendant.[3] It should be remembered, also, that an undisclosed principal cannot, by disclosing himself, cut off the other contracting party from any defence he might otherwise make.[4]

Surety in writing may be proved by parol.

§ 952. When a bond is by its terms joint and several, and contains no indication as to which of the obligors is surety, parol evidence, as between the parties, is admissible in equity (and now in most jurisdictions at law), for the purpose of showing which of the obligors is surety, and the knowledge of this relationship by the obligees.[5] This exception is now extended to suits on negotiable paper,[6] in cases where

[1] Fleet *v.* Murton, L. R. 7 Q. B. 126; Fairlee *v.* Denton, L. R. 5 Ex. 169; Hutchin *v.* Tatham, L. R. 8 C. P. 482; Mason *v.* Massa, 122 Mass. 477.

[2] Carr *v.* Jackson, 7 Excheq. R. 382.

[3] In Chandler *v.* Coe, 54 N. H. 561, it is held that if the principal was *not disclosed* at the time of the making of the contract by the agent in his own name, he may be held liable thereon by parol proof; but that if the principal was *disclosed* at the time, such evidence cannot be admitted, not by reason of the rule of evidence, but upon the ground of estoppel; that the acceptance of the instrument executed in the name of the agent is conclusive evidence of an election to look to the agent exclusively. And it was also held, that where there is an express contract in the agent's name, whether verbal or written, the principal is not liable to be sued upon an implied contract arising from the passage of the consideration between his agent and the other contracting party, unless an action might be sustained against him upon the express contract.

[4] Whart. on Agency, § 405. See Humble *v.* Hunter, 12 Q. B. 310.

[5] Davis *v.* Barrington, 30 N. H. 517; Barry *v.* Ransom, 12 N. Y. 462; Brown *v.* Stewart, 4 Md. Ch. 368; Smith *v.* Bing, 3 Ohio, 33; Dickerson *v.* Commis., 6 Ind. 128; Welfare *v.* Thompson, 83 N. C. 276; Garrett *v.* Ferguson, 9 Mo. 125; Scott *v.* Bailey, 23 Mo. 140; Field *v.* Pelot, 1 McMul. Eq. 369; Bank *v.* White, 14 Nev. 373. See fully infra, § 1059.

[6] Infra, §§ 1059 *et seq.*; Taylor's Ev. § 1054; Greenough *v.* Greenough, 2 E. & E. 424; Mutual Loan Co. *v.* Sudlow, 5 C. B. (N. S.) 449; Pooley *v.* Harradine, 7 E. & B. 431; Lawrence *v.* Walmsley, 12 C. B. (N. S.) 799; Bristow *v.* Brown, 13 Ir. Law R. (N. S.) 201; Davis *v.* Barrington, 30 N. H. 517; Archer *v.* Douglass, 5 Denio, 509; Hubbard *v.* Gurney, 64 N. Y. 457. See for American cases infra, §§ 1060–61.

the statute of frauds does not intervene.[1] In questions of contribution, also, the relationship of alleged co-sureties may be shown by extrinsic proof.[2] But it is otherwise as to a document in which a party expressly describes himself as principal.[3] Nor can the averments of a contract be in this way ordinarily contradicted.[4]

Other cases of distinction and identification.

§ 953. When there are two persons or objects to either of whom the document in question apparently equally applies, but to only one of whom it can be made to apply, parol evidence of extraneous facts or of intent will be received to show which the testator meant.[5] The same rule applies as to all disputed terms. Thus it is admissible to prove by parol that a certificate of deposit taken by a guardian in his own name was really a certificate of deposit of his ward's money;[6] to show that a person acting as "treasurer" or "agent" acted as treasurer or agent for a particular company;[7] to show that a husband, in making an instrument, was really agent for his wife in whole or in part,[8] to show that P. was the real purchaser, and that T. was merely his trustee;[9] to show the identity of "Eli" with "Elias" in a grant from the state;[10] to show that a Christian name in a deed or grant from the state was entered by mistake for another name;[11] to show, where a deed of land was executed to E. A. C., which was the name of E. A. S. before marriage, that E. A. S. was the intended grantee;[12] to show that a blank in the vendee's name in an act of sale was intended for H. T. W., as the recitals in the act indicated;[13] to show that "Hiram Gowing, cordwainer," the nominal grantee in a deed, was intended for "Hiram G. Gowing," a cordwainer, a man of middle age, and not for his infant son, Hiram

[1] Hauer *v.* Patterson, 84 Penn. St. 274. See infra, § 1059.

[2] Turner *v.* Davis, 2 Esp. 478; Taylor *v.* Savage, 12 Mass. 98; Barry *v.* Sansom, 37 N. H. 564.

[3] McMillan *v.* Parkell, 64 Mo. 286.

[4] Norton *v.* Coons, 2 Selden, 33.

[5] Supra, §§ 939 ff; Hall *v.* Davis, 36 N. H. 569; Hoar *v.* Goulding, 116 Mass. 132; Frederick *v.* Campbell, 14 S. & R. 293; Morgan *v.* Burroughs, 45 Wis. 211.

[6] Beasley *v.* Watson, 41 Ala. 234.

[7] Wharton on Agency, §§ 291, 296, 409, 492, 729; Mich. State Bank *v.* Peck, 28 Vt. 200.

[8] Westholz *v.* Retand, 18 La An. 285; Dunham *v.* Chatham, 21 Tex. 231.

[9] Leakey *v.* Gunter, 25 Tex. 400. Infra, § 1031.

[10] Henderson *v.* Hackney, 23 Ga. 383.

[11] Williams *v.* Carpenter, 42 Mo. 327; Henderson *v.* Hackney, 23 Ga. 383.

[12] Scanlan *v.* Wright, 13 Pick. 523.

[13] Beauvais *v.* Wall, 14 La. An. 199.

Gowing ;[1] to show, when there are two persons bearing the exact name of the grantee in a deed, which was intended ;[2] and to show that, through a mispunctuation, "A. B., orphan," should be read "A. B.'s orphan."[3] But, as is elsewhere seen,[4] when the mistake is a mistake of judgment on the part of a grantor, as between two persons, and not a mistake of the name of a particular intended person, parol evidence is not admissible to correct the mistake.[5] As a general rule, however, parol evidence is admissible to explain latent ambiguities as to names.[6]

§ 954. We will elsewhere observe that evidence of the course of business between two contracting parties is admissible to show that they used certain litigated words in a special sense.[7] On the same principle it is admissible to show that the writer of a unilateral document was in the habit of giving a particular meaning, distinct from that primarily expressed, to a disputed word. This is frequently illustrated in cases where a testator's habit of misnaming a particular person is put in evidence to explain a particular devise.[8] Contractions and short-hand expressions may be in like manner interpreted by showing their customary meaning, or the meaning of the parties by whom they are used.[9]

Evidence of writer's use of language admissible in solving latent ambiguities.

§ 955. Under the statutes enabling parties to be witnesses, a party, in all cases where extrinsic evidence is admissible to prove a party's declarations of intent, may be himself permitted to testify to such intent or understanding; although in most states he is precluded from so

Party himself admissible to prove his intent or understanding.

[1] Peabody *v.* Brown, 10 Gray, 45.

[2] Coit *v.* Starkweather, 8 Conn. 289 ; Avery *v.* Stites, Wright (Ohio), 56.

[3] Walker *v.* Wells, 25 Ga. 141 ; Tuggle *v.* McMath, 38 Ga. 648 ; Simmons *v.* Marshall, 3 G. Greene, 502. That documents may be identified by parol, see Dester *v.* Whitbeck, 46 Conn. 224.

As to other cases of identification, see infra, § 957 ; Cotton Ins. Co. *v.* Carter, 65 Ga. 228 ; Thompson *v.* Hall, 67 Ga. 627.

[4] See infra, §§ 1082–9.

[5] See Crawford *v.* Spencer, 8 Cush. 418 ; Jackson *v.* Hart, 12 Johns. R. 77 ; Jackson *v.* Foster, 12 Johns. R. 488 ; Moody *v.* McCowen, 39 Ala. 586.

[6] Infra, § 949 ; Whart. on Contracts, § 803 ; Spurr *v.* Cass, L. R. 5 Q. B. 656 ; Foster *v.* McGraw, 64 Penn. St. 464 ; Scammon *v.* Campbell, 75 Ill. 223.

[7] Infra, §§ 962–1001.

[8] See for cases, infra, §§ 1010 *et seq.*

[9] Infra, § 972 ; Sweet *v.* Lee, 3 Man. & Gr. 452.

testifying where the other contracting party is deceased.[1] So wherever a witness's intent is relevant, he may be examined as to it.[2] But a party cannot be examined to vary, by proving his intent, a contract on its face unambiguous.[3]

[1] Supra, §§ 466, 482; Hale *v.* Taylor, 45 N. H. 405; Delano *v.* Goodwin, 48 N. H. 205; Fisk *v.* Chester, 8 Gray, 506; Lombard *v.* Oliver, 7 Allen, 155.

"Before the statute making parties competent witnesses, the ordinary way to prove their intent or understanding was by circumstantial evidence. But now that the party himself is admitted to testify, there is no reason for confining his testimony to a variety of circumstances tending to show his purpose or understanding, when he knows and can testify directly what that purpose or understanding was. Accordingly, it has been held that where the intention or good faith of a party to a suit becomes material, it may be shown directly as well as from circumstances; and the party himself, if a competent witness, may testify directly to his intention or understanding, unless prevented by some other principle of law applicable to the particular case. Hale *v.* Taylor, 45 N. H. 405; Norris *v.* Morrill, 40 N. H. 395; Fisk *v.* Chester, 8 Gray, 506; Thacher *v.* Phinney, 7 Allen, 146; Lombard *v.* Oliver, 7 Allen, 155. The same principle must apply to the 'understanding' of a party relative to the meaning or effect of a contract. To prove a contract, it must be shown (except in cases where the doctrine of estoppel applies) that both parties have understandingly assented to the same thing in the same sense. See 1 Parsons on Contracts, 4th ed. 399 *b*. But although the issue on trial is whether there has been a concurrence in understanding of two parties, yet it is not improper to prove separately the understanding of each. See Hale *v.* Taylor, 45 N. H. 407. It is no objection to a single piece of evidence that it does not make out the whole of a plaintiff's case. The evidence to prove several propositions (all of which are requisite to the case) may be of different kinds and drawn from different sources. See Blake *v.* White, 13 N. H. 267, 272. In proving a concurrence of understandings the plaintiff may prove his own understanding by one witness, and defendant's understanding by another witness. The admissibility of party's evidence as to how he understood a contract cannot depend upon the grounds of that understanding, though these grounds may often be very important in determining the credit to be given to such evidence. Whether his understanding is founded on personal knowledge or hearsay is of no consequence in point of law, provided it actually concurs with the other party's understanding; and, if it does not so concur, then his testimony on this point is immaterial, except in cases of estoppel, where the party claiming that the other is estopped would have to show how he himself understood the contract, and then show that the other party induced him to entertain and act upon that understanding." Delano *v.* Goodwin, 48 N. H. 205, 206, Smith, J.

[2] Stearns *v.* Gosselin, 58 Vt. 38; Over *v.* Schriffling, 102 Ind. 191; Heap *v.* Parrish, 104 Ind. 196; supra, § 545.

[3] Dillon *v.* Anderson, 43 N. Y. 231; Lewis *v.* Rogers, 34 N. Y. Sup. Ct. 64; Harrison *v.* Kirke, 37 N. Y. Sup. Ct. 396, fully cited supra, § 482. See Gould *v.* Lead Co., 9 Cush. 338, where

§ 956. The admission of evidence to explain ambiguities is confined to such ambiguities as are *latent*. That which is called a *patent* ambiguity (*i. e.*, one in which the imperfection of the writing is so obvious that the idea that it was intended cannot be absolutely excluded) cannot be explained by parol.[1] Judge Story, in this relation,[2] makes a new distinction: "There seems, indeed, to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities; and that is, where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the *subject-matter*, in the contemplation of the parties. In such case, I should think that parol evidence might be admitted, to show the circumstances under which the contract was made, and the subject-matter to which the parties referred."[3] But an ambiguity which is only developed by extrinsic evidence is not patent in the strict sense of the term. A patent ambiguity is one which arises from the writer's own incapacity, either of perception or explanation, and exhibits itself on the face of the writing. His meaning in a particular relation he fails to exhibit, and the writing shows the failure. But in the cases men-

Patent ambiguities cannot be explained.

it was held that the opinion of the director of a corporation could not be received to explain the meaning of a recorded resolution of the board.

[1] Bacon's Law Tracts, 99, 100; Clayton *v.* Nugent, 13 M. & W. 200; Whately *v.* Spooner, 5 Kay & J. 542; Webster *v.* Atkinson, 4 N. H. 21; Pingry *v.* Walkins, 17 Vt. 379; Horner *v.* Stillwell, 35 N. J. L. 307; Berry *v.* Matthews, 13 Md. 537; Clark *v.* Lancaster, 36 Md. 196; Bowyer *v.* Martin, 5 Rand. (Va.) 525; Morris *v.* Edwards, 1 Ohio, 189; Richmond *v.* Farquhar, 8 Blackf. 89; Panton *v.* Tefft, 22 Ill. 366; Eggert *v.* White, 59 Iowa, 464; Findley *v.* Armstrong, 23 W. Va. 113; Robeson *v.* Lewis, 64 N. C. 734; Goodman *v.* Henderson, 58 Ga. 567; Harriman *v.* Baptist Church, 63 Ga. 166; McGuire *v.* Stephens, 42 Miss. 724; Brown *v.* Guice, 46 Miss. 299; Peacher *v.* Strauss, 47 Miss. 358; Johnson *v.* Ballew, 2 Port. Ala. 29; Force *v.* Hibbard, 63 Ala. 410; Campbell *v.* Johnson, 44 Mo. 247; Jennings *v.* Briseadine, 44 Mo. 332; Mithoff *v.* Byrne, 20 La. An. 363; McNair *v.* Toler, 5 Minn. 435; Hobart *v.* Beers, 26 Kan. 329; State Historical Soc. *v.* Lincoln, 14 Neb. 336; Norris *v.* Hunt, 51 Tex. 609; Brandon *v.* Leddy, 67 Cal. 43. See Fish *v.* Hubbard, 21 Wend. 651; and infra, § 1006.

It must be at the same time remembered that patent mistakes may be corrected, when practicable, by the context. Wilson *v.* Wilson, 5 H. L. C. 60; Marion *v.* Faxon, 20 Conn. 486; Huyler *v.* Atwood, 26 N. J. Eq. 504.

[2] Peisch *v.* Dickson, 1 Mason, 9.

[3] See comments of Moncure, J., in Early *v.* Wilkinson, 9 Grat. 74. And see Byers *v.* Wheatly, 59 Tenn. 160.

tioned by Judge Story there is no ambiguity in the writer's mind, but a conception which fails simply because the words selected by the writer are susceptible of a meaning other than that which he intended. By Sir J. Stephen the rule is stated more correctly to be, that "if the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say."[1] We may add that latent ambiguities in contracts, when raised by parol evidence, can be got rid of by parol evidence.[2]

"Patent" is "subjective," and "latent," "objective."

§ 957. Were we to translate Lord Bacon's maxim into modern terms, we might say that a patent ambiguity is subjective, that is to say, an ambiguity in the mind of the writer himself; while a latent ambiguity is objective, that is to say, an ambiguity in the thing he describes. A writer's mind may be ambiguous for several reasons. He may have no idea on the topic on which he writes; and if so, it is inadmissible to prove that he had an idea, which would be to contradict the writing itself, and which would make him say what he did not intend to say. In such case a writing is to be treated as a piece of blank paper, and is not (as is the case with a meaningless will) to be permitted in any way to disturb the due course of the law. To graft a meaning, for instance, on a meaningless will, would be to open the way to great frauds, and to contravene the statutes requiring wills to be in writing. Or a writing may be ambiguous because the writer intends it to be so. Of this an illustration is to be found in a much litigated case in which the testator left his estate to his "heir at law." It was perfectly competent for him to say in his will who his "heir at law" was, and to make such person his heir at law; but he did not choose to do so, but preferred to leave it to the law itself to decide who was his heir at law. Now in such a case to have taken evidence to prove that Mr. Aspden, the testator, at one time said that he liked one nephew, or that at another time he said he liked another nephew, would have been to contravene (1.) the statute which requires wills to be written; (2.) the policy of the law which forbids the transfer of

[1] Steph. Ev. art. 91; citing Baylis v. R. J., 2 Atk. 239; Shore v. Wilson, 9 C. & F. 365. See infra, § 1006.

[2] Towle v. Topham (Ch. Div. 1878), 37 L. T. 308; 26 W. R. Dig. 253.

property by loose talk; and (3.) the intention of the testator, which was to have the question of heirship determined, not by himself, but by the courts. Hence, in this famous case, extrinsic evidence as to his intention was properly rejected.[1] On the other hand, an ambiguity which is "latent" or "objective" is an ambiguity, not in the writer's mind, which it is not the business of the court to clear, but in the thing described, which it is the business of the court to discover and to distinguish, so as to carry out the writer's intent. Hence, parol evidence is admissible to solve such an ambiguity.[2]

§ 958. Usage cannot be introduced either to give to a dispositive writing a meaning different from that which it bears on its face, or to interpret any of the terms used in such writing, in a sense conflicting with that attached to such terms by law.[3] Thus where goods had been sold

Usage cannot in general vary dispositive writing.

[1] Aspden's Est., 3 Wall. Jr. 368.

[2] See cases cited supra; Baldwin Co. *v.* Clements, 38 Ohio St. 587; Lanman *v.* Crooker, 97 Ind. 163; Ritchie *v.* Pease, 114 Ill. 353; Lyman *v.* Gedney, Id. 388; Farmer *v.* Batts, 83 N. C. 387; Kaphan *v.* Ryan, 10 S. C. 352; Saulsbury *v.* Blandys, 60 Ga. 646; Force *v.* Hibbard, 63 Ala. 410; Sikes *v.* Shews, 74 Ala. 382; Meyer *v.* Mitchell, 75 Ala. 475; Goff *v.* Roberts, 72 Mo. 570; Trowbridge *v.* Dean, 40 Mich. 687; Nilson *v.* Morse, 52 Wis. 240; Terry *v.* Berry, 13 Nev. 514; Jenkins *v.* Lykes, 19 Fla. 148.

[3] R. *v.* Lee, 12 Mod. 514; Smith *v.* Wilson, 3 B. & Ad. 731; Hoçkin *v.* Cooke, 4 T. R. 314; Wigglesworth *v.* Dallison, 1 Smith's Leading Cases, 498; Noble *v.* Durell, 3 T. R. 371; Blackett *v.* Exch. Co., 2 Cr. & J. 249; Doe *v.* Lea, 11 East, 312; Sotilichos *v.* Kemp, 3 Ex. R. 105; Holding *v.* Pigott, 7 Bing. 465, 474; 5 M. & P. 427, *S. C.*; Clarke *v.* Roystone, 13 M. & W. 752; Yeats *v.* Pim, Holt N. P. R. 95; *nom.* Yates *v.* Pym, 6 Taunt. 446, *S. C.*; Trueman *v.* Loder, 11 A. & E. 589; 3 P. & D. 267, *S. C.*; Muncey *v.* Dennis, 1 H. & N. 216; Suse *v.* Pompe, 8 Com. B. N. S. 538; Buckle *v.* Knoop, 36 L. J. Ex. 49; Menzies *v.* Lightfoot, 11 L. R. Eq. 459; Insurance Co. *v.* Wright, 1 Wall. 456; Merchants' Bank *v.* State Bank, 10 Wall. 604; Moran *v.* Prather, 23 Wall. 499; Grace *v.* Ins. Co., 109 U. S. 278; Patch *v.* White, 117 U. S. 210; Cabot *v.* Winsor, 1 Allen, 546; Dodd *v.* Farlow, 11 Allen, 426; Luce *v.* Ins. Co., 105 Mass. 297; Davis *v.* Galloupe, 111 Mass. 121; Sawtelle *v.* Drew, 122 Mass. 228; Glendale Co. *v.* Ins. Co., 21 Conn. 19; Simmons *v.* Law, 4 Abb. (N. Y.) App. Dec. 241; Lombardo *v.* Case, 45 Barb. 95; Thompson *v.* Ashton, 14 Johns. 317; Woodruff *v.* Bank, 25 Wend. 673; Markham *v.* Jaudon, 41 N. Y. 235; Farm. & Mech. Bk. *v.* Sprague, 52 N. Y. 605; Stenton *v.* Jerome, 54 N. Y. 480; Baker *v.* Drake, 66 N. Y. 518; Security Bank *v.* Nat. Bank, 67 N. Y. 458; Bank of Commerce *v.* Bissell, 72 N. Y. 615; Hermann *v.* Ins. Co., 100 N. Y. 411; Bigelow *v.* Legg, 102 N. Y. 652; Schenck *v.* Griffin, 38 N. J. L. 462; Coxe *v.* Heisley, 19 Penn. St. 243; Wetherill *v.* Neilson, 20 Penn. St. 448; Wilmer-

through a London broker under a written contract, which stipulated that payment should be made by bills, Lord Ellenborough rejected evidence of a custom, that *bills* meant *approved* bills.[1] So where linseed was bought to be delivered at Hull, and "fourteen days to be allowed for its delivery from the time of the ship's being ready to discharge," evidence to show that this stipulation was intended by the parties for the benefit, not of the seller, but of the buyer, who had the option of accepting the seed during any portion of the fourteen days, was rejected.[2]

§ 959. On the other hand, documents may be explicable by usage as to matters in respect to which they are obscure or silent.[3] But it

ing *v.* McGaughey, 30 Iowa, 205; Osgood *v.* McConnell, 32 Ill. 74; Marc *v.* Kupfer, 34 Ill. 287; Sanford *v.* Rawlings, 43 Ill. 92; Gilbert *v.* McGinnis, 111 Ill. 28; Rafert *v.* Scroggins, 40 Ind. 195; Spears *v.* Ward, 48 Ind. 546; Marks *v.* Cass Co. Mill, 43 Iowa, 146; Advertiser Co. *v.* Detroit, 43 Mich. 116; Werner *v.* Footman, 54 Ga. 128; Sugart *v.* Mays, 54 Ga. 554; Jackson *v.* Beling, 22 La. An. 377; Mangum *v.* Ball, 43 Miss. 288; Harvey *v.* Cady, 3 Mich. 431.

As to negotiable paper, see infra, § 1058.

The impolicy of expanding the rule admitting this kind of evidence is thus discussed by Lord Denman: "If a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts; while, in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written document. Again, what can be more difficult than to ascertain, as a matter of fact, such a prevalence of what is called a custom in trade as to justify a verdict that it forms a part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them; a conflict may exist between the customs of two different places; and supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom." Trueman *v.* Loder, 11 A. & E. 597, 598. To the same effect is an opinion of Judge Story in The Schooner Reeside, 2 Sumn. 567.

For an article on the usages of Trade, see 7 Cent. L. J. 958.

[1] Hodgson *v.* Davies, 2 Camp. 532; approved of by Ld. Denman in Trueman *v.* Loder, 11 A. & E. 599.

[2] Sotilichos *v.* Kemp, 3 Ex. R. 105.

[3] Hence where a business document is insensible when read according to the ordinary sense of the words used there-

does not follow, because a usage exists as to the object of a contract, that the contract is meant by the parties to incorporate the usage.[1] It is within the power of parties to override by consent any usage, no matter how settled. It may be the usage of a particular business, for instance, to accept checks given in payment of goods as cash, and hence an agent, on such usage, if the matter be open, may accept checks without incurring liability for the loss of his principal;[2] but if the principal should instruct the agent not to receive checks, then the agent cannot protect himself by setting up the usage. Wherever, also, it appears from the instrument, either expressly or impliedly, that the parties did not mean to be governed by an alleged custom, evidence of the custom cannot be received.[3] Thus, if the custom of the country should require the tenant to plough, sow, and manure a certain portion of the demised land in the last year, and should entitle him, on quitting, to receive from the landlord a reasonable compensation for his labor, seeds, and manure; evidence of such a custom would be rejected, had the tenant covenanted to plough, sow, and manure, in accordance with the custom, he being paid on quitting for the *ploughing*.[4] Nor can

Parties may override usage by consent.

in, it is a question for the jury whether the language thereof has not acquired a definite meaning by mercantile usage. Ashworth *v.* Redford, 9 L. R. C. P. 20.

[1] Whart. on Cont. § 559. As to usage construing power of agents, see infra, § 967.

[2] Wharton on Agency, § 210.

Evidence has been held admissible in England to prove it to be the common and almost invariable practice of bill-brokers in the city of London, not to indorse each bill of exchange which they have discounted for a customer when they re-discount it with their bankers, but to give to such bankers a general guarantee for all bills which they re-discount with them. On this proof being made, it was held that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor, the drawer in discounting the bill with bill-brokers in the city of London, has an implied authority from the acceptor to deal with them in the ordinary course of their business, and, consequently, that the bill-brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantee to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantee. Bishop, ex parte, Fox, in re, 15 Ch. D. 400; see infra, § 967.

[3] Hutton *v.* Warren, 1 M. & W. 477, per Parke, B. See Clarke *v.* Roystone, 13 M. & W. 752.

[4] 1 M. & W. 477, 478; Webb *v.* Plummer, 2 B. & A. 746. See the question discussed by Davis, J., in Barnard *v.* Kellogg, 10 Wall. 383, citing Thomp-

oral proof of custom be adduced to destroy the force of brokers contracts.[1]

Proof of submission to a conflicting usage is inadmissible.

§ 960. Even parol proof that the parties agreed that a written contract should be subjected to a usage conflicting with the writings is inadmissible, unless fraud or gross concurrent mistake be proved; for this would be contradicting the writing by parol evidence, and substituting an inferior and treacherous medium of proof for that which is superior and which is solemnly adopted by the parties as expressing their purposes.[2] It is, however, admissible to prove that the course of business between the parties gave to certain terms used by them a distinctive meaning.[3]

Otherwise when ambiguous business terms are to be explained.

§ 961. Where, also, a dispositive writing employs ambiguous terms, usage can be appealed to, to give a definition of such terms, and to explain, not to vary, the writing. What is meant, is the question, by these terms. And in order to answer this question it is admissible to show a local usage affixing a particular meaning to such ambiguous terms, provided such evidence be explicatory of the meaning of the parties, and does not contradict the tenor of the instrument.[4] Parties, preparing a document in a place or trade

son *v.* Ashton, 14 Johns. 317; Dodd *v.* Farlow, 11 Allen, 426; Frith *v.* Barker, 5 Johns. 327; Woodruff *v.* Bank, 25 Wend. 673; Simmons *v.* Law, 3 Keyes, 219, and other cases.

[1] Infra, § 968.

[2] Oelricks *v.* Ford, 23 How. 49.

[3] See infra, § 961; Whart. on Contracts, §§ 637 *et seq.*

[4] Whart. on Cont. §§ 629 *et seq.*; Webb *v.* Plummer, 2 B. & Ald. 746; Wigglesworth *v.* Dallison, 1 Smith's Lead. Cas. 498; Spicer *v.* Hooper, 1 Q. B. 424; Chaurand *v.* Ankerstein, Peake's N. P. Cases, 43; Cochran *v.* Retburgh, 3 Esp. 121; Evans *v.* Pratt, 3 M. & Gr. 759; Smith *v.* Wilson, 3 B. & A. 728; Roberts *v.* Barker, 1 Cr. & M. 808; Hughes *v.* Gordon, 1 Bligh, 287; Clinan *v.* Cooke, 1 Sch. & L. 22; Buckle *v.* Knoop, L. R. 2 Ex. 122; Taylor *v.* Briggs, 2 C. & P. 525; Taylor *v.* Clay, 9 Q. B. 713; Adams *v.* Royal Mail Steam Packet Co., 5 C. B. (N. S.) 493; Leidman *v.* Schultz, 14 C. B. 38; Robertson *v.* Jackson, 2 C. B. 412; Grant *v.* Paxton, 1 Taunton, 463; Planché *v.* Fletcher, 1 Doug. 521; Elton *v.* Larkins, 8 Bing. 198; Hudson *v.* Ede, Law Rep. 3 Q. B. 412; 1 Arnould on Ins. (2d Amer. ed) 71, note; Insurance Co. *v.* Wright, 1 Wallace, 456, 485; Sturgis *v.* Cary, 2 Curtis C. C. 382; Barnard *v.* Adams, 10 How. 270; Barnard *v.* Kellogg, 10 Wall. 383; Robinson *v.* U. S., 13 Wall. 363; Howe *v.* Ins. Co., 3 Cliff. 318; Moore *v.* U. S., 17 Ct. of Cls. 17; Farrar *v.* Stackpole, 6 Greenl. 154; Stone *v.* Bradbury, 14 Me. 185; George *v.* Joy, 19 N. H. 544; Hart *v.* Hammett, 18 Vt. 127; Patch *v.* Ins. Co., 44 Vt. 481; Murray *v.* Hatch,

where certain terms have a customary meaning, may be interpreted as using these terms in the meaning thus customary. Thus, under

6 Mass. 465; Eaton *v.* Smith, 20 Pick. 150; Luce *v.* Ins. Co., 105 Mass. 297; Howard *v.* Ins. Co., 109 Mass. 387; Schnitzer *v.* Print Works, 114 Mass. 123; Page *v.* Cole, 120 Mass. 37; Avery *v.* Stewart, 2 Conn. 69; Collins *v.* Driscoll, 34 Conn. 43; Astor *v.* Ins. Co., 7 Cow. 202; Hinton *v.* Locke, 5 Hill, 437; Hulbert *v.* Carver, 37 Barb. 62; Dana *v.* Fiedler, 12 N. Y. 40; Markham *v.* Jaudon, 41 N. Y. 235; Dent *v.* S. S. Co., 49 N. Y. 390; Walls *v.* Bailey, 49 N. Y. 464; Lawrence *v.* Maxwell, 53 N. Y. 21; Collender *v.* Dinsmore, 55 N. Y. 204; Harris *v.* Rathbun, 2 Abb. (N. Y.) App. 326; Smith *v.* Clayton, 5 Dutch. (29 N. J. L.) 357; Hartwell *v.* Camman, 10 N. J. Eq. 128; New Jersey Co. *v.* Boston Co., 15 N. J. Eq. 418; Brown *v.* Brooks, 25 Penn. St. 110; Meighen *v.* Bank, 25 Penn. St. 288; Carey *v.* Bright, 58 Penn. St. 70; McMasters *v.* R. R., 69 Penn. St. 374; Williams *v.* Woods, 16 Md. 220; Merick *v.* McNally, 26 Mich. 374; Whittemore *v.* Weiss, 33 Mich. 348; Prather *v.* Ross, 17 Ind. 495; Myers *v.* Walker, 24 Ill. 133; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332; Fruin *v.* R. R., 69 Mo. 397; Hooper *v.* R. R., 27 Wis. 81; Lamb *v.* Klaus, 30 Wis. 94; Johnson *v.* Ins. Co., 39 Wis. 87; Reynolds *v.* Jourdan, 6 Cal. 108; Jenny Lind Co. *v.* Bower, 11 Cal. 194; Drake *v.* Goree, 22 Ala. 409; Cowles *v.* Garrett, 30 Ala. 341; Soutier *v.* Kellerman, 18 Mo. 509; Taylor *v.* Sotolingo, 6 La. An. 154. See, also, Moran *v.* Prather, 23 Wall. 499; citing Seymour *v.* Osborne, 11 Wall. 546.

"Evidence may be given of a custom or usage in explanation and application of particular words or phrases, and to aid in the interpretation of the contract, but not to derogate from the rights of the parties, or to import into the contract new terms and conditions, or vary the legal effect of the transaction." Allen, J., Lawrence *v.* Maxwell, 53 N. Y. 21.

"In Barnard *v.* Kellogg, 10 Wallace, 383, this court decided that proof of a custom or usage inconsistent with a contract, and which either expressly or by necessary implication contradicts it, cannot be received in evidence to affect it; and that usage is not allowed to subvert the settled rules of law. But we stated at the same time that custom or usage was properly received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, and that such evidence was thus used on the theory that the parties knew of the existence of the custom or usage and contracted in reference to it. This latter rule is as well settled as the former; 1 Smith's Leading Cases, p. 386, 7th edition; and under it the evidence was rightly received." Davis, J., Robinson *v.* United States, 13 Wallace, 365.

"Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated if the language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted, in order to expound it and arrive at its true meaning. Again, in all contracts as to the subject-matter of which a known usage prevails, parties are found to proceed with the tacit assumption of those usages; they commonly reduce into writing the special

a contract to carry a full and complete cargo of molasses from Trinidad to London, evidence has been received to qualify the contract by showing that a cargo is full and complete if the ship be filled with casks of the standard size, although there be smaller casks of other produce freighted in the same vessel.[1] Where a writing promises to pay the "product" of hogs, parol testimony is admissible to prove what such product is;[2] and where an Irish corn merchant sends written instructions to his *del credere* agent in London to sell some oats "*on his account*," parol evidence is admissible on the agent's part, for the purpose of showing that, by the custom of the London corn trade, he is warranted, under these instructions, in selling in his own name.[3] Where a deed uses the term "north," it is admissible, in explanation of the term, to show a usage to run the courses by the magnetic meridian.[4] So, though according to the general import of the words "at and from," a policy would attach upon the ship's first mooring in a harbor on the coast; yet, where these expressions are employed in a Newfoundland policy, they may be explained by evidence of usage to mean, that the risk should not commence till the expiration of the fishing, technically called

particulars of their agreement, but omit to specify those known usages, which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing; partly implied or understood and unwritten. But in these cases a restriction is established on the soundest principle, that the evidence received must not be a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less; neither in the construction of a contract among merchants, tradesmen, or others will the evidence be excluded because the words are, in their ordinary meaning, unambiguous, for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day'? Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred; 'a week' only a week during the theatrical season; 'a day' a working day. In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract,—it only ascertains it by expounding the language." Per Coleridge, J., Browne *v.* Byrne, 3 E. & B. 703; Powell's Evidence, 4th ed. 429.

[1] Cuthbert *v.* Cumming, 11 Ex. 405.

[2] Stewart *v.* Smith, 28 Ill. 397.

[3] Johnstone *v.* Usborne, 11 A. & E. 549.

[4] Jenny Lind Co. *v.* Bower, 11 Cal. 194.

"banking," or of an intermediate voyage.[1] Evidence of usage, also, is admissible, in a suit on a written contract of sale, to show the meaning of "good, merchantable shipping hay;"[2] on a similar contract for boots, to show the meaning of "good custom cowhide;"[3] and on a similar contract for a machine to show the meaning of "team."[4] It has also been held admissible to show that by the usage of parties an inferior kind of palm oil answers to the description of "best palm oil;"[5] and that by the custom of the building trade the words "weekly accounts" refer to regular day work only;[6] and that credit for "six or eight weeks" does not necessarily give the whole eight weeks for payment for goods.[7] So, to explain the meaning of the term with "all faults," evidence is admissible to prove that these terms have a customary meaning in a contract for the sale of goods.[8]

§ 961 *a*. It has also been held admissible to admit proof of usage to show that in a contract for "freight," "freight" does not include "hay;"[9] to show the meaning of the term "dollars;"[10] to show the difference between "comediennes" and "danseuses" in a written engagement for the services of a dancing girl;[11] to determine whether "per square yard," in a contract for plastering, relates to the plastering actually laid on, or to the whole surface of the house to be plastered;[12] to settle the number of hours in a measurement of labor at so much "per day;"[13] to determine the area of mason work covered by the term of so much "per foot;"[14] to determine the meaning of "per thousand" in a contract for furnishing bricks;"[15]

[1] Vallance *v.* Dewar, 1 Camp. 503. See Eldridge *v.* Smith, 13 Allen, 140. As to proof of misstatements by insurance agents, see infra, § 1172.

[2] Fitch *v.* Carpenter, 43 Barb. 40.

[3] Wait *v.* Fairbanks, Brayt. (Vt.) 77.

[4] Ganson *v.* Madigan, 15 Wis. 144.

[5] Lucas *v.* Brystow, E., B. & E. 907.

[6] Myers *v.* Sarl, 3 E. & E. 306.

[7] Ashwell *v.* Retford, L. R. 9 C. P. 20; 43 L. J. C. P. 57.

[8] Whitney *v.* Boardman, 118 Mass. 242; citing Henshaw *v.* Robins, 9 Met. 83; Whitmarsh *v.* Conway Ins. Co., 16 Gray, 359; Miller *v.* Stevens, 100 Mass. 518; Swett *v.* Shumway, 102 Mass. 365; Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331; Boardman *v.* Spooner, 13 Allen, 353, 359. See Shepherd *v.* Kain, 5 B. & Ald. 240; Schneider *v.* Heath, 3 Camp. 506.

[9] Noyes *v.* Canfield, 29 Vt. 79. See Peisch *v.* Dickson, 1 Mason, 11.

[10] Supra, § 948.

[11] Baron *v.* Placide, 7 La. An. 229.

[12] Walls *v.* Bailey, 49 N. Y. 467. See Hill *v.* McDowell, 14 Penn. St. 175.

[13] Hinton *v.* Locke, 5 Hill, 437.

[14] Ford *v.* Tirrell, 9 Gray, 401.

[15] Lowe *v.* Lehman, 15 Ohio St. 179.

to determine in what way the limit "not less than one foot high" is to be construed in a contract to furnish young trees;[1] to show the meaning of "square yards" in a contract for payment by measurement;[2] to prove by parol the meaning of the words "weeks," used

[1] Barton *v.* McKelway, 22 N. J. L. 165.

[2] The authorities as to measurement are well grouped in the following opinion:—

"The contract between the parties was in writing. By it the plaintiffs were to furnish the material for the plastering work of the defendant's house, and to do the work of laying it on. The defendant was to pay them for the work and material a price per square yard. Of course, the total of the compensation was to be got at by measurement. But when the parties came to determine how many square yards there were, they differed. The query was, the square yards of what? Of the plaster actually laid on, or of the whole side of the house, calling it solid, with no allowance for the openings by windows and doors!

"And it is not to be said of this contract, that it was so plain in its terms that there could be but one conclusion as to the mode of measurement, by which the number of square yards of work should be arrived at. It is in this case as it was in Hinton *v.* Locke, 5 Hill, 437. There the work was done at so much per day. The parties there differed as to how many hours made a day's work. That is, what should be the measurement of the day? And there, evidence of the usage was admitted, not to control any rule of law, nor to contradict the agreement of the parties, but to explain an ambiguity in the contract. And the proof showing a usage among carpenters that the day was to be measured by the lapse of ten hours, it was held a valid usage; and the contract was interpreted in accordance with it.

"In Ford *v.* Tirrell, 9 Gray, 401, the contract was to build the wall of an octangular cellar, at the rate of eleven cents per foot. The only question was as to the mode of measurement. The defendant contended that the inner surface of the wall should be the rule. The plaintiff claimed that an additional allowance should be made for the necessary work at the angles to support the building. It was held that the agreement as to the compensation was equivocal and obscure, and that it was competent to prove a local usage of measuring cellar walls, in order to interpret the meaning of the language, and to ascertain the extent of the contract.

"So in Lowe *v.* Lehman, 15 Ohio St. 179, in a contract to *furnish and lay up* brick at so much *per thousand*, the controversy was as to the proper mode of counting. Evidence of a local usage, to estimate by measurement of the walls, on a uniform rule, based on the average size of brick, making slight addition for extra work and wastage, deducting for openings in wall, but not for openings in chimneys nor jambs, nor for caps, sills, nor lintels, was admitted as not unreasonable. So, in Barton *v.* McKelway, 2 Zabriskie (22 N. J.), 165, in a contract to deliver certain trees from a nursery, they were to be not less than one foot high. The dispute was as to the measurement; and evidence was held competent of a usage in that trade to measure only to the top of the ripe, hard wood and not to the tip of the tree. See, also, Wil-

in a theatrical contract;[1] of "months," as meaning calendar months in a charter-party;[2] of "days," as meaning working days in a bill of lading;[3] of "corn,"[4] "pig-iron,"[5] "salt,"[6] and of similar expressions used in transportation contracts, or in policies of insurance.[7] On the same principle, evidence has been admitted to show that, by usage in the hop trade, a sale of "ten pockets of Kent hops at £5," means £5 per cwt.[8] So, where goods having been sent to a London packer to prepare for exportation, he acknowledged their receipt "on account of the vendor for the vendee," evidence of usage was admitted to prove that when packers signed receipts in this form, it was their duty not to part with the goods without the vendor's further orders.[9] Again, where a written contract contained a stipulation that a party should "lose no time on his own account, and do his work well, and behave himself in all respects as a good servant," extrinsic evidence was received to show that, by the custom of his trade, such a party was entitled to certain holidays.[10] In all cases, so it has been ruled, where a word is used which is susceptible of two or more meanings,[11] extrinsic evidence is admissible of the usage or course of trade at the place where the contract is made, or where it is to be carried into effect, to explain or remove such doubt. So, also, where a similar doubt arises as to the *lex loci* by which such a contract is to be construed, evidence of usage will be received to determine the place. Thus, where the question was whether goods were to be liable to freight according to their weight at the place of shipment, or according to their ex-

cox *v.* Wood, 9 Wendell, 346; Grant *v.* Maddox, 15 M. & W. 737." Folger, J., Walls *v.* Bailey, 49 N. Y. 467. And see, as to measurement, supra, § 947. The topic in the text is considered in Whart. on Contracts, §§ 630 *et seq.*

[1] Grant *v.* Maddox, 15 M. & W. 737. See Meyers *v.* Sarl, 30 L. J. Q. B. 9; 3 E. & E. 306, *S. C.*

[2] Jolly *v.* Young, 1 Esp. 186; recognized in Simpson *v.* Margitson, 11 Q. B. 32.

[3] Cochran *v.* Retberg, 3 Esp. 121.

[4] Mason *v.* Skurray, and Moody *v.* Surridge, Park Ins. 245; Scott *v.* Bourdillon, 2 N. R. 213.

[5] Mackenzie *v.* Dunlop, 3 Macq. Sc. Cas. H. of L. 26, per Ld. Cranworth, C.

[6] Journu *v.* Bourdieu, Park Insur. 245.

[7] As to "general average," see Miller *v.* Tetherington, 6 H. & N. 278; Kidston *v.* Ins. Co., L. R. 1 C. P. 535; *S. C.* L. R. 2 C. P. 357.

[8] Spicer *v.* Cooper, 1 Q. B. 424.

[9] Bowman *v.* Horsey, 2 M. & Rob. 85.

[10] R. *v.* Stoke upon Trent, 5 Q. B. 303.

[11] Buckle *v.* Knoop, L. R. 2 Ex. 125; 15 W. R. 588.

panded weight at the place of consignment, the terms of the charter-party were construed by extrinsic evidence that the usage was to measure the goods according to their weight at the place of shipment.[1]

Usage is to be brought home to the party to whom it is imputed.

§ 962. The term "Usage," we must remember, is employed in the class of cases which are here collected in several distinct senses. First, in construing unilateral writings, such as letters, wills, and powers of attorney, "usage" may be convertible with habit. In such case, therefore, we may prove that the writer had a habit of using certain words in a particular sense, and we may in this way arrive at the sense in which the words were used in the litigated writing to be construed.[2] Secondly, as to bilateral writings, when two persons make a written contract, we may inquire, in construing that contract, what was their course of business, and we may seek to collect their meaning from their correspondence or conversation.[3] Thirdly, every person conducting a trade is supposed to use the language of that trade, and in making a contract connected with the trade to use terms in the sense in which they are accepted in the trade, unless the usage is precluded by the terms used.[4] "Every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself."[5] Fourthly, all persons living in a district may be supposed to adopt the peculiarities of expression of such district, and evidence is therefore admissible of the sense in which litigated words are used in such district.[6] But in whatever sense the term is employed, the usage we seek to attach to such term must be brought

[1] Bottomley *v.* Forbes, 5 Bing. N. C. 121; Powell's Evidence (4th ed.), 428.

[2] Shore *v.* Wilson, 9 Cl. & F. 355; Castle *v.* Fox, L. R. 11 Eq. 542; Benham *v.* Hendricson, 32 N. J. Eq. 441. See Whart. on Contracts, §§ 930 *et seq.* Supra, § 954; infra, §§ 1008, 1287.

[3] Rushford *v.* Hatfield, 7 East, 225; Bourne *v.* Gatliff, 3 M. & Gr. 643; 11 Cl. & F. 45; Barnard *v.* Kellogg, 10 Wall. 383; Gray *v.* Harper, 1 Story, 574; Fabbri *v.* Ins. Co., 55 N. Y. 133; Wilson *v.* Randall, 67 N. Y. 338. See further infra, § 971.

[4] Meighén *v.* Bank, 25 Penn. St. 288; Carter *v.* Phil. Coal Co., 77 Penn. St. 286. Supra, § 961.

[5] Noble *v.* Kennoway, 2 Doug. 513; so Da Costa *v.* Edmunds, 4 Camp. 143, per Ld. Ellenborough. Infra, § 1243.

[6] Trimby *v.* Vignier, 1 Bing. (N. C.) 151; Clayton *v.* Gregson, 5 Ad. & El. 502; De la Vega *v.* Vianna, 1 Barn. & Ad. 284; DeWolf *v.* Johnson, 10 Wheat. 367; Bank U. S. *v.* Donally, 8 Pet. 368; Pope *v.* Nickerson, 3 Story R. 465; Whart. Confl. of L. 434.

home to the writer.[1] In the first two classes of cases noticed above, this may be done by showing from the writings or other expressions of the persons charged an adoption of the particular meaning set up.[2] When the usage of a trade exists, by which certain words are used in a particular sense, then it is sufficient to show directly or inferentially that the writers belonged to this trade. When the local interpretation of a district is set up, then it must appear that the writer was so identified with the district as to make it probable that he used words in the local sense.

When usage is that of a particular class, party must be proved to belong to the class.

§ 963. There are, however, cases in which it must be substantively shown that the party whose writings are to be construed belonged to the class by whom the contested terms were used in the assigned sense. Thus, to recur to a case already noticed, where a party, founding a charity in the early part of the eighteenth century, had, in the deed of grant, described the objects of her bounty as "godly preachers of Christ's Holy Gospel," and it became necessary to determine, a century afterwards, what persons were entitled to the charity, extrinsic evidence was admitted to show that at the time of the grant a religious sect existed, who applied this particular phraseology to Protestant Trinitarian dissenters, and that the founder was herself a member of such sect.[3] So where a term having a general and a technical meaning is used in an instrument to which there are several parties doing business in different places, we must inquire first as to the place of business of the party by whom the term is introduced into the contract, and then as to the local interpretation there attached to the term.[4] It stands to reason, also, that a party against whom a usage is offered may prove that he was ignorant of the usage, and could not, therefore, have contracted subject to its conditions.[5] It has even been said[6]

[1] Tilley *v.* Cook, 103 U. S. 155; Grace *v.* U. S., 109 U. S. 278; Phœnix Co. *v.* Frissell, 142 Mass. 513; Harris *v.* Tuxbridge, 83 N. Y. 92; Flatt *v.* Osborne, 33 Minn. 98.

[2] See Ober *v.* Carson, 62 Mo. 209.

[3] Shore *v.* Wilson, 9 Cl. & Fin. 355, 580, per Ld. Cottenham. See, also, Att.-Gen. *v.* Drummond, 1 Dru. & War. 353; Drummond *v.* Att.-Gen., 2 H. of L. Cas. 837, 857, *S. C.* on appeal.

[4] Whart. Confl. of Laws, §§ 435 *et seq.*; Westlake, Priv. Int. Law, § 209; Power *v.* Whitmore, 1 M. & S. 141; Schmidt *v.* Ins. Co., 1 Johns. R. 249; Shiff *v.* Ins. Co., 6 Mart. (N. S.) 629; Lenox *v.* Ins. Co., 3 Johns. Cas. 178.

[5] Bourne *v.* Gatliff, 3 M. & Gr. 384; Bottomley *v.* Forbes, 5 Bing. N. C. 127; Walls *v.* Bailey, 49 N. Y. 464.

[6] Taylor's Ev. § 1077.

that if any reason exists for believing that the opposite party will rely upon usage, the evidence on these points may be given by way of *anticipation*. In support of this view is cited an English case, where the owner of goods brought an action of assumpsit against a carrier by sea for non-delivery of the goods to him at the port of London, and the defendant pleaded that he had delivered them at that port. Under this state of facts it was held first by the Court of Exchequer Chamber,[1] and then by the House of Lords,[2] that the plaintiff might prove former dealings between himself and the defendant respecting the carriage of other goods from the defendant's London wharf to the plaintiff's place of business; as such evidence was offered, not for the purpose of extending or narrowing the contract, or in any way changing it, but with the sole view of meeting a case which might be made on the other side to establish a custom of delivery at a wharf. The fact that the evidence consisted of instances of individual contracts might be open to observation, but the evidence could not be rejected on that ground;[3] and Lord Brougham observed: "A party may properly in this way anticipate objections and introduce evidence of this sort, which, if he delayed to produce at that moment, would afterwards be shut out."[4] But to bring home the usage of a trade to a person engaged in such trade, it is not necessary that it should be immemorial and universal. It is enough if it be generally adopted in the trade at the time of the particular contract.[5] The proof must go, not to opinion, but to fact.[6]

One witness may prove usage.

§ 964. Although there were at one time intimations to the contrary,[7] it is now settled that a single witness is sufficient to prove a usage so far as to enable the case to go to the jury;[8] but one witness is not enough to prove usage so as to bind a party who desires notice of it, and who would have had or ought to have taken notice of it if it existed.[9]

[1] Bourne *v.* Gatliff, 3 M. & Gr. 643, 689; 3 Scott N. R. 1, *S. C.*

[2] Ibid.; 11 Cl. & Fin. 45, 49, 69–71; 7 M. & Gr. 850, 865, 866, *S. C.*

[3] 11 Cl. & Fin. 70, per Ld. Lyndhurst, C.; 7 M. & Gr. 865, *S. C.*

[4] 11 Cl. & Fin. 71; 7 M. & Gr. 866, *S. C.*

[5] Legh *v.* Hewitt, 4 East, 154; Dalby *v.* Hirst, 1 B. & B. 224; 3 Moore, 536; Vallance *v.* Dewar, 1 Camp. 508; Robertson *v.* Jackson, 2 C. B. 412.

[6] Lewis *v.* Marshall, 7 M. & Gr. 744.

[7] Wood *v.* Hickok, 2 Wend. 501; Boardman *v.* Spooner, 13 Allen, 359.

[8] Robinson *v.* U. S., 13 Wall. 366; Vail *v.* Rice, 1 Selden, 155; Bissell *v.* Campbell, 54 N. Y. 853.

[9] Goodall *v.* Ins. Co., 25 N. H. 169.

§ 965. Of the law merchant, as is elsewhere seen, a court takes judicial notice.[1] It is otherwise as to local usages, which must be put in proof to the jury as are foreign laws,[2] and which do not become customs, so as to have the force of law, until accepted as law by the community, or by the courts acting on proof of the usage. The distinction between custom and usage is that usage is a fact and custom is a law. There can be usage without custom, but not custom without usage. Usage is inductive, based on consent of persons in a locality.[3] Custom is deductive, making established local usage a law. There is an important distinction, however, between a domestic local usage as a basis of custom and a foreign law. A foreign law is part of an independent jurisprudence, which is accepted, when proved, without regard to the question how far it harmonizes with the *lex fori*. A domestic local usage, on the other hand, will not be accepted if it is unreasonable, or irreconcilable with the *lex fori*.[4] If it conflicts either with statute,[5] or with the common law,[6] it cannot be sustained. But if a business usage be reasonable, and not conflicting with the *lex fori*, it is enough, in order to adopt such usage as interpretative of a contract, to show that it is fixed and established in the trade with which the business is concerned.[7]

Usage is to be proved to the jury; and must be reasonable, and not conflicting with the *lex fori*.

[1] Supra, § 298.

[2] Simpson *v.* Margitson, 11 Q. B. 32, and cases cited supra, § 315. See Whart. on Cont., §§ 630 *et seq.*

[3] See Gallup *v.* Lederer, 1 Hun, 287; Cutter *v.* Waddingham, 22 Mo. 284.

[4] Hodgson *v.* Davies, 2 Camp. 536; Fleet *v.* Murton, L. R. 7 Q. B. 124; Barnard *v.* Kellogg, 10 Wallace, 383; Farnsworth *v.* Hemmer, 1 Allen, 494; Mears *v.* Waples, 3 Houst. 581; Evans *v.* Waln, 71 Penn. St. 69; Glass Co. *v.* Morey, 108 Mass. 570. That a usage, in order to bring it to bear as that of a trade, must be established, reasonable, and well known, see Dean *v.* Swoop, 2 Binn. 72; Cope *v.* Dodd, 13 Penn. St. (1 Harris) 33; McMasters *v.* R. R., 69 Penn. St. 374; Adams *v.* Ins. Co., 76 Penn. St. 411, and cases cited in Whart. on Agency, §§ 40, 126, 676, 700. And see Pittsburgh Ins. Co. *v.* Dravo, 2 Weekly Notes of Cases, 194.

[5] Smith *v.* Wilson, 3 B. & Ad. 731; Hockin *v.* Cooke, 4 T. R. 271; Doe *v.* Benson, 4 B. & A. 588.

[6] Coxe *v.* Heisley, 19 Penn. St. (7 Harris) 243; Jones *v.* Wagner, 66 Penn. St. 430; Evans *v.* Waln, 71 Penn. St. 69; Randall *v.* Smith, 63 Mo. 105; Dewees *v.* Lockhart, 1 Tex. 535.

[7] Lewis *v.* Marshall, 7 M. & G. 744; Collins *v.* Hope, 3 Wash. C. C. 149; U. S. *v.* Duval, 1 Gilpin, 372; Chicopee *v.* Eager, 9 Met. 583; Furness *v.* Hone, 8 Wend. 247; Snowden *v.* Warder, 3 Rawle, 101; Koons *v.* Miller,

§ 966. Unless there be proof of usage, as to the meaning of a term, a judge ought not to leave it to the jury to pronounce on the sense in which the term was used, but should himself construe the term according to its fixed legal or popular signification.[1] Thus, where an auctioneer sued for a sum he was to receive by a written contract only if he sold "within two months," it was held that, in the absence of admissible extrinsic evidence, this meant in point of law two lunar months; and that, unless the context, or the circumstances of the contract, showed that the parties meant two calendar months, "the conduct of the parties to the written contract alone was not admissible to withdraw the construction of a word therein, of a settled primary meaning, from the judge and transfer it to the jury."[2]

Meaning of term is for court, unless there be proof of usage.

§ 967. An agent is authorized to do whatever is usual to enable him to execute his commission,[3] though as between himself and his principal he is liable if he transgress his written instructions.[4] But as to third parties, the principal, notwithstanding his private instructions, is bound by the acts of his general agent, so far as such acts are incident to the agency, and the parties privileged by the acts are ignorant of the private limitations.[5] In subordination to the general rule, however, a power to an agent to sell oil may be limited by proof of usage giving the principal the right to reject vendees of whom he disapproves.[6] So a power to an agent to sell may be interpreted

Power of agent may be construed by usage.

3 Watts & S. 271; Eyre *v.* Ins. Co., 5 Watts & S. 116; Pittsburgh *v.* O'Neill, 1 Barr, 342; Helme *v.* Ins. Co., 61 Penn. St. 107; McMasters *v.* R. R. Co., 69 Penn. St. 374; Carter *v.* Phil. Coal Co., 77 Penn. St. 286. See Whart. on Contracts, §§ 630 *et seq.*

[1] See Whart. on Contracts, § 631, and cases there cited.

[2] Simpson *v.* Margitson, 11 Q. B. 32; Powell's Evidence (4th ed.) 427.

[3] Whart. on Agency, §§ 126, 134.

[4] R. *v.* Lee, 12 Mod. 514; Farmers & Mechanics' Bk. *v.* Sprague, 52 N. Y. 605.

[5] Davidson *v.* Stanley, 2 M. & G. 128; Brady *v.* Todd, 9 C. B. N. S. 592; Bennett *v.* Lambert, 15 M. & W. 489; Schuchardt *v.* Allens, 1 Wallace, 359; Damon *v.* Granby, 2 Pick. 345; Temple *v.* Pomroy, 4 Gray, 128; Rogers *v.* Kneeland, 10 Wend. 218; Nelson *v.* R. R., 48 N. Y. 498; Layet *v.* Gano, 17 Ohio, 466; Cedar Rapids R. R. *v.* Stewart, 25 Iowa, 115; Smith *v.* Supervisors, 59 Ill. 412; Palmer *v.* Hatch, 46 Mo. 585, and cases cited in Whart. on Agen. §§ 40, 126, 676.

[6] Sumner *v.* Stewart, 69 Penn. St. 321. See Hodgson *v.* Davies, infra, § 968.

by usage to mean to sell by warranty or sample.[1] So it may be admissible to prove a usage by which corn factors in London sell in their own names.[2] But usage cannot be proved for the purpose of making the agent of an insurance company agent of the insured, when this is not provided for in the contract.[3]

Usage explanatory of brokers' memoranda.

§ 968. The importance of usage, as explanatory of ambiguous writings, is peculiarly illustrated by the evidence given as to the meaning of brokers' memoranda. These memoranda, as is elsewhere shown,[4] are sufficient to take a sale out of the statute of frauds; yet they are singularly brief, requiring for their interpretation expansions of meaning which, though now accepted by the courts, were originally proved by usage.[5] Special usages, in reference to the mode of payment on sales made by brokers, have been found by juries and adopted by the courts. Thus, if goods in the city of London be sold by a broker, to be paid for by a bill of exchange, the usage, so found and approved, is for the vendor, at his election, when goods are payable by a bill of exchange, if he be not satisfied with the sufficiency of the purchaser, to annul the contract, provided he take the earliest opportunity of intimating his disapproval; five days being held not too long a period for making the necessary inquiries.[6] But, apart from usage, the rule is to hold the broker's signed memoranda, if there be such, to be the primary contract between the parties.[7] It has also been held that oral proof of the usage of brokers is not admissible to vary the relation of broker and customer under the ordinary contract for a speculative purchase of stock, which is that of pledgor and pledgee.[8] It was ruled, however, that the parties to such a pledge might provide for the mode of disposing

[1] Alexander *v.* Gibson, 2 Camp. 555; Whart. on Agency, §§ 120, 187, 739; Dingle *v.* Hare, 7 C. B. N. S. 145; Howard *v.* Shepherd, L. R. 2 C. P. 148; Randall *v.* Kehlor, 60 Me. 37; Morris *v.* Bowen, 52 N. H. 416; Fay *v.* Richmond, 43 Vt. 25; Andrews *v.* Kneeland, 6 Cow. 354.

[2] Johnson *v.* Osborne, 3 P. & D. 11 A. & E. 549. As to usage of bill-brokers in London, see supra, § 959.

[3] Grace *v.* Ins. Co., 109 U. S. 278.

[4] Supra, § 75; Whart. Agen. § 715

[5] See Whart. on Agency, § 696.

[6] Hodgson *v.* Davies, 2 Camp. 536.

[7] Supra, § 75. On a contract to buy shares of stock "on margin," evidence is admissible on behalf of the broker to show the meaning of the words "on margin." Hatch *v.* Douglas, 48 Conn. 116; *S. C.* 40 Am. Rep. 154.

[8] Baker *v.* Drake, 66 N. Y. 518; aff. Markham *v.* Jaudon, 41 N. Y. 435.

of the security, and that parol evidence of usage was admissible to show in part what this mode of disposition was.[1]

Customary incidents may be annexed to contract.

§ 969. It will hereafter be shown that it may be proved by parol that the parties to a contract have agreed to collaterally extend it in a mode not inconsistent with its written terms.[2] What may be thus done by direct agreement may be done indirectly by force of a usage to which the parties are supposed to have agreed.[3] Under this rule it is admissible to prove by parol "any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract."[4] Thus to a sale of a horse it is admissible to annex a customary warranty;[5] to a shipping contract, a usage as to the mode of engaging and paying crews;[6] to negotiable paper, silent in this respect, the incident of customary days of grace;[7] and to a lease, the reservation of ripening crops.[8] So, where a quantity of linseed oil had been sold through London brokers by bought and sold notes, and the name of the purchaser was not disclosed in the bought note, evidence was received of a usage of trade in the city, by which every buying broker who did not, at the date of the bargain, name his principal, rendered himself liable to be treated by the vendor as the purchaser.[9] Evidence, also, when a party

[1] Baker *v.* Drake, supra.

[2] Infra, § 1026; Whart. on Contracts, § 660.

[3] Ashwell *v.* Retford, L. R. 9 C. P. 20; Bruce *v.* Hunter, 3 Camp. 467; Eaton *v.* Bell, 3 B. & Al. 34; Eldredge *v.* Smith, 13 Allen, 140. See Hatton *v.* Warren, 1 M. & W. 475, quoted infra, § 1027.

[4] Stephen's Ev. art. 90.

[5] Allen *v.* Prink, 4 M. & W. 140. See Jones *v.* Bowden, 4 Taunt. 847; Randall *v.* Kehlor, 60 Me. 37. But a usage cannot be annexed inconsistent with the contract, nor conflicting with the obligations of the parties imposed by the law, unless mutual mistake be proved. Boardman *v.* Spooner, 13 Allen, 353; Snelling *v.* Hall, 107 Mass. 138; Evans *v.* Waln, 71 Penn. St. 69.

[6] Eldredge *v.* Smith, 13 Allen, 140.

[7] Renner *v.* Bank, 9 Wheat. 581.

[8] 3 Washb. Real Prop. (4th ed.) 392; Wigglesworth *v.* Dallison, 1 Dougl. 201; Adams *v.* Morse, 51 Me. 499; Backenstoss *v.* Stahler, 33 Penn. St. 251; Baker *v.* Jordan, 3 Ohio St. 438; Bond *v.* Coke, 71 N. C. 97. See 1 Smith's Lead. Cas. 300. See, however, Wintermute *v.* Light, 46 Barb. 283.

[9] Humfrey *v.* Dale, 26 L. J. Q. B. 137; 7 E. & B. 266, *S. C.*; Dale *v.* Humfrey, 27 L. J. Q. B. 390; E. B. & E. 1004; *S. C.* in Ex. Ch. See Allan *v.* Sundius, 1 H. & C. 123; Fleet *v.*

contracts in the body of a charter party as "agent," is admissible to show that by custom such person is personally liable if he does not disclose the name of his principal in a reasonable time.[1] In suits on written contracts of hiring, also, it has been held admissible, as we have seen, to prove a custom that the servant should have certain holidays;[2] and that the contract should be defeasible on giving a month's notice on either side.[3] It has also been held, when mining shares were sold upon the terms that they should be paid for "half in two, and half in four months," but the contract was silent as to the time of their delivery, that in an action against the purchaser for not accepting and paying for the shares, evidence was admissible of a usage among brokers, that on contracts for the sale of mining shares, the vendor was not bound to deliver them without contemporaneous payment.[4] It may be also shown by parol that a heater and gas-fixtures were to pass to the purchaser of a house under a written agreement in which no mention was made of such articles.[5] It has even been held admissible to attach to bought and sold notes the incident of a sale by sample.[6] Incidents, also, in extension of a contract, may be proved by parol.[7]

§ 970. Such incidents, however, must not conflict with the writing to which they are applied.[8] Thus, it has been held that a parol reservation of future crops upon the land, ready for harvest, is void when repugnant to a deed which passes the grantor's entire estate in the land.[9]

But not when conflicting with writing.

Murton, L. R. 7 Q. B. 126; Southwell *v.* Bowditch, L. R. 1 C. P. D. 100; *S. C.* in Ct. of App. 45 L. J. C. P. 630.

[1] Hutchinson *v.* Tatham, L. R. 8 C. P. 482.

[2] R. *v.* Stoke-upon-Trent, 5 Q. B. 303. Supra, § 961 *a*.

[3] Parker *v.* Ibbetson, 4 C. B. (N. S.) 348.

[4] Field *v.* Lelean, 30 L. J. Ex. 168, per Ex. Ch.; 6 H. & N. 617, *S. C.*; overruling Spartali *v.* Benecke, 10 Com. B. 212. See Godts *v.* Rose, 17 Com. B. 229. See, also, Bywater *v.* Richardson, 1 A. & E. 508; 3 N. & M. 748, *S. C.*; Smart *v.* Hyde, 8 M. & W. 723; and Foster *v.* Mentor Life Assur. Co., 2 E. & B. 48. See § 968.

[5] Heysham *v.* Dettre, 89 Penn. St. 506.

[6] Cuthbert *v.* Cumming, 11 Ex. R. 405; Lucas *v.* Bristow, E. B. & E. 907. See Syers *v.* Jonas, 2 Exch. 111.

[7] Infra, § 1026.

[8] Cent. R. R. *v.* Anderson, 58 Ga. 393; I. & G. N. R. R. *v.* Gilbert, 64 Tex. 536.

[9] Brown *v.* Thurston, 56 Me. 127; Austin *v.* Sawyer, 9 Cow. 40; Wilkins *v.* Vashbinder, 7 Watts, 378; Evans *v.* Waln, 71 Penn. St. 69; Ring *v.* Billings, 51 Ill. 475; Wickersham *v.* Orr, 9 Iowa, 253; Bond *v.* Coke, 71 N. C. 97.

§ 971. Extrinsic evidence, as we have already seen, is admissible to prove, when the language is ambiguous, what the parties meant. To such evidence the course of the parties, in dealing with the same subject-matter, is an important contribution.[1] Thus a usage adopted by the Bridgeport Bank of sending packages of checks once a week to New York by the captain of a steamboat, may indicate, if notice be shown to the party giving the check, an agreement between the parties to take this mode of transmission.[2]

Course of business admissible in ambiguous cases.

§ 972. It is to be remembered that while an expert can give, as a matter of fact, a definition of an obscure term, he cannot be permitted to testify as to a conclusion of law, covering the interpretation of the document.[3] Thus it has been held, that to permit an expert to be asked whether it was the duty of the builders in a building contract to put in clutch-couplings, is to allow him to give an opinion covering matters entirely beyond the functions

Opinion of expert as to construction of document is inadmissible, but otherwise to decipher or interpret.

[1] Rushford *v.* Hatfield, 6 East, 526; 7 East, 225; Broome's Maxims, 601; 1 Phil. on Ev. 2d Am. ed. 708, 729; Bishop, ex parte, 15 Ch. D. 400 (cited in full supra, § 959); Wigram Extrin. Ev. 57, 58; Boorman *v.* Jenkins, 12 Wend. 573; Barnard *v.* Kellogg, 10 Wallace, 383; Robinson *v.* U. S., 13 Ibid. 363; Hearn *v.* Ins. Co., 3 Cliff. 318–328; Gibson *v.* Culver, 17 Wend. 305; Bourne *v.* Gatliff, 11 Cl. & Fin. 45; 6 East, 228, 229, 526; Gray *v.* Harper, 1 Story, 574; Clinton *v.* Hope Ins. Co., 45 N. Y. 460; and see particularly Bourne *v.* Gatliff, 3 M. & Gr. 643; *S. C.* 11 Cl. & F. 45.

"It was competent for the plaintiffs to make clear any ambiguity or indefiniteness in their application for insurance. They could do this by proof of the course of business and dealing between them and the defendant; Russell Manufacturing Co. *v.* N. H. St. Boat Co., 50 N. Y. 121; *S. C.* on second appeal, May, 1873, 52 N. Y. 657; and also (as the one was connected and depended upon the other) by the course of business and dealing with other companies, with the knowledge and concert of the defendant. This did not contradict nor vary, by parol, the contract of the parties. Nor did it involve the defendant with the business of other companies, so as to make it liable for contracts with which it had no concern, any further than the course of business and dealing, and the contract of the parties to this action, contemplated by it and framed upon it, had that effect." Folger, J., Fabbri *v.* Ins. Co., 55 N. Y. 133.

[2] Bridgeport Bk. *v.* Dyer, 19 Conn. 137.

[3] Wharton on Contracts, §§ 627 *et seq.*; supra, § 435; Norment *v.* Fastnaght, 1 McArthur, 515; Winans *v.* R. R., 21 How. 88; Collyer *v.* Collins, 17 Abb. (N. Y.) Pr. 467; Ormsby *v.* Ihmsen, 34 Penn. St. 462; Sanford *v.* Rawlings, 43 Ill. 92; Collins *v.* Crocker, 15 Ill. Ap. 107; Monitor *v.* Ketchum, 44 Wis. 126. So to explain meaning of "export beer bottles." Ottawa Glass Co. *v.* Gunther, 31 Fed. Rep. 208.

of a witness, and is error.[1] An expert, however, may be admitted to decipher or explain figures or terms or abbreviations which an ordinary reader is unable to understand;[2] and to explain technical terms.[3] In order, therefore, "to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible, or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions; of abbreviations; and of common words which from the context appear to have been used in a peculiar sense;[4] but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used."[5]

Parol evidence admissible to "rebut an equity."

§ 973. It may sometimes happen that a court of equity, or a court of law exercising equity powers, may impose upon a particular writing, under the circumstances under which it is brought before the court, an equitable construction, at variance with the superficial tenor of the writing.[6] Thus, as we shall see hereafter, when the purchase-money is paid by A., and the title made out to B., B. may be decreed to be a trustee for A.[7] In such case, to rebut this equity, it is, from the nature of things, admissible for B. to show that he is, to a greater

[1] Clark *v.* Detroit, 32 Mich. 348.

[2] Kell *v.* Charmer, 23 Beav. 195; Goblet *v.* Beechey, 3 Sim. 24; Masters *v.* Masters, 1 P. Wms. 425; Norman *v.* Morrell, 4 Ves. 769; Wigram on Wills, 187; Stone *v.* Hubbard, 7 Cush. 595; Ullman *v.* Babcock, 63 Tex. 68. See supra, § 704; infra, § 1003; and see State *v.* Ring, 29 Minn. 78.

[3] Loom Co. *v.* Higgins, 105 U. S. 580; Schmieder *v.* Barney, 113 U. S. 645; Pollen *v.* Le Roy, 30 N. Y. 549; Colwell *v.* Lawrence, 38 Barb. 643; Collender *v.* Dinsmore, 55 N. Y. 200; Barton *v.* Anderson, 104 Ind. 578; Walrath *v.* Whittekind, 26 Kan. 482; Wigram on Wills, 61. See Parke, B., in Shore *v.* Wilson, 9 Cl. & F. 555; Tindal, C. J., 9 Cl. & F. 566; Jaqua *v.* Witham Co., 106 Ind. 545; and supra, §§ 435, 937–9, 961 *a*.

[4] See Barnard *v.* Kellogg, 10 Wall. 383; Seymour *v.* Osborn, 11 Wall. 546; Robinson *v.* U. S., 13 Wall. 363; Moran *v.* Prather, 23 Wall. 499; Farmers' Bank *v.* Day, 13 Vt. 36; Knox *v.* Clark, 123 Mass. 216; Dana *v.* Fiedler, 2 Kern, 40; Collender *v.* Dinsmore, 55 N. Y. 206. As to "I. O. U.," see infra, § 1337; Whart. on Contracts, § 639.

[5] Stephen's Ev. art. 91, citing Smith *v.* Wilson, 3 B. & Ad. 728; Gorrison *v.* Perrin, 2 C. B. (N. S.) 681; Blackett *v.* Royal Exch., 2 C. & J. 244; and see, as to customary terms, supra, § 937.

[6] See Hurst *v.* Beach, 5 Madd. 351; Trimmer *v.* Bayne, 7 Ves. 518.

[7] Infra, §§ 1035–8.

or less amount, the creditor of A.[1] So where, by two distinct codicils, two legacies, of the same amount and in substantially the same terms, are left to the same person, such legacies being presumed[2] to have been intended as cumulative, on the ground that the sums and the expressed terms of both exactly correspond;[3] in such case parol evidence is received to rebut the presumption of mistake and to show that the testator intended both legacies to take effect.[4]

And so to rebut a rebuttable presumption.

§ 974. In the same way parol evidence is received to rebut the presumption that a debt due a legatee is extinguished by a legacy of a greater or less amount.[5] Parol evidence has been also received to rebut the presumption that an advance to a legatee by a parent, or person in *loco parentis*,[6] was intended to operate as an ademption, though only *pro tanto*,[7] of the legacy.[8] For the same purpose, parol evidence may be received to repel the presumption against double portions, which English courts of equity raise, when a father makes a provision for his daughter by settlement on her marriage, and afterwards provides for her by his will.[9] It follows, also, that parol evidence is received

[1] Hall *v.* Hill, 1 Dru. & War. 114; Williams *v.* Williams, 32 Beav. 370; Livermore *v.* Aldrich, 5 Cush. 431; Horn *v.* Keteltas, 46 N. Y. 609; McGinity *v.* McGinity, 63 Penn. St. 44.

[2] See Hubbard *v.* Alexander, L. R. 3 Ch. D. 798; Russell *v.* Dickson, 4 H. of L. Cas. 293; Brennan *v.* Moran, 6 Ir. Eq. R. N. S. 126; Wilson *v.* O'Leary, Law Rep. 12 Eq. 525, per Bacon, V. C.; 40 L. J. Ch. 709, *S. C.*; *S. C.* confirmed by Lord Justices, 41 L. J. Ch. 342.

[3] Tatham *v.* Drummond, 33 L. J. Ch. 438, per Wood, V. C.; Tuckey *v.* Henderson, 33 Beav. 174.

[4] Hurst *v.* Beach, 5 Madd. 351, 359, 360, per Leach, V. C.; recognized in Hall *v.* Hill, 1 Dru. & War. 116, 127, by Sugden, C.

[5] Wallace *v.* Pomfret, 11 Ves. 547; Edmonds *v.* Low, 3 Kay & J. 318.

[6] Taylor's Ev. § 1110; citing Benham *v.* Newell, 24 L. J. Ch. 424, per Romilly, M. R.; *S. C. nom.* Palmer *v.* Newall, 20 Beav. 32; 8 De Gex, M. & G. 74, *S. C.*; Campbell *v.* Campbell, 35 L. J. Ch. 241, per Wood, V. C.; 1 Law Rep. Eq. 383, *S. C.*

[7] Pym *v.* Lockyer, 5 Myl. & Cr. 29; per Lord Cottenham; recognized in Suisse *v.* Lowther, 2 Hare, 434, per Wigram, V. C. See Montifiore *v.* Guedalla, 29 L. J. Ch. 65; 1 De Gex, F. & J. 93, *S. C.*; Ravenscroft *v.* Jones, 33 L. J. Ch. 482; 32 Beav. 669, *S. C.*; Watson *v.* Watson, 33 Beav. 574; Peacock's Est., in re, 14 L. R. Eq. 238.

[8] Trimmer *v.* Bayne, 7 Ves. 515, per Ld. Eldon; Hall *v.* Hill, 1 Dru. & War. 120; Kirk *v.* Eddowes, 3 Hare, 517, per Wigram, V. C.; Hopwood *v.* Hopwood, 26 L. J. Ch. 292; 22 Beav. 428, *S. C.*; 29 L. J. Ch. 747, *S. C.* in Dom. Proc.; 7 H. of L. Cas. 728, *S. C.*; Schofield *v.* Heap, 28 L. J. Ch. 104.

[9] Weall *v.* Rice, 2 Russ. & Myl. 251, 267; Lord Glengall *v.* Barnard, 1 Keen, 769, 793; Hall *v.* Hill, 1 Dru. & War. 128-131, per Sugden, C., explaining

to rebut the rebuttal,[1] though, when the presumption is one arising on the face of the writing, not primarily to fortify such presumption.[2] It should also be remembered that wherever there is an equitable presumption *donec in contrarium probetur*, extrinsic evidence is admissible to rebut the presumption; but when the presumption arises from the construction of the words of an instrument, *qua* words, no extrinsic evidence can be admitted.[3]

§ 975. Another exception to the rule arises from the necessities of the case in actions for libel. In such an action, how are the innuendoes to be proved? All the common acquaintances of the parties may know that the plaintiff is the person to whom the libel refers. Yet, if parol evidence is here inadmissible to explain, no proof of the innuendo could be obtained. Hence, under such circumstances, it is held

Opinion of witnesses as to libel admissible.

and limiting the two former cases; Nevin *v.* Drysdale, Law Rep. 4 Eq. 517, per Wood, V. C.; Dawson *v.* Dawson, Law Rep. 4 Eq. 504, per Wood, V. C.; Russell *v.* St. Aubyn, L. R. 2 Ch. D. 398. See Taylor's Ev. § 1110; 7th ed. § 1227.

[1] Kirk *v.* Eddowes, 3 Hare, 517; Hall *v.* Hill, 1 Dru. & War. 121.

[2] See cases cited, and Taylor's Ev., 6th ed. § 1112, where the author says:

"The important case of Hall *v.* Hill, 1 Dru. & War. 94, affords a good illustration of this distinction. There a father, upon the marriage of his daughter, had given a bond to the husband to secure the payment of £800; part to be paid during his life and the residue at his decease. He subsequently by his will bequeathed to his daughter a legacy of £800; and the question was, whether this legacy could be considered as a satisfaction of the debt. Parol evidence of the testator's declaration was tendered to show that such was his real intention, and Lord Chancellor Sugden acknowledged that the evidence, if admissible, was conclusive on the subject. 1 Dru. & War. 112. His lordship, however, finally decided that though the debt was to be regarded in the light of a portion; Ibid. 108, 109; yet as it was due to the daughter's husband, while the legacy was left to the daughter herself, the ordinary presumption against double portions was rebutted by the language of the instrument, or rather, it could not, under the circumstances, be raised by the court; and the consequence was that the declarations were rejected. Indeed, the evidence would have been equally inadmissible in the first instance, on the ground of its inutility, had the ordinary presumption arisen; though, in such case, had the opponent offered parol evidence to show that the testator intended that the debt should not be satisfied by the legacy, the evidence rejected might then have been received with overwhelming effect, to corroborate and establish the presumption of law."

[3] Per Wood, V. C., Barrs *v.* Fewkes, 33 L. J. Ch. 522; 2 H. & M. 60; citing Coote *v.* Boyd, 2 Bro. C. C. 321; cf. Weal *v.* Rea, 2 Russ. & M. 267; Powell's Evidence, 4th ed. 406.

admissible for the plaintiff, in a libel suit, in cases where his name is not mentioned, to introduce witnesses to testify that they knew the parties, and were familiar with the relations existing between them, and that on reading the libel they understood the plaintiff to be the person to whom it referred; ground being first laid by proving the circumstances of the case.[1]

Dates not necessarily part of document.

§ 976. Much discussion has been had as to the binding effect of a date upon the writer of a document in which such date is stated. If, for instance, in a dispositive document, a date is given as that of the dispositive act, it is open to question how far such date is part of the essence of the disposition. Such date, it is argued, is not part of the disposition, so that it binds contractually the writer, but is simply evidence that the act of disposition took place on a particular day. But it may be that time is an essential condition of the validity of the document; it may be that the rights of third parties may be affected by the question of the accuracy of the date.[2] The French Code, in view of the dangers that would accrue if the rights of third parties were affected by dates so entered, provides, that an instrument making a disposition of property is, as to third parties, to be considered as taking effect at the time of its registry, or, in cases of non-registry, of its attestation before the proper functionary.[3] And where statutory provisions of this kind do not exist, the Roman common law provides, that where the date of a document is material in determining the rights of third parties, such date must be independently proved by the party setting up the document.[4]

[1] Supra, § 32; Folkhard on Slander, 445; 2 Starkie on Slander, 51; 2 Greenleaf's Ev. § 417; Daines *v.* Hartley, 3 Ex. 209; Martin *v.* Loci, 2 F. & F. 654; Heming *v.* Power, 10 M. & W. 569; Barnett *v.* Allen, 3 H. & N. 376–9; Homer *v.* Taunton, 5 H. & N. 661; Smart *v.* Blanchard, 41 N. H. 137; Miller *v.* Butler, 6 Cush. 71; Mix *v.* Woodward, 12 Conn. 262; Lindley *v.* Horton, 27 Conn. 58; McLoughlin *v.* Russell, 17 Ohio, 475; Morgan *v.* Livingston, 2 Rich. (S. C.) 573; Howe *v.* Souder, 58 Ga. 64; Russell *v.* Kelly, 44 Cal. 641. See, however, White *v.* Sayward, 33 Me. 322; Snell *v.* Snow, 13 Met. 278; Van Vechten *v.* Hopkins, 5 Johns. 211; and compare Du Bost *v.* Beresford, 2 Camp. 511, cited fully supra, § 253.

[2] Undoubtedly a party himself, and those claiming under him, may be bound by a solemn assertion of a date. But it is otherwise as to third parties, whose rights are thereby compromised; *e. g.*, subsequent *bonâ fide* purchasers.

[3] Code Civil, art. 1328.

[4] See Weiske, Rechtslexicon, xi. 665.

In Louisiana, an act *sous seing prive*

§ 977. In our own law, dates are *primâ facie* presumed to give correctly the time of the execution and delivery of the documents to which they are attached,[1] though this presumption does not extend to third parties.[2] The presumption may be rebutted by proof that the document was executed on a different day.[3] Thus, parol evidence is admissible to show that there was a mistake in the date of a charter-party,[4] of a deed,[5]

Dates to be held *primâ facie* true.

has no date, against third parties, except to prove the time when it is produced; unless the real date is shown by extrinsic evidence. Murray *v.* Gibson, 2 La. An. 311; Corcoran *v.* Sheriff, 19 La An. 139. See McGill *v.* McGill, 4 La. An. 262; Hubnall *v.* Watt, 11 La. An. 57.

[1] Smith *v.* Battens, 1 Moo. & R. 341; Anderson *v.* Weston, 6 Bing. N. C. 296; Sinclair *v.* Baggaley, 4 M. & W. 312; Yorke *v.* Brown, 10 M. & W. 78; Morgan *v.* Whitmore, 6 Ex. 726; Malpas *v.* Clements, 19 L. J. Q. B. 435; Merrill *v.* Dawson, 11 How. 375; Smith *v.* Porter, 10 Gray, 66; Costigan *v.* Gould, 5 Denio, 290; Breck *v.* Cole, 4 Sandf. (N. Y.) 79; People *v.* Snyder, 41 N. Y. 397; Livingston *v.* Arnoux, 56 N. Y. 518; Ellsworth *v.* R. R., 34 N. J. L. 93; Claridge *v.* Klett, 15 Penn. St. 252; Glenn *v.* Grover, 3 Md. 212; Williams *v.* Woods, 16 Md. 220; Meadows *v.* Cozart, 76 N. C. 450; Abrams *v.* Pomeroy, 13 Ill. 133; Chickering *v.* Failes, 26 Ill. 507; Savery *v.* Browning, 18 Iowa, 246; Dodge *v.* Hopkins, 14 Wis. 630. See Whart. on Contracts, § 678.

As to impossible date, see Davis *v.* Loftin, 6 Tex. 489.

[2] See Sams *v.* Rand, 3 C. B. (N. S.) 442; Baker *v.* Blackburn, 5 Ala. 417. Infra, § 1312.

[3] Steele *v.* Mart, 4 B. & C. 273; Reffell *v.* Reffell, 1 P. & D. 139; Butler *v.* Mountgarrett, 7 H. of L. Cas. 633; Sinclair *v.* Baggaley, 4 M. & W. 312; Cooper *v.* Robinson, 10 M. & W. 694; Edwards *v.* Crock, 4 Esp. 39; Anderson *v.* Weston, 6 Bing. (N. C.) 296; Sweetzer *v.* Lowell, 33 Me. 446; Bird *v.* Monroe, 66 Me. 337; Fowle *v.* Coe, 63 Me. 245; Cole *v.* Howe, 50 Vt. 35; Cady *v.* Eggleston, 11 Mass. 282; Dyer *v.* Rich, 1 Met. 180; Clark *v.* Houghton, 12 Gray, 38; Goddard *v.* Sawyer, 9 Allen, 78; Shaughnessy *v.* Lewis, 130 Mass. 355; Draper *v.* Snow, 20 N. Y. 331; Breck *v.* Cole, 4 Sandf. 79; Ellsworth *v.* R. R., 34 N. J. L. 93; Finney's App., 59 Penn. St. 398; Serviss *v.* Stockstill, 30 Ohio St. 418; Abrams *v.* Pomeroy, 13 Ill. 133; Meldrum *v.* Clark, 1 Morris, 130; Cook *v.* Knowles, 38 Mich. 316; Dodge *v.* Hopkins, 14 Wis. 630; Stockham *v.* Stockham, 32 Md. 196; Perrin *v.* Broadwell, 3 Dana (Ky.), 596; Kimbro *v.* Hamilton, 2 Swan, 190; Pressly *v.* Hunter, 1 Speers, 133; McCrary *v.* Caskey, 27 Ga. 54; Miller *v.* Hampton, Ala. Sel. Cas. 357; McComb *v.* Gilkey, 29 Miss. 146; Gately *v.* Irwine, 51 Cal. 72; Richardson *v.* Ellett, 10 Tex. 190; Perry *v.* Smith, 34 Tex. 277. See Clark *v.* Akers, 16 Kans. 166. Infra, § 1312.

[4] Hall *v.* Cazenove, 4 East, 476.

[5] Payne *v.* Hughes, 10 Ex. 430.

Hence it has been held admissible to show that the date stated in the *in testimonium* clause of a mortgage of personal property is not its true date, from which the fifteen days limited by Mass. St. 1874, ch. iii., for the recording thereof, begin to run. Shaughnessy *v.* Lewis, 130 Mass. 355.

or of a will,[1] or of an item in an account.[2] So an ambiguous date may be explained by parol.[3] Where a contract is silent as to the place of payment, the burden is on the party who seeks to show that the place of payment is other than that which the date of the instrument indicated;[4] and where the date of payment is not stated in a lease, it may be fixed by parol evidence showing the situation and surroundings of the parties.[5] A deed may be proved to have been delivered either before or after the day on which it purports to have been delivered.[6] The fact that a deed is recorded at a date prior to the alleged date of its acknowledgment will be imputed to clerical mistake, and will be no ground for rejecting or discrediting the instrument.[7] So far as concerns the question of the applicatory law the date of place in a document may be varied by parol.[8]

[1] Reffell *v.* Reffell, L. J. 35 P. & M. 121; L. R. 1 P. & D. 139; Powell's Evidence (4th ed.), 412.

[2] McEwing *v.* James, 35 Ohio St. 152.

[3] "When it is necessary to determine the date of a paper offered in evidence, and the name of the month is so inartificially written that upon inspection the presiding judge is unable to determine whether it should be read June or January, extraneous evidence is admissible to show the true date, and the question is a proper one to be submitted to the jury. So held in Armstrong *v.* Burrows, 6 Watts, 266.

"The same word was in dispute in that case as in this, whether the name of the month in the date of a paper should read June or January; and the court held that the question was for the jury, and not the court.

"This is so upon principle as well as authority. To the court belongs the duty of declaring the law, but it is the province of the jury to weigh evidence and determine facts. Whether certain characters were intended to represent one word or another is not a question of law, it is a question of fact; and when the fact is in dispute, and to ascertain the truth, it is necessary to resort to extraneous evidence (circumstantial and conflicting it may be), its ascertainment would seem, upon principle, to belong to the jury, and not to the court.

"It is undoubtedly the duty of the court to interpret written contracts. But reading and interpreting are very different matters. A blind man may interpret, but he cannot read. The language must be ascertained before the work of interpretation commences. It does not follow that, because it is the duty of the judge to interpret, it is therefore his duty to read the paper in controversy." Walton, J., Fenderson *v.* Owen, 54 Maine, 374. See, also, Hearne *v.* Chadbourne, 65 Me. 202.

[4] King *v.* Ruckman, 20 N. J. Eq. 316; Whart. Conf. of L., § 411.

[5] Hartsell *v.* Myers, 57 Miss. 135.

[6] Goddard's case, 2 Rep. 4 *b*.

[7] Munroe *v.* Eastman, 31 Mich. 283.

[8] Whart. Conf. of L., § 411.

§ 978. To the rule that dates are to be *primâ facie* assumed to be correct, there is an exception to be noticed. Where there is a valid ground to suppose collusion in the dating of a paper, then the inference of accuracy as to date so far yields to the inference of falsification as to require the date to be substantively proved.[1] In cases of adultery, also, when there is suspicion of collusion, and where the case depends upon the truthfulness of the dates of certain letters, these dates must be shown independently.[2]

Exception to the rule that dates are *primâ facie* true.

§ 979. The time of execution may be inferred from the circumstances of the case. Thus, an indorsement or assignment is inferred to be of the same date as that of the instrument indorsed or assigned, if there be nothing on the paper to modify the inference.[3] The post-mark on a letter, also, has been viewed as *primâ facie* proof of its date of mailing and forwarding;[4] and the date of the cancellation of a revenue stamp will be presumed, as an inference of fact, to be that of the delivery of a deed.[5] If the date is otherwise uncertain, it may be inferred from the contents of an instrument;[6] and where two deeds are executed on the same day, that which the parties intended to be prior will be adjudged such.[7] Whether an indorsement of payment of interest is to be presumed to be of the date it bears is elsewhere discussed.[8]

Time may be inferred from circumstances.

[1] Anderson *v.* Weston, 6 Bing. (N. C.) 301; Sinclair *v.* Baggaley, 4 M. & W. 318.

[2] Trelawney *v.* Coleman, 2 Stark. R. 193; Houliston *v.* Smyth, 2 C. & P. 24. Supra, § 225.

[3] Hutchinson *v.* Moody, 18 Me. 393; Parker *v.* Tuttle, 41 Me. 349; Burnham *v.* Wood, 8 N. H. 334; Balch *v.* Onion, 4 Cush. 559; Noxon *v.* De Wolff, 10 Gray, 343; Pinkerton *v.* Bailey, 8 Wend. 600; Thorn *v.* Woodhull, Anth. (N. Y.) 103; Snyder *v.* Riley, 7 Penn. St. 164; McDowell *v.* Goldsmith, 6 Md. 319; Snyder *v.* Oatman, 16 Ind. 265; Hayward *v.* Munger, 14 Iowa, 516; Stewart *v.* Smith, 28 Ill. 377; Hatch *v.* Gilmore, 3 La. An. 508; Rhode *v.* Alley, 27 Tex. 443. Infra, § 1312.

[4] R. *v.* Johnson, 7 East, 68; Shipley *v.* Todhunter, 7 C. & P. 688; New Haven Bank *v.* Mitchell, 15 Conn. 206; Callan *v.* Gaylord, 3 Watts, 321. See infra, § 1325.

[5] Van Rensselaer *v.* Vickery, 3 Lansing, 57.

[6] Cleavinger *v.* Reimar, 3 Watts & S. 486.

[7] Barker *v.* Keete, 1 Freem. 249.

[8] Supra, § 228; infra, §§ 1100 *et seq.*

II. SPECIAL RULES AS TO RECORDS, STATUTES, AND CHARTERS.

Records cannot be varied by parol.

§ 980. Judicial records, in their various forms, are, as is elsewhere seen, proof of the highest order. They are framed under the general direction of courts, by officers skilled in the work; they follow settled precedents, being mostly composed of words to which definite meanings have been long attached; they are usually, in litigated cases, scanned by intelligent and experienced counsel; if they can be upset by parol, no titles could be safe. Hence, such averments cannot be collaterally impeached by parol.[1] Nor can certified copies of records be so impeached.[2]

[1] Infra, § 982; 1 Co. Litt. 260 *a*; Glynn *v.* Thorpe, 1 Barn. & A. 153; Dickson *v.* Fisher, 1 W. Black. 364; Garrick *v.* Williams, 3 Taunt. 544; Galpin *v.* Page, 18 Wall. 365; The Acorn, 2 Abbott (U. S.), 434; Sanger *v.* Upton, 91 U. S. 56; Boody *v.* York, 8 Greenl. 272; Ellis *v.* Madison, 13 Me. 312; Dolloff *v.* Hartwell, 38 Me. 54; Stuart *v.* Morrison, 67 Me. 549; Eastman *v.* Waterman, 26 Vt. 494; Hunneman *v.* Fire District, 37 Vt. 40; Hall *v.* Gardner, 1 Mass. 171; Legg *v.* Legg, 8 Mass. 99; Wellington *v.* Gale, 13 Mass. 483; Sheldon *v.* Kendall, 7 Cush. 217; Kelley *v.* Dresser, 11 Allen, 31; Mayhew *v.* Gay Head, 13 Allen, 129; Com. *v.* Slocum, 14 Gray, 395; Capen *v.* Stoughton, 16 Gray, 364; Richardson *v.* Hazleton, 101 Mass. 108; Whiting *v.* Whiting, 114 Mass. 494; O'Shaugnessy *v.* Baxter, 121 Mass. 515; Gorman's case, 124 Mass. 190; Brintnall *v.* Foster, 7 Wend. 103; Davis *v.* Talcott, 12 N. Y. 184; Hill *v.* Burke, 62 N. Y. 111; Brown *v.* Balde, 3 Lans. 283; Wallace *v.* Coil, 24 N. J. L. 600; Kennedy *v.* Wachsmuth, 12 S. & R. 171; Hoffman *v.* Coster, 2 Whart. R. 468; Withers *v.* Livezey, 1 W. & S. 433; Coffman *v.* Hampton, 2 Watts & S. 377; McClenahan *v.* Humes, 25 Penn. St. 75; McMicken *v.* Com., 58 Penn. St. 213; Coxe *v.* Deringer, 78 Penn. St. 271; *S. C.* 82 Penn. St. 236; Ray *v.* Townsend, 78 Penn. St. 329; Com. *v.* Kreager, 78 Penn. St. 477; Burgess *v.* Lloyd, 7 Md. 178; Hoagland *v.* Schnorr, 17 Ohio St. 30; Taylor *v.* Wallace, 31 Ohio St. 151; State *v.* Clemens, 9 Iowa, 534; Ney *v.* R. R., 20 Iowa, 347; Schirmer *v.* People, 33 Ill. 276; Hobson *v.* Ewan, 62 Ill. 154; Moffitt *v.* Moffitt, 69 Ill. 641; Herrington *v.* McCollum, 73 Ill. 476; Rice *v.* Brown, 77 Ill. 549; Robinson *v.* Ferguson, 78 Ill. 538; Lawver *v.* Langhans, 85 Ill. 138; Kemper *v.* Waverley, 81 Ill. 278; Long *v.* Weaver, 7 Jones L. 626; Lamothe *v.* Lippott, 40 Mo. 142; McFarlane *v.* Randle, 41 Miss. 411; Taylor *v.* Jones, 3 La. An. 619; Edwards *v.* Edwards, 25 La. An. 200; Thompson *v.* Probert, 2 Bush. 144; Hickerson *v.* Blanton, 2 Heisk. 160; May *v.* Jameson, 11 Ark. 368; Wilson *v.* Wilson, 45 Cal. 399. As to records of towns and school districts, see Eady *v.* Wilson, 43 Vt. 362. As to impeaching judgments, see supra, § 795. As

[2] Monk *v.* Corbin, 58 Iowa, 503.

§ 980 *a*. In the interpretation of a statute the whole context must be taken together.[1] Even the title and preamble are for this pur-

to impeaching returns of officers, see supra, § 833 *a*; infra, § 1118. See Hames *v*. Brownlee, 71 Ala. 132.

In a late Massachusetts case, for instance, the evidence was that real estate, which had been fraudulently conveyed, was attached in an action against the grantor under the Gen. Sts. c. 123, § 55, and taken on execution, and was described in the officer's return, which set out that the notice of the sale was of land situated upon Union Street. It was ruled by the Supreme Court, that evidence that in the published notice of sale the premises were described as situated on Avon Street was not competent to contradict the return. Sykes *v*. Keating, 118 Mass. 517; citing Chappell *v*. Hunt, 8 Gray, 427.

"In Campbell *v*. Webster, 15 Gray, 28, it was held that the officer's return was conclusive evidence as to the competency of the appraisers, and could not be impeached by showing that one of them was not disinterested. The same principle was recognized in Dooley *v*. Wolcott, 4 Allen, 406, and Hannum *v*. Tourtellott, 10 Allen, 494. The case of Whitaker *v*. Sumner, 7 Pick. 551, more closely resembles the case at bar. In that case the notice of the sale published in the newspaper did not in fact specify any place of sale, but the officer's return stated that he had advertised the place of sale. It was held that the return was conclusive, that the equity of redemption passed by the sale, and that the plaintiff, who was a subsequent attaching creditor, could maintain an action against the officer for a false return. The case of Wolcott *v*. Ely, 2 Allen, 338, is not in conflict with these adjudications. That case was submitted upon an agreed statement of facts, in which the parties agreed that one of the appraisers was not disinterested. The court, in the opinion, say: 'It was held in Boston *v*. Tilestou, 11 Mass. 468, that where the parties in an agreed statement of facts agree to a fact decisive of the title, the officer's return, which would have been conclusive evidence upon a trial between them, is not to be regarded.' This is not in conflict with, but clearly recognizes, the general rule that, in a trial between parties, the officer's return, when used in evidence, is conclusive." Morton, J., Sykes *v*. Keating, 118 Mass. 519.

This rule is applied in Pennsylvania to proceedings by aldermen under the Landlord and Tenant Act; Wistar *v*. Ollis, 77 Penn. St. 291; and to the indorsements of approval, by the proper court, of a statutory bond. Leedom *v*. Lombaert, 80 Penn. St. 381.

In Wistar *v*. Ollis, Mercur, J., said: "To establish fraud or want of jurisdiction, the court might have heard facts by depositions; but not to show an irregularity which contradicted the record. When heard by the court below, they do not come regularly before this court, and should be disregarded. Boggs *v*. Black, 1 Binney, 336; Blashford *v*. Duncan, 3 S. & R. 480; Cunningham *v*. Gardner, 4 W. & S. 120; McMillan *v*. Graham, 4 Barr, 140;

[1] De Winton *v*. Brecon, 26 Beav. 533; Com. *v*. Alger, 7 Cush. 53; State *v*. Commiss., 37 N. J. 228; Com. *v*. Dnane, 1 Binn. 601; Com. *v*. Montrose, 52 Penn. St. 391; Cochran *v*. Taylor, 13 Ohio N. S. 382; Cantwell *v*. Owens, 14 Md. 215; District *v*. Dubuque, 5 Clarke, 262; Brooks *v*. Mobile, 31 Ala. 227; Ellison *v*. R. R., 36 Miss. 572; Lieber, Pol. Her. ch. v.

pose to be taken into account.[1] But the judges are permitted to go outside of the statute to consider the law as it stood before the statute, and the circumstances of its passing, so far as shown by the records of the legislature.[2] Mr. Sedgwick, indeed, says, that "we are not to suppose that the court will receive evidence of extrinsic facts as to the intention of the legislature; that is, of facts which have taken place at the time of, or prior to, the passage of a bill."[3] But as the courts will take judicial notice of matters of notoriety, it will not be neces-

So as to statutes, charters, and legislative journals.

Union Canal *v*. Keiser, 7 Harris, 134; Bedford *v*. Kelly, 11 Smith, 491; Buchanan *v*. Baxter, 17 Smith, 348.

"It is not designed to deny the correctness of the ruling in McMasters *v*. Carothers, 1 Barr, 324, and in Ayres *v*. Novinger, 8 Barr, 412, in which it was held that the selection of a jury of inquest was so far a judicial act imposed on the sheriff that it could not be delegated to another, but they are distinguishable from the present case. The former was a case of partition in the Orphans' Court, in which an inquest had been awarded. The case is badly reported, but it appears the jurors were summoned by a constable from a list furnished by one whose authority is not shown. In setting aside the inquisition, this court said there was a gross irregularity in the partition, and the case presented 'a bundle of irregularities.' In the latter case, the *record* showed that the sheriff had deputed one juror to execute the writ, and the depositions showed that this special deputation was made at the request of the landlord's attorney.

"There is, however, another reason why the defendants should not be permitted now to allege an irregularity in the summoning of a part of the jurors. Having been personally served, and attended at the hearing; having gone to trial on the merits, they should be held to have waived all errors and irregularities in the selection and summoning of the jurors. It is true the acts of assembly which hold that pleading the general issue, or a trial on the merits, in any court, civil or criminal, is a waiver of all irregularities in drawing and summoning the jurors, do not in express terms apply to an inquest under the Landlord and Tenant Act; yet the whole reason and spirit of them applies with full force. Burton *v*. Ehrlich, 3 Harris, 236; Fife et al. *v*. Commonwealth, 5 Casey, 429; Jewell *v*. Commonwealth, 10 Harris, 94." And see further, §§ 824, 830, 981.

The rule applies to awards which cannot be modified so as to make them correspond with what is claimed to be the opinion of the arbitrators. Scott *v*. Green, 89 N. C. 275; supra, § 599.

[1] Sedgwick, Stat. Law, 2d ed. 201. See Lieb. Polit. Herm. ch. iv.

[2] Infra, §§ 1260, 1309; and see, as to evidence of the intention of the legislators, Waller *v*. Harris, 20 Wend. 555.

"Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it." Davis, J., U. S. *v*. Un. Pac. R. R., 91 U. S. 79.

That naturalization cannot be proved by parol, see State *v*. O'Hearn, 58 Vt. 718.

[3] Sedgw. Stat. Law, 203; citing Southwark Bank *v*. Com., 27 Penn. St. 446.

sary for evidence, in its strict sense, to be taken, to enable a survey to be made by the court of the condition of things leading to a statute. Such a survey is, in fact, inevitable, to a degree greater or less.[1] We have an illustration of this in a paragraph which Mr. Sedgwick quotes from Lord Mansfield; where that eminent judge, in construing a statute declaring void all marriages of children under age, gave, as a reason for a strict construction, that "clandestine marriages" "were become very numerous; that places were set apart in the Fleet and other prisons for the purpose of celebrating clandestine marriages. The Court of Chancery, on the ground of its illegality, made it a contempt of court to marry one of its wards in this manner. They committed the offenders to prison; but that mode of punishment was found ridiculous and ineffectual. Then this act was introduced to remedy the mischief."[2] At the same time, the courts unite in refusing to push the extrinsic facts thus to be taken notice of beyond the limits of notoriety, as heretofore defined,[3] and there is no case in which witnesses or documents have been received as evidence of extrinsic facts. In this sense we may accept Mr. Sedgwick's conclusion, "that, for the purpose of ascertaining the intention of the legislature, no extrinsic fact prior to the passage of the bill, which is not of itself a rule of law or act of legislation, can be inquired into or in any way taken into view."[4] The courts, however, may resort to the journals to see whether a bill has rightly passed;[5] and will receive parol proof of the date of the signature of a bill as to which the bill itself is silent.[6]

As the motives of a statute cannot be inquired into,[7] an ex-member of Congress cannot be admitted to show the object of an act of Congress;[8] nor can a statute be impeached by proof of corruption in its passage.[9]

[1] See Hadden *v.* Collector, 5 Wall. 107; Delaplane *v.* Crenshaw, 15 Grat. 457; Harris *v.* Haynes, 30 Mich. 140; Scanlan *v.* Childs, 33 Wis. 663; Keith *v.* Quinney, 1 Oregon, 364.

[2] R. *v.* Hodnett, 1 T. R. 96.

[3] See supra, §§ 278 *et seq.*

[4] Sedgwick, Stat. Law, 209. See, also, Union P. R. R. *v.* U. S., 10 Ct. of Cl. 518; Paine *v.* Boston, 124 Mass. 486; Wise *v.* Bigger, 79 Va. 269.

It is said, however, that parol evidence of extraneous facts may be given in order to make a statute operative. Morrow *v.* Whitney, 95 U. S. 551.

[5] Supra, § 290.

[6] Gardner *v.* Collector, 6 Wall. 499.

[7] Fletcher *v.* Peck, 6 Cranch, 131; People *v.* Devlin, 33 N. Y. 268.

[8] Badeau *v.* U. S., 21 Ct. of Cl. 48. See supra, § 295.

[9] Jersey R. R. *v.* Jersey City, 20 N. J. Eq. 61; People *v.* Petrea, 92 N. Y. 128; Lusher *v.* Scites, 4 W. Va. 11; Wright *v.* Defrees, 8 Ind. 298.

A statute, as printed in the standard established as such by the legislature, cannot be attacked by parol evidence to the effect that as printed and certified it varies from its original text.[1] But when there is no such legislative rule, the enrolled bill is the standard.[2]

A charter, also, as a legislative act, cannot, under the rules above stated, be impeached collaterally by parol.[3] So, no evidence will be admissible to show that a charter granted by the crown was made or delivered at another time than when it bears date.[4]

So as to charters.

Parol evidence is inadmissible to vary or contradict legislative journals.[5]

So as to journals.

§ 981. While, however, to return to the subject of judicial records, a record cannot be collaterally impeached, except on proof of fraud or want of jurisdiction, it is otherwise with deeds by sheriffs, which are not to be regarded as *res adjudicata*. It has therefore been held that the acknowledgment of a sheriff does not cure radical defects in the authority of the sheriff; and these defects may be collaterally shown, though the deed is *primâ facie* proof of regularity.[6] It has also been held admissible for a defendant in eject-

Otherwise as to acknowledgment of sheriff's deed.

[1] Annapolis *v.* Harwood, 32 Md. 471.

[2] Clare *v.* State, 8 Iowa, 509; Duncombe *v.* Prindle, 12 Iowa, 1. Supra, §§ 290, 295.

[3] Garrett *v.* R. R., 78 Penn. St. 465.

[4] Ladford *v.* Gretton, Plowd. 490.

[5] Supra, 637.

[6] Infra, § 1304. "It is true that the acknowledgment by the sheriff of a deed executed by him is not such *res adjudicata* as precludes an inquiry into the legality of the proceedings by which the sale was made. Braddee *v.* Brownfield, 2 W. & S. 271. And the absence of authority, or the presence of fraud, utterly frustrates the operation of a sheriff's sale as a means of transmission of title, and may be insisted on after acknowledgment. Shields *v.* Miltenberger, 2 Harris, 76. While Spragg *v.* Shriver, 1 Casey, 284, might justify some doubt on the question in the case of a sale under a *venditioni exponas*, it is clear that an acknowledgment will not cure the want of a sufficient inquisition, or a waiver of it, in the case of a sale under a *fieri facias*. Gardner *v.* Sisk, 4 P. F. Smith, 506. But it waives all defects of the process or its execution, on which the court has power to act; Thompson *v.* Phillips, 1 Baldwin, 246; and mere irregularities of every kind. Blair *v.* Greenway, 1 Browne, 219. It is sufficient to raise the presumption, in the first instance, that the statutory requisites for notice to parties have been compliod with, and this presumption must prevail until it is rebutted by satisfactory affirmative proof." Woodward, J., Saint Bartholomew Church *v.* Bishop Wood, 80 Penn. St. 219. As to acknowledgment of non-official deeds, see infra, § 1052.

ment to prove, in defence, that the land in controversy, though embraced in the sheriff's deed, was in fact exempted from the sale.[1] But ordinarily the recitals in a sheriff's deed are regarded as conclusive between the parties to the suit and their privies;[2] though, from the nature of things, open to correction, so far as concerns their obligatory force, by the same proof of fraud or mistake as is receivable in respect to private deeds.[3]

Record imports verity.

§ 982. Leaving this partial exception, we may generally state that a record of a competent court imports such absolute verity that it cannot be collaterally contradicted, unless on proof of fraud in its concoction by the court, or want of jurisdiction.[4] To an important distinction, however, which has been already stated,[5] we must recur. "The mode of proving judicial acts is a different thing from the effect of those acts when proved; and the rules regulating the effect of *res judicata* would remain exactly as they are, if the decisions of our tribunals could

[1] Bartlett *v.* Judd, 21 N. Y. 200.

[2] Freeman on Executions, § 334; Cooper *v.* Galbraith, 3 Wash. C. C. 550; Jackson *v.* Roberts, 7 Wend. 83; Den *v.* Winans, 2 Green N. J. 6; Pollard *v.* Cocke, 19 Ala. 188; Blood *v.* Light, 31 Cal. 115.

[3] See infra, §§ 1019 *et seq.*

[4] See infra, § 1302; 1 Coke Litt. 260 *a;* Glynn *v.* Thorpe, 1 Barn. & A. 153; Amory *v.* Amory, 3 Biss. 266; U. S. *v.* Walsh, 22 Fed. Rep. 644; Foss *v.* Edwards, 47 Me. 145; Willard *v.* Whitney, 49 Me. 235; Douglass *v.* Wickwire, 19 Con. 489; Dowse *v.* McMichael, 6 Paige, 139; Hageman *v.* Salisberry, 74 Penn. St. 280; Roy *v.* Townsend, 78 Penn. St. 329; Kendig's App., 82 Penn. St. 68; Quinn *v.* Com., 20 Grat. 138; Southern Bank *v.* Humphreys, 47 Ill. 227; McBane *v.* People, 50 Ill. 503; Martin *v.* Judd, 60 Ill. 78; Farley *v.* Budd, 14 Iowa, 289; Allen *v.* Mills, 26 Mich. 123; Baugh *v.* Baugh, 37 Mich. 59; Galloway *v.* McKeithen, 5 Ired. L. 12; Covington *v.* Ingraham, 64 N. C. 123; Duer *v.* Thweatt, 39 Ga. 578; Alexander *v.* Nelson, 42 Ala. 462; Murrah *v.* State, 51 Miss. 652; Morris *v.* Hulbert, 36 Tex. 19.

Thus it is not permitted to contradict by parol the minutes of the circuit court as to the time of adjournment. Jones *v.* Williams, 62 Miss. 183.

"The jurisdiction being established, no matter how erroneous the finding of the court may be, the finding is not void, and cannot be questioned in a collateral proceeding. This is the universal rule in all courts of common law. Buckmaster *v.* Carlin, 3 Scam. 104; Swiggart *v.* Harber, 4 Ibid. 364; Rockwell *v.* Jones, 21 Ill. 279; Chestnut *v.* Marsh, 12 Ibid. 173; Weiner *v.* Heintz, 17 Ibid. 259; Horton *v.* Critchfield, 18 Ibid. 133; Iverson *v.* Loberg, 26 Ill. 179; Goudy *v.* Hall, 36 Ill. 313. The later cases are Wimberly *v.* Hurst, 33 Ill. 166; Wight *v.* Wallbaum, 39 Ibid. 555; Elston *v.* City of Chicago, 40 Ibid. 514; Mulford *v.* Stalzenback, 46 Ibid. 303; Huls *v.* Buntin, 49 Ibid. 396." Breese, J., Hobson *v.* Ewan, 62 Ill. 154.

[5] Supra, §§ 176, 760.

be established by oral testimony. In truth, the record of a court of justice consists of two parts, which may be denominated respectively the *substantive* and the *judicial* portions. In the former—the *substantive* portion—the court records or attests its own proceedings and acts. To this, unerring verity is attributed by the law, which will neither allow the record to be contradicted in these respects,[1] nor the facts, thus recorded or attested, to be proved in any other way than by production of the record itself, or by copies proved to be true in the prescribed manner:[2] 'Nemo potest contra recordum verificare per patriam.'[3] 'Quod per recordum probatum, non debet esse negatum.'[4] In the *judicial* portion, on the contrary, the court expresses its judgment or opinion on the matter before it. This has only a conclusive effect between, and indeed in general is only evidence against, those who are parties or privies to the proceeding."[5]

On application to court of record mistakes may be shown by parol.

§ 983. Yet even with records, when application is made to the courts controlling the record, a correction of the record, in cases of fraud or gross mistake, may be made on the error being proved by parol.[6] The application in such case, however, if it be merely by motion, and unless it takes the form of bill in equity, is to the discretion of the court, from which there is no appeal.[7]

For relief petition should be specific.

§ 984. When a petition or bill, of the character mentioned in the last section, is presented to a court, the fraud or mistake must be specifically set forth, and such relief craved as equity will give.[8]

§ 985. In cases of fraud, as we have seen more fully elsewhere,[9]

[1] Co. Litt. 260*a*; Finch, Law, 231; Gilb. Ev. 7, 4th ed.; 4 Co. 71*a*; Litt. R. 155; Hetl. 107; 1 East, 355; 2 B. & Ad. 362.

[2] See several instances collected, 1 Phill. Ev. 441, 10th ed.

[3] 2 Inst. 380.

[4] Branch Max. 186.

[5] Best's Ev. § 619.

[6] Trafton *v.* Rogers, 13 Me. 315; Com. *v.* Bullard, 9 Mass. 270; Brier *v.* Woodbury, 1 Pick. 362; Olmstead *v.* Hoyt, 4 Day, 436; Gardner *v.* Humphrey, 10 Johns. R. 53; Clammer *v.* State, 9 Gill, 279; Jenkins *v.* Long, 23 Ind. 460.

[7] King *v.* Hopper, 3 Price, Exch. Rep. 495; Woods *v.* Young, 4 Cranch, 237; Com. *v.* Judges of Com. Pleas, 3 Binney, 273; Com. *v.* Judges of Com. Pleas, 1 S. & R. 192; Clymer *v.* Thomas, 7 S. & R. 180. See § 984.

[8] Kendig's Appeal, 2 Weekly Notes of Cas. 680; 82 Penn. St. 68.

[9] Supra, § 797.

records may be collaterally impeached.[1] In this way a collusive judgment,[2] or a judgment entered without jurisdiction,[3] or a fraudulent list of agents of insurance companies surreptitiously placed in the office of the attorney-general,[4] may be attacked.

Fraudulent record may be impeached.

§ 986. Like all other written instruments, a record, when silent or ambiguous, may be explained by parol.[5] Thus, where the record gives the name of a party ambiguously, the ambiguity may be cleared and the party identified by parol extrinsic proof.[6] So where an executor sells personal property, and the record is silent as to the statutory notice, this notice may be proved by parol.[7] Where, also, an officer made a return of service of a notice that a debtor arrested on a mesne process desired to take the oath that he did not intend to leave the state, but the return did not state where the service was made, except that it was headed with the name of the county for which the officer was appointed; and where it appeared that the service was actually made outside of his precinct, but this objection was waived, evidence was admitted that the service was made at a certain distance from the place of hearing, and that there

Record when silent or ambiguous may be explained by parol.

[1] Beckley *v.* Newcomb, 24 N. H. 359; Lowry *v.* McMillan, 8 Penn. St. 157; Jackson *v.* Stewart, 6 Johns. 34; Henck *v.* Todhunter, 7 Har. & J. 275; Kent *v.* Ricards, 3 Md. Chan. 392; Stell *v.* Glass, 1 Ga. 475; Dalton *v.* Dalton, 33 Ga. 243. See Van Pelt *v.* Hutchinson, 114 Ill. 435.

[2] Whart. on Agency, § 566; Amory *v.* Amory, 3 Biss. 266; Martin *v.* Judd, 60 Ill. 78; supra, § 797; Morris *v.* Halbert, 36 Tex. 19; though see Davis *v.* Davis, 61 Me. 395.

[3] Supra, § 795.

[4] Thorne *v.* Ins. Co., 80 Penn. St. 15.

[5] Infra, § 989; Farnsworth *v.* Rand, 65 Me. 19; Eastman *v.* Cooper, 15 Pick. 276; Freeman *v.* Creech, 112 Mass. 180; Knott *v.* Sargent, 125 Mass. 95; Gardner *v.* Humphrey, 10 Johns. R. 53; Kerr *v.* Hays, 35 N. Y. 331; Shoemaker *v.* Ballard, 15 Penn. St. 92; Stark *v.* Fuller, 42 Penn. St. 23; McCart *v.* Frisby, 81 Ill. 118; Phillips *v.* Jamison, 14 T. B. Mon. 579; Carr *v.* College, 32 Ga. 557; McBride *v.* Bryan, 67 Ga. 584; Young *v.* Fuller, 29 Ala. 464; Saltonstall *v.* Riley, 28 Ala. 164; Temple *v.* Marshall, 11 La. An. 641; Hickerson *v.* Mexico, 58 Mo. 61. This is peculiarly the case with informal records, such as justices' dockets. Evans *v.* Williamson, 79 N. C. 86.

[6] Root *v.* Fellowes, 6 Cush. 29.

[7] Gelstrop *v.* Moore, 26 Miss. 206. See R. *v.* Wick, 5 B. & Ad. 526; R. *v.* Perranzabuloe, 3 Q. B. 400; R. *v.* Yeovely, 8 A. & E. 818. A patent ambiguity, however, cannot be so explained. Porter *v.* Byrne, 10 Ind. 146.

were places within the county of such distance.[1] And on a question arising under a bill in equity, filed January 8, 1874, to redeem a mortgage, the evidence being that on a writ of entry to foreclose the mortgage an execution for possession issued dated May 6, 1869, upon a conditional judgment; that the officer's return and the acknowledgment of possession were dated May 3, 1869; and that the execution was recorded June 10, 1869: it was ruled in Massachusetts that the date of the officer's return was not conclusive as to the actual date of the possession; and it appearing from the whole record, without resort to other evidence, that possession was actually taken on some day after the execution was issued and before June 10, it was held that this was enough to commence the foreclosure as of the later date.[2] So, whether a marginal entry upon the record of a judgment is an assignment or a satisfaction, may be determined by parol.[3] It is also competent to show by parol that a title, on which a particular suit of ejectment is tried, is equitable.[4] So, though there is no entry on the record of an or-

[1] Francis *v.* Howard, 115 Mass. 236. That returns, when ambiguous, may be explained by parol, see further, Atkinson *v.* Cummins, 9 How. U. S. 479; Guild *v.* Richardson, 6 Pick. 364; Dolan *v.* Briggs, 4 Binn. 499; Weidensaul *v.* Reynolds, 49 Penn. St. 73; Susq. Boom Co. *v.* Finney, 58 Penn. St. 200; Smalley *v.* Lighthall, 37 Mich. 348. As to effect of returns, see supra, § 833 *a*.

[2] Worthy *v.* Warner, 119 Mass. 550.

[3] Emory *v.* Joice, 70 Mo. 537.

[4] "The second question, whether it was competent to prove by parol evidence that the title upon which the recovery was had in the first ejectment was an equitable one, has been expressly ruled by this court in Meyers *v.* Hill, 10 Wright, 9. Mr. Justice Strong said: 'Notwithstanding what has been said in some cases, it is well established, in reason and authority, that where a record is general, it may be shown by parol what were the matters in litigation. The record may be explained, though it cannot be contradicted. The matters in dispute may be identified.' This was applied in that case to the very question now before us, the admission of parol evidence to show that a former recovery in ejectment was upon an equitable title. The dictum of Mr. Justice Bell in Paull *v.* Oliphant, 2 Harris, 351, is not in conflict. That case, as we have seen, was under the Act of 1846, which required a conditional verdict to give conclusive effect to one verdict and judgment. Mr. Justice Bell merely says: 'To ascertain the character of that judgment we must look to the record of it alone. That shows not that it is such a conditional judgment as is contemplated by the statute, and the omission cannot be aided by parol.'" Sharswood, J., Treftz *v.* Pitts, 74 Penn. State, 349.

While no evidence will be received to dispute the fact that the day spec-

phans' court of the issue of letters testamentary, the letters themselves, and other proof, may be produced to show the authority of the executors.[1] Additional facts, however, which should be of record, cannot be added to a record by parol.[2]

The rule as to records of corporations is elsewhere stated.[3]

§ 987. Parol evidence cannot, generally, be received to vary the records of towns, in matters within the jurisdiction of the towns, and when the entries are duly made by the proper officers.[4] In case of contradiction or ambiguity, however, parol evidence is admissible for explanation.[5] But when there is a neglect of a municipal council to keep proper minutes, what the council did may be shown by evidence *aliunde* the record.[6] It is, however, inadmissible to modify a county commissioner's record of their acceptance of a macadamized road as completed according to contract.[7] So the records of a county court held to make appropriations cannot be contradicted by parol evidence.[8]

Town records may be explained by parol.

§ 988. Of the admissibility of parol proof to explain a record, the most familiar illustration is that which is supplied when the identity or non-identity of one case with another is set up, in order to sustain or disprove a plea of former recovery. It may happen that a judgment has been entered in a former suit (either civil or criminal), in which the record entries would fit the case on trial,

Former judgment may be shown by parol to relate to a particular case.

ified in a record of conviction is the commission day of the assizes at which the trial took place (see Thomas *v.* Ansley, 6 Esp. 80; R. *v.* Page, Ibid. 83), yet the party against whom the record is produced is permitted to show by parol the actual day of the trial. Whitaker *v.* Wisbey, 12 Com. B. 44; Roe *v.* Hersey, 3 Wils. 274. Proof of the real day of trial would not, so it is said, in such a case, contradict the record, but would simply explain it. So, again, if a *nisi prius* record were to contain two counts, or distinct causes of action, and a verdict awarding damages to the plaintiff were entered generally, parol evidence would be admissible to show that the substantial damages were recovered on one count only. Preston *v.* Peeke, 1 E., B. & E. 336.

[1] Blaen Oven Coal Co. *v.* McCulloh, 59 Md. 403; Cowan *v.* Corbett, 68 Ga. 66.

[2] Wilcox *v.* Emerson, 10 R. I. 270.

[3] Supra, § 663.

[4] Crommett *v.* Pearson, 18 Me. 344; Blaisdell *v.* Briggs, 23 Me. 123; Howlett *v.* Holland, 6 Gray, 418; Wood *v.* Mansell, 3 Blackf. 125; see Steele *v.* Schriker, 55 Wis. 134.

[5] Walter *v.* Belding, 24 Vt. 658; Matthews *v.* Westborough, 134 Mass. 555.

[6] Bridgford *v.* Tuscombia, 16 Fed. Rep. 910. See Long *v.* Battle Creek, 39 Mich. 323.

[7] Noble County Comm'rs *v.* Hunt, 33 Ohio St. 169.

[8] Brooks *v.* Claiborne County, 8 Baxter, 45.

but as to which it is alleged that parol evidence would show that the points really in issue are essentially different. Or it may be that the record of the former suit exhibits a case different from that on trial, while it is alleged that in point of fact the former case and the present are substantially the same. In either of these relations it is admissible to show by parol what was the cause of action in the former suit, so that its identity or non-identity with that on trial may be proved.[1] The same rule applies when the object is to prove that a former judgment was entered not on the merits but on technical grounds.[2] Evidence is also admissible to show the distinctive

[1] See supra, §§ 64, 785; R. *v.* Bird, 2 Den. C. C. 94; 5 Cox C. C. 20; Miles *v.* Caldwell, 2 Wall. 35; Russell *v.* Place, 94 U. S. 606; Davis *v.* Brown, 94 U. S. 423; Wilson *v.* Deen, 121 U. S. 525; Frost *v.* Shapleigh, 7 Greenl. 236; Mathews *v.* Bowman, 25 Me. 157; Dunlap *v.* Glidden, 34 Me. 517; Torrey *v.* Berry, 36 Me. 589; Lando *v.* Arno, 65 Me. 405; Eastman *v.* Clark, 63 N. H. 31; Perkins *v.* Walker, 19 Vt. 144; Bassett *v.* Marshall, 9 Mass. 312; Parker *v.* Thompson, 3 Pick. 429; Pease *v.* Smith, 24 Pick. 122; Com. *v.* Dillane, 11 Gray, 67; Com. *v.* Sutherland, 109 Mass. 342; Hood *v.* Hood, 110 Mass. 483; Boynton *v.* Morrill, 111 Mass. 4; Hungerford's Appeal, 41 Conn. 322; Stedman *v.* Patchin, 34 Barb. 218; Thurst *v.* West, 31 N. Y. 210; Burt *v.* Sternburgh, 4 Cow. 559; Davisson *v.* Gardner, 10 N. J. L. 289; Zeigler *v.* Zeigler, 2 S. & R. 286; Haak *v.* Breidenbach, 3 Ibid. 204; Wilson *v.* Wilson, 9 Ibid. 424; Cist *v.* Zeigler, 16 Ibid. 282; Leonard *v.* Leonard, 1 W. & S. 342; Sterner *v.* Gower, 3 Watts & S. 136; Butler *v.* Slam, 50 Penn. St. 456; Coleman's Appeal, 62 Penn. St. 252; McDermott *v.* Hoffman, 70 Penn. St. 31; Follansbee *v.* Walker, 74 Penn. St. 309; Federal Hill Co. *v.* Mariner, 15 Md. 224; Hughes *v.* Jones, 2 Md. Ch. 178; Whitehurst *v.* Rogers, 38 Md. 503; Streeks *v.* Dyer, 39 Md. 424; Barger *v.* Hobbs, 67 Ill. 592; Swalley *v.* People, 116 Ill. 247; Porter *v.* State, 17 Ind. 415; Wabash Canal *v.* Reinhart, 24 Ind. 122; Bottorf *v.* Wise, 53 Ind. 32; Morris *v.* State, 101 Ind. 560; Hollenbeck *v.* Stanberry, 38 Iowa, 325; Duncan *v.* Com., 6 Dana, 295; Justice *v.* Justice, 3 Ired. L. 58; Rollins *v.* Henry, 84 N. C. 569; Dowling *v.* Hodge, 2 McMul. 209; State *v.* De Witt, 2 Hill, S. C. 282; Cave *v.* Burns, 6 Ala. 780; Rake *v.* Pope, 7 Ala. 161; State *v.* Matthews, 9 Port. 370; Robinson *v.* Lane, 22 Miss. 161; Shirley *v.* Fearne, 33 Miss. 653; State *v.* Scott, 31 Mo. 121; State *v.* Thornton, 37 Mo. 360; Hickerson *v.* Mexico, 58 Mo. 61; Hampton *v.* Dean, 4 Tex. 455; Walsh *v.* Harris, 10 Cal. 391; Jolley *v.* Foltz, 34 Cal. 321; Oldham *v.* McIvery, 49 Tex. 589. See Greenlee *v.* Lowing, 35 Mich. 63.

[2] "It would be very unreasonable and contrary to the settled rules upon the subject to permit the plaintiff, having once been defeated on the merits, to try the same question over again in a different form. Calhoun's Lessee *v.* Dunning, 4 Dall. 120; Marsh *v.* Pier, 4 Rawle, 273; Chambers *v.* Lapsley, 7 Barr, 24. The charge of the judge, as filed of record in the first case, showed conclusively that both the questions referred to in the offer were submitted to the jury. In Carmony *v.* Hoober, 5 Barr, 305, the charge of the judge so

issue on which a case is tried, when the record is silent in this respect.[1]

In other cases cause of action may be proved.

§ 989. For other purposes than the support or attack of a plea of former recovery, it is admissible to prove the cause of action of a particular record.[2] Thus, in a Massachusetts case, where it appeared that P. agreed to pay S. any sum not exceeding $1500 which S. should be legally compelled to pay C. on a certain account, and C. recovered in New Hampshire in a suit against S. a larger sum than $1500, it was held that the cause of action in the latter suit might be identified by parol.[3]

filed of record was considered as sufficient to establish on what point a former recovery had passed." Sharswood, J., Follansbee *v.* Walker, 74 Penn. St. 309, citing Fleming *v.* The Insurance Co., 2 Jones, 391 ; Carmony *v.* Hoober, 5 Barr, 305.

[1] Supra, § 785 ; Preston *v.* Peeke, 1 E., B. & E. 336 ; Carter *v.* Shibles, 74 Me. 273 ; Withers *v.* Sims, 80 Va. 651 ; Hickerson *v.* Mexico, 58 Mo. 61.

"Where it appears several issues were presented for adjudication under the declaration and pleadings of the case, and the record fails to show upon which in fact the judgment was rendered, it is competent, in some cases, to show the fact by evidence *aliunde*. Dunlap *v.* Glidden, 34 Me. 517 ; Rogers *v.* Libbey, 35 Me. 200 ; Emery *v.* Fowler, 39 Me. 326 ; Cunningham *v.* Foster, 49 Me. 68.

"So where a particular fact in controversy has been, by the same parties, under an issue legitimately raised by the pleadings, litigated, parol evidence is admissible to prove the consideration and determination of that fact, if the record fails to disclose it. Such evidence is admitted in aid of the record, and must always be consistent with it. Chase *v.* Walker, 53 Me. 258.

"Where the record shows that the same questions which are in controversy were already determined in a prior suit, parol evidence is inadmissible to show what matters were adjudicated in the former suit. Armstrong *v.* St. Louis, 69 Mo. 309.

"It is never allowed to contradict or vary the record. Gay *v.* Welles, 7 Pick. 217 ; McNear *v.* Bailey, 18 Me. 251 ; Sturtevant *v.* Randall, 53 Me. 149.

"The evidence must be confined to the proof of such facts and issues as were, or might have been legitimately decided under the declaration and pleadings.

"The record is *conclusive* evidence that the judgment was rendered upon some one or more of the issues legitimately raised by the pleadings of the parties.

"The parol proof is only to distinguish which of those several issues were decided, or to show that some particular fact was decided in the determination of some of those issues." Tapley, J., Jones *v.* Perkins, 54 Me. 396.

Parol evidence is not admissible to show that a point that the case necessarily involved was not submitted to the jury. Butler *v.* Glass Co., 126 Mass. 512.

[2] Miles *v.* Caldwell, 2 Wall. 35 ; Dunlap *v.* Glidden, 34 Me. 517 ; Stedman *v.* Patchin, 34 Barb. 218 ; Justice *v.* Justice, 3 Ired. L. 58.

[3] Parker *v.* Thompson, 3 Pick. 429.

§ 990. The averment of the *day* of entering a judgment cannot be collaterally contradicted by parol; and it has even been held that a judgment entered on a particular day will be imputed to the earliest practicable hour of that day.[1] Yet the better opinion is that parol evidence is admissible as to the *hour* of entry, when it is important that this should be ascertained; for this is a point as to which the record does not speak.[2] Thus, where the defendant died on a particular day on which judgment was entered against him, it is admissible to prove by the clerk that the judgment could not have been entered before eight o'clock in the morning.[3] So the hour of the service of a writ may be explained or even varied by parol.[4] And it has been held that, where a writ is dated on Sunday, it may be proved by parol that the date is a mistake for another day.[5]

Hour of legal procedure may be proved by parol.

§ 991. It should be remembered, as has been already fully seen, that with records, as with other documentary proof, there are collateral incidents as to which parol evidence is admissible.[6] Thus, though a judgment cannot be impeached, it may be shown by evidence outside of the record that the parties interested united in limiting its lien.[7] It may be also shown by parol that a judgment against an indorser was not intended to pass as collateral to a judgment against the principal.[8] So evidence is admissible to show that judgments in favor of A. as agent belong to his wife.[9] So the application of the proceeds of land sold under execution may be shown by parol,[10] and so may the extent of land actually sold at a trustee's sale.[11] So a witness may be asked whether he has not been in prison.[12] Parol evidence is also admis-

Collateral incidents may be shown by parol.

[1] Wright *v.* Mills, 4 H. & N. 488; Edwards *v.* R., 9 Ex. R. 628; Wellman, in re, 20 Vt. 693; Wiley *v.* Southerland, 41 Ill. 25. The day of trial may be shown by parol. Whitaker *v.* Wisbey, 12 C. B. 44.

[2] D'Obree, ex parte, 8 Ves. 83: Lang *v.* Phillips, 27 Ala. 311.

[3] Lanning *v.* Pawson, 38 Penn. St. 480. *Contra*, Wright *v.* Mills, 4 H. & N. 488. See Edwards *v.* R., 9 Exch. 628.

[4] Allen *v.* Stage Co., 8 Greenl. 207; Williams *v.* Cheeseborough, 4 Conn. 356.

[5] Trafton *v.* Rogers, 13 Me. 315. See Whitaker *v.* Wisbey, cited supra, § 986.

[6] See supra, § 64.

[7] Sankey *v.* Reed, 12 Penn. St. 95. See Darling *v.* Dodge, 36 Me. 370.

[8] Bank *v.* Fordyce, 9 Penn. St. 275.

[9] Bohner *v.* Cummings, 91 Penn St. 55.

[10] Downs *v.* Rickards, 4 Del. Ch. 416.

[11] Washburne *v.* White, 62 Miss. 545.

[12] Supra, § 567.

sible, in an action for malicious prosecution, to show that the reason why a bill of indictment had not been acted on was because it had been adjourned from term to term on account of the absence of a material witness.[1]

III. SPECIAL RULES AS TO WILLS.

Intention of wills to be drawn from writing.

§ 992. Wills are the most solemn of dispositive writings, and yet, from the circumstances under which they are frequently written, they require peculiar delicacy in the interpretation of terms, and in the elucidation of ambiguities. Many persons are unwilling to consult counsel in the preparation of wills. When counsel are called in, wills may have to be written in great haste, and from the dictation of testators sometimes incapable of collected and exact statement. Even after a will has been carefully and deliberately prepared by counsel, a testator may add codicils in a style different from that of the body of the writing, and with provisions whose consistency with prior dispositions may be open to perplexing doubts. And yet, notwithstanding these side considerations, the courts have agreed that, though the intent of the testator is to be effectuated, this intent is to be drawn from the will, not the will to be drawn from the intent.[2]

[1] Knott *v.* Sargent, 125 Mass. 95.

[2] Hunt *v.* Hort, 3 Br. C. C. 311; Miller *v.* Travers, 8 Bing. 253; Doe *v.* Hiscocks, 5 M. & W. 368; Loring *v.* Woodward, 41 N. H. 391; Pickering *v.* Pickering, 50 N. H. 349; Wells *v.* Wells, 27 Vt. 483; Crocker *v.* Crocker, 11 Pick. 252; Brown *v.* Saltonstall, 3 Met. 423; Osborne *v.* Varney, 7 Met. 301; American Soc. *v.* Pratt, 9 Allen, 109; Warren *v.* Gregg, 116 Mass. 304; Chappel *v.* Avery, 6 Conn. 31; Canfield *v.* Bostwick, 21 Conn. 550; Ryerss *v.* Wheeler, 22 Wend. 148; White *v.* Hicks, 33 N. Y. 383; Phillips *v.* McCombs, 53 N. Y. 494; Charter *v.* Otis, 41 Barb. 525; Johnson *v.* Hicks, 1 Lans. 150; Bowers *v.* Bowers, 1 Abb. (N. Y.) App. 214; Massaker *v.* Massaker, 13 N. J. Eq. 264; Leigh *v.* Savidge, 14 N. J. Eq. 124; Torbert *v.* Twining, 1 Yeates, 432; Brownfield *v.* Brownfield, 12 Penn. St. 136; Wallize *v.* Wallize, 55 Penn. St. 242; Best *v.* Hammond, 55 Penn. St. 409; Tyson *v.* Tyson, 37 Md. 567; Taylor *v.* Boggs, 20 Ohio St. 516; Crook *v.* Whitford, 47 Mich. 283; Hays *v.* West, 37 Ind. 21; Pugh *v.* Pugh, 105 Ind. 552; Fraim *v.* Millison, 59 Ind. 123; Rutherford *v.* Morris, 77 Ill. 397; Kirkland *v.* Conway, 116 Ill. 438; Watkyns *v.* Flora, 8 Ired. L. 374; Ralston *v.* Telfair, 2 Dev. Eq. 255; Thomas *v.* Lines, 83 N. C. 191; McDaniel *v.* King, 90 N. C. 597; Taylor *v.* Maris, 90 N. C. 619; Clark *v.* Clark, 2 Lea, 723; Willis *v.* Jenkins, 30 Ga. 167; Foscue *v.* Lyon, 55 Ala. 440; Love *v.* Buchanan, 40 Miss. 758; Gilliam *v.* Chancellor, 43 Miss. 437; Gibson *v.* Moore, 24 Mo. 227; Robnett *v.* Ashlock, 49 Mo. 171;

The reasons for this stringent exclusion of testimony of the testator's intention are conclusive. (1.) In the construction of *contracts*, extrinsic evidence of concurrent intent may be admissible, because when one party states to another his intention in executing a document, and the other accepts such intention, then this expression may be so worked into the contract that the one party cannot recall it without the other's assent. In respect to *wills*, however, there can be no such mutuality in the expression of intentions; for there is no other party with whom the testator contracts. Hence it is that no testator can be regarded as bound by expressions of intention which, if made to-day, may be to-morrow revoked. Nor is this all. Experience tells us that few kinds of talk are more unreliable than talk about wills. Not only are expressions of intention, when uttered (and ordinarily the very fact of their utterance is a presumption against them), uttered with the consciousness that they may be at any time recalled; but, as we have already noticed, it is a common maxim that people who talk about their wills rarely make wills in conformity with their talk. What a man puts down in a solemn testamentary instrument is naturally very different from what he might say when disposed either to mystify those whom he might consider impertinent inquirers, or to please those whom for the moment he might particularly desire to please. As a general rule, therefore, declarations, as expressing the intention of a testator as to his will, are to be rejected, for the reason that such declarations, if not in themselves illusory, are subject at any moment to be recalled, and cannot be regarded as exhibiting definite intentions until they are put in a definite shape. (2.) Nor are we to forget, when considering this question, the character of the medium through which these declarations must pass. The testator's lips are sealed in death; and evidence of his intentions, thus reproduced,

Spoonomore *v.* Cables, 66 Mo. 579; Caldwell *v.* Caldwell, 7 Bush. 515.

Thus parol evidence of intent is inadmissible to show that "children" were meant to include illegitimate children; Shearman *v.* Angel, 1 Bailey Eq. 351; Ward *v.* Epsy, 6 Humph. 447; or that for "children" was meant "sons;" Weatherhead *v.* Baskervile, 11 How. 329; Weatherhead *v.* Sewell, 9 Humph. 272; or that by a devise to a parent, known to be dead at the time, was meant a devise to the parent's children; Judy *v.* Williams, 2 Ind. 449; or that the term "heir at law" was used in the popular, not the legal sense. Aspden's Est. 2 Wall. Jun. C. C. 368. Supra, § 957.

As to fraud and coercion, see infra, §§ 1010-2.

comes to us without that sanction which is given when there is a power of explanation in the person whose remarks are reported.[1] (3.) In view of the reasoning just expressed, and for the additional reason that public policy requires that wills should be solemn instruments, deliberately prepared, and that every proper obstacle should be put in the way of a disturbance of the ordinary course of descent by the forgery of wills, the statute of frauds, as we have already seen,[2] has prescribed peculiar sanctions as essential to due testamentary action. The statute of frauds, however, would be defied and abrogated, and the wrongs it strives to correct would be perpetuated, if it were allowable, after a will has been duly executed, and when the testator is no longer capable of assent or dissent, to empty it of its written provisions and then pour in new provisions by parol. These new provisions, if so inserted, will be destitute of the formal sanction which the statute requires, and will be, by force of the statute, if for no other reason, inoperative. Insensible provisions the courts may be unable to effectuate; ambiguous expressions may be explained by showing what they meant at the time they were used; but provisions which were not put in by the testator himself at the time of execution and attestation cannot be put in after execution and attestation, and *a fortiori*, cannot be put in after the testator's death. Hence it is that, with three exceptions, evidence of the testator's intentions is inadmissible in explanation of a will. These exceptions are as follows: (1.) What is said at the time of the execution and attestation is admissible as part of the *res gestae*, though not to contradict the will. (2.) When it is doubtful as to which of two or more extrinsic objects a provision, in itself unambiguous, is applicable, then evidence of the testator's declarations of intention is admissible; not to interpret the will, for this is on its face unambiguous, but to interpret the extrinsic objects. When this is done, the court, so it is held, applies the will by determining which of these extrinsic objects it designates. This exception will hereafter be discussed.[3] But even this relaxation of the rule has been deplored, on account not only of its impolicy, but of the vagueness of the distinction it introduces.[4] (3.) When a will is attacked for fraud or coercion, it may be sustained by proof of

[1] See supra, § 467.
[2] Supra, § 884.
[3] Infra, §§ 997, 1001.
[4] Stephen's Evidence, note xxxiv.

prior consistent expressions; and such expressions may be received when indicating mental symptoms.[1]

[1] Infra, §§ 1010–2.

Sir James Wigram, in his authoritative Treatise on Wills, collects the result of the rulings in this relation in the following seven propositions:—

"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 cases, admit extrinsic evidence of *intention*, to make certain

§ 993. With the exceptions, therefore, just noticed, we may regard it as settled that a testator's intentions cannot be proved by parol for the purpose of varying or even explaining his will, or in other words, of clearing patent ambiguities.[1] No doubt we have early English cases where a less stringent rule was sustained,[2] but these cases are now discredited,[3] and with them should fall the American rulings to which they for a time gave rise.[4] Acting on the strict principle of exclusion we have noticed, the English courts have rejected evidence when tendered to show what persons a testator meant to include or exclude in employing the word "relations;"[5] what articles he intended to give by the word "plate,"[6] and what property he meant to devise by the words "lands out of settlement,"[7] or by other generic terms.[8] But evidence of such intent may be received when it was communicated to the legatee, assented to by him, and such assent acted upon by the testator.[9]

Proof of intent inadmissible to explain patent ambiguities.

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." Wigram, Wills, 10–13.

[1] See as to patent ambiguities, supra, § 956; infra, § 1006.

[2] Thomas *v.* Thomas, 6 T. R. 671; Beaumont *v.* Fell, 2 P. Wms. 141; Doe *v.* Needs, 2 M. & W. 129.

[3] See remarks of Lord Abinger in Doe *v.* Hiscocks, 5 M. & W. 368. Infra, § 997.

[4] Shore *v.* Wilson, 9 Cl. & Fin. 525, per Coleridge, J.; 556, per Parke, B.; 565, 566, per Tindal, C. J. See Re Peel, Law Rep. 2 P. & D. 46; 39 L. J. Pr. & Mat. 36, *S. C.*

[5] Goodinge *v.* Goodinge, 1 Ves. Sen. 230; Edye *v.* Salisbury, Amb. 70; Green *v.* Howard, 1 Br. C. C. 31. See Sullivan *v.* Sullivan, 4 I. R. Eq. 457, where the words were "my dearly beloved." Taylor's Evid. § 1036.

[6] Nicholls *v.* Osborne, 2 P. Wms. 419; Kelly *v.* Powlett, Amb. 605.

[7] Strode *v.* Russell, 2 Vern. 621.

[8] Wigr. Wills, 99–105; Doe *v.* Hubbard, 15 Q. B. 227; Horwood *v.* Griffith, 23 L. J. Ch. 465; 4 De Gex, M. & G. 700, *S. C.*; Hicks *v.* Sallitt, 23 L. J. Ch. 571; Millard *v.* Bailey, Law Rep. 1 Eq. 378, per Wood, V. C. On the other hand, in Knight *v.* Knight, 30 L. J. Ch. 644, Stuart, V. C., appears to have held that extrinsic evidence was admissible to show that shares in an insurance company were meant to pass under the words "ready money." See Taylor, § 1089.

Where the testator devised property to his nephews and nieces, but he had none of his own, while his wife had, evidence is inadmissible that he was not on good terms with his wife's nephews and nieces. Sherratt *v.* Mountford, L. R. 8 Ch. Ap. 928.

[9] Vreeland *v.* Williams, 32 N. J. Eq. 734.

§ 994. It has been further ruled that when the description of a devisee applies with exactitude to one person, parol evidence is inadmissible to show that another person, less exactly described, is the intended object of the testator's bounty.[1] It is otherwise in cases of latent ambiguity.[2]

Evidence inadmissible to modify obvious meaning as to devisee.

§ 995. We shall hereafter[3] see that even where there is a mistake in a will caused by the inadvertence of those who prepared it, and it does not in consequence carry out the testator's intentions, still the court will not correct it. Even a letter written to a testator by his solicitor, whether by way of advice or statement, is inadmissible for the purpose of construction of the will.[4] On the same principle declarations of the testatrix, made at the time of executing the will, to the effect that she desired to have it so drawn that in case C. B. G. died before reaching the age of twenty-five, none of the property should go to the family of his mother, have been refused admission to vary the terms of the will.[5]

And so are declarations qualifying terms.

[1] 1 Redf. on Wills, 498; Tucker *v.* Seaman's Aid Soc., 7 Met. 188; Griscom *v.* Evans, 40 N. J. L. 402; Kelley *v.* Kelley, 25 Penn. St. 460; Wallize *v.* Wallize, 55 Penn. St. 242; Johnson's Appeal, Sup. Ct. of Penns. 1876, 3 Weekly Notes, 52.

On a devise to a nephew, A., where the testator left two nephews of that name, one legitimate, and the other not, it was held that parol evidence was inadmissible to show that he intended that the illegitimate nephew was to take. Appel *v.* Byers, 98 Penn. St. 479.

[2] Infra, § 999.

[3] Infra, § 1008.

[4] Per James, L. J., Wilson *v.* O'Leary, L. R. 7 Ch. 456; Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109; Harter *v.* Harter, L. R. 3 P. & D. 11. Infra, § 1008. In Ryerss *v.* Wheeler, 22 Wend. 148, the court strangely held that declarations made at the time of the execution could not be received, but that prior declarations were admissible.

[5] Ordway *v.* Dow, 55 N. H. 12.

"There is nothing, however, ambiguous in the terms of this will. There is no doubt about the meaning of the words, and no testimony is offered tending to show that the words were used by this testatrix in any sense different from their ordinary acceptance, or tending to show any latent ambiguity, or taking the case out of the rule excluding parol testimony as above expressed. For these reasons, which I have endeavored to express as briefly as possible, I concur in the opinions already expressed. Felton *v.* Sawyer, 41 N. H. 202; Brown *v.* Brown, 44 N. H. 281; Burleigh *v.* Clough, 52 N. H. 267, are all cases in which the rule given above, from Woodeson, is recognized, and its application illustrated." Cushing, C. J., Ordway *v.* Dow, 55 N. H. 18.

§ 996. Recurring to the topic of latent ambiguities, already discussed,[1] the first specific distinction that we have to notice is that where a term (not in itself ambiguous), descriptive of an object, has two meanings, one general and patent, but which is inapplicable to any ascertainable object, and the other, capable of parol proof, is special and latent, such parol proof will be received, if the result be to indicate an object consistent with the writer's intentions as expressed in the will.[2] For this purpose evidence of the condition of the testator's family and of his estate is admissible, under the limitations hereafter expressed.[3] But the rule just stated must be carefully guarded so as to exclude evidence of such declarations of the testator's intent as would give a new effect, in cases of the character just mentioned, to the will. As an illustration of this may be mentioned a case before Lord Penzance,[4] where a question arose as to the meaning of a clause in which the testator appointed my "son, Foster Charter," as executor. He had two sons, William Foster Charter and Charles Charter, and "many circumstances pointed to the conclusion that the person whom the testator wished to be his executor was Charles Charter. Lord Penzance not only admitted evidence of all the circumstances of the case, but expressed an opinion that, if it were necessary, evidence of declarations of intention might be admitted."[5] But "the part of Lord Penzance's judgment above referred to was unanimously overruled in the House of Lords; though the court, being equally divided as to the construction of the will, refused to reverse

Where primary meaning is inapplicable to any ascertainable object, evidence of secondary meaning admissible.

[1] Supra, § 957.

[2] Doe *v.* Hiscocks, 5 M. & W. 369; Taylor on Evidence, § 1109; Trustees *v.* Peaslee, 15 N. H. 317; Brown *v.* Brown, 43 N. H. 17; Hine *v.* Hine, 39 Barb. 507; St. Luke's Home *v.* Assoc. for Ind. Females, 52 N. Y. 191; Pritchard *v.* Hicks, 1 Paige, 270; Marshall's Appeal, 2 Penn. St. 338; Mitchell *v.* Mitchell, 6 Md. 224; Robertson *v.* Dunn, 2 Murph. 133; Allan *v.* Vanmeter, 1 Metc. (Ky.) 264; Case *v.* Young, 3 Minn. 209; Hopkins *v.* Holt, 9 Wis. 228; Billingslea *v.* Moore, 14 Ga. 370; Elder *v.* Ogletree, 36 Ga. 64.

[3] Johnson *v.* Lydford, L. R. 1 P. & D. 546; Holmes *v.* Holmes, 36 Vt. 525; Wootton *v.* Redd, 12 Gratt. 196.

[4] Charter *v.* Charter, L. R. 2 P. & D. 315. See comments on this case in Stephen's Ev. 4th Eng. ed. note 33.

[5] Stephen's Ev. 161. Thus a scrivener who drew a will has been permitted to testify that the testator described certain land occupied by a house, devised by him, as distinct from a certain shop or market. Cleverly *v.* Cleverly, 124 Mass. 314.

the judgment, upon the principle, 'Praesumitur pro negante.'"[1] Subsequently occurred a case[2] in which the testator appointed several executors, one of whom was described as "Perceval ——, of Brighton, Esq., the father." The testator was intimately acquainted with William Perceval Boxall, of Brighton, who was commonly known as Mr. Perceval Boxall, and had a son named Perceval Gretwick Boxall. It did not appear that any person bearing the surname of Perceval was known to the testator. The court held that extrinsic evidence was admissible to assist it in ascertaining the person designated, and ordered the name of William Perceval Boxall to be included in the probate as one of the executors. And where a testator left a legacy to the children of his daughter by any husband other than Thomas Fisher, of B. St. Bath, and it appeared that there was a Thomas Fisher, of B. St. Bath, who was a married man, who had a son, Henry Tom Fisher, who sometimes lived with him, it was held that parol evidence was admissible to show that the latter was the party intended.[3]

When terms are applicable to several objects, evidence of intent admissible to distinguish.

§ 997. The most common case of latent ambiguity is that which exists when the writer makes use of a term equally descriptive of several objects or persons, and when from the writing itself it cannot be collected which object he had in view. In such case not only can extrinsic circumstances be put in evidence from which his intent can be inferred, but his own explanatory declarations can be proved.[4] Numerous rulings have been made, based on this distinction, in which evidence has been received to prove which of two religious or eleemosynary societies was meant by the testator when using words not giving an exact description of either, but approximating thereto.[5] Following this same distinction, it has been held, that, where a testator has devised one house "to George

[1] Ibid., Errata.

[2] De Rosaz, in re, L. R. 2 P. D. 56. Infra, § 1008.

[3] Woolverton, etc., in re, L. R. 7 Ch. D. 197.

[4] Supra, § 946; Harman *v.* Gurner, 25 Beav. 478; Dougless *v.* Fellows, 1 Ray, 114; Doe *v.* Hiscocks, 5 M. & W. 368. See Melcher *v.* Chase, 105 Mass. 125; Washington & Lee University's Appeal, 111 Penn. St. 572; Smith *v.* Dennison, 112 Ill. 367. For exception see infra, § 1001.

[5] Swasey *v.* Bible Soc., 57 Me. 528; Tilton *v.* Bible Soc., 60 N. H. 377; Sanderson *v.* White, 18 Pick. 336; Hinckley *v.* Thatcher, 139 Mass. 477; Ensign, in re, 3 Demarest, 516; and cases cited infra, § 999.

Gord, the son of George Gord;" another "to George Gord, the son of John Gord;" and a third, after the expiration of certain life estates, "to George Gord, the son of Gord;" evidence of his declarations was admissible to show that the person meant to be designated by the last description was George, the son of *George* Gord.[1] So, where the devise was "to John Allen, the grandson of my brother Thomas, and I charge the same with the payment of £100 to each and every the brothers and sisters of the said John Allen;" and it appeared that, at the date of the will, the testator's brother Thomas had two grandsons named John Allen, one having several brothers and sisters, and the other having one brother and one sister; the court received evidence of the declarations of the testator, to show which grandchild was intended.[2] So, where provision was made for the testator's nephews, Harmon Baldwin and Joseph Baldwin, it may be shown that the testator had no nephews by those names, but did have nephews by the names of Samuel Harbourne Baldwin, usually called Harbourne, and Josiah M. Baldwin, usually called Josie.[3] The same conclusion was reached where lands were left to John Cluer, of Calcot, and two persons, father and son, were of that name.[4] So, where property was devised to "William Marshall, my second cousin," and it appeared that the testator had no second cousin of that name, but that he had two first cousins once removed, one named William Marshall, and the other named William John Robert Blandford Marshall, Vice Chancellor Page Wood admitted similar evidence to resolve this latent ambiguity.[5] But to such cases the right to prove intention is limited; and we may hence accept Judge Redfield's summary,[6] that "Doe *v.* Hiscocks is now universally admitted to have settled the law upon this point; that the only cases in which evidence to prove intention is admissible are those in which the description in the will is ambiguous in its application to each of several objects."

§ 998. We must conclude, therefore, that unless there be a latent ambiguity as to two or more probable objects, the intentions of a

[1] Doe *v.* Needs, 2 M. & W. 129; Doe *v.* Morgan, 1 C. & M. 235.

[2] Doe *v.* Allen, 12 A. & E. 451; 4 P. & D. 220, *S. C.*; Fleming *v.* Fleming, 31 L. J. Ex. 419; 1 H. & C. 242, *S. C.*

[3] Taylor *v.* Tolen, 38 N. J. Eq. 91.

[4] Jones *v.* Newman, 1 W. Bl. 60, explained in Doe *v.* Hiscocks, 5 M. & W. 370.

[5] Bennett *v.* Marshall, 2 Kay & J. 740. See particularly remarks supra, § 992.

[6] 1 Redfield on Wills, ed. 1876. See Hanner *v.* Moulton, 23 Fed. Rep. 5.

testator are inadmissible to affect the construction. It is otherwise as to evidence of the family, surroundings, and habits of the testator, which, when relevant to a litigated question of construction, is always to be received.[1] Hence, where a testator appointed his "nephew A. B." executor, and his own nephew and his wife's nephew both bore that name, extrinsic evidence of the testator's family and surroundings was admitted to show that the latter was the person designated.[2] So, where a testator had seven sons, four minors, liv-

All the surroundings and habits of testator may be proved.

[1] Atty.-Gen. *v.* Drummond, 1 Dru. & W. 367; Grant *v.* Grant, L. R. 2 P. & D. 8; see *S. C.* L. R. 5 C. P. 380; L. R. 5 C. P. 727; Newman *v.* Piercy, 25 W. R. 37; Powell *v.* Biddle, 2 Dall. 70; Howard *v.* Ins. Co., 49 Me. 288; Bodman *v.* Tract Soc., 9 Allen, 447; Connolly *v.* Pardon, 1 Paige, 291; Lawrence *v.* Lindsay, 68 N. Y. 108; Rewalt *v.* Ulrich, 23 Penn. St. 388; Cresson's Appeal, 30 Penn. St. 437; Wootton *v.* Redd, 12 Grat. 196; Maund *v.* McPhail, 10 Leigh, 199; Black *v.* Hill, 32 Ohio St. 313; Henry *v.* Henry, 81 Ky. 342; Waldron *v.* Waldron, 48 Mich. 350; Ganson *v.* Madigan, 15 Wis. 144; Morgan *v.* Burrows, 45 Wis. 211; Woods *v.* Woods, 2 Jones Eq. 420; Travis *v.* Morrison, 28 Ala. 494; Hockensmith *v.* Slusher, 26 Mo. 237; Tuxbury *v.* French, 41 Mich. 7; Eberts *v.* Eberts, 42 Mich. 404.

[2] Grant *v.* Grant, L. R. 2 P. & D. 8; 18 W. R. 330; followed in Grant *v.* Grant, L. R. 5 C. P. 381; 18 W. R. 951.

So, more recently, the chancery division of the English high court of justice, in Laker *v.* Hordern, 34 L. T. Rep. (N. S.) 88, held that illegitimate daughters were entitled to take under a will as *personae designatae*, on proof of the following facts, which were held admissible: H. and L. lived together as husband and wife for many years without being legally married. They had three illegitimate female children. In 1857 H. and L. were legally married, and in 1859 H. made his will, giving certain personal estate to trustees upon trust for his wife L. for life, and after her death, "for all my daughters who should attain twenty-one years or marry." H. never had any other children, and died in 1861. The children had always lived with their parents, and were spoken of and introduced as their daughters. It was held that not only was the evidence of the state of the family admissible, but that the illegitimate daughters of H. were sufficiently described in the will, and were entitled to the bequest. The court relied on a ruling of Lord Eldon, in Wilkinson *v.* Adam, 1 V. & B. 422. In this latter case, under a devise by a married man, having no legitimate children, "to the children which I may have by A. living at my decease," issue, who had acquired the reputation of being his children by A. before the date of the will, were held entitled as upon the whole will intended, and sufficiently described. In Lepine *v.* Bean, L. R. 10 Eq. 170, it was held that an illegitimate child took under a gift to "all and every my children," the testator having no legitimate children. But *aliter* when there are legitimate children or representatives of the same degree. Ellis *v.* Houston, L. R. 10 Ch. D. 236; Bowers *v.* Bowers, 1 Abb. (N. Y.) 214.

ing with him, evidence was admitted to show that the "four boys" mentioned in the will were his four minor sons.[1] So, when an estate was devised to Mary Beynon's three daughters, Mary, Elizabeth, and Ann; and at the date of the will Mary Beynon had two legitimate daughters, namely, Mary and Ann, and a younger illegitimate child, named Elizabeth, the court, in order to rebut the claim of the illegitimate Elizabeth, permitted the introduction of extrinsic evidence, which showed that Mary Beynon had formerly had a legitimate daughter named Elizabeth, who was born in the order stated in the will; and that, though this daughter had died several years before the date of the will, her death was unknown to the testator, who had also been studiously kept in ignorance of the birth of the natural child; and under these circumstances the jury were held to have rightly decided, that the illegitimate daughter Elizabeth was not entitled to the devise in question.[2] "In constructing a will," so is this position accurately expressed by Blackburn, J.,[3] "the court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used, with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words." After quoting Wigram on Extrinsic Evidence, and Doe *v.* Hiscocks, he adds: "No doubt in many cases the testator has, for the moment, forgotten or overlooked the material facts and circumstances which he well knew. And the consequence sometimes is, that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean."

§ 999. It was once thought that when a description of a devisee answered equally two separate claimants, the one having identity of

[1] Bradley *v.* Rees, 113 Ill. 327.

[2] Doe *v.* Beynon, 12 A. & E. 431; Phillips *v.* Barker, 1 Sm. & Gif. 583; Taylor, § 1085; Apel *v.* Byers, 98 Penn. St. 479.

[3] Allgood *v.* Blake, L. R. 8 Eq. 160.

name was to be preferred.[1] This doctrine, however, has been more recently repudiated;[2] and it is now settled that the court will take cognizance of all the facts, and place itself, as nearly as may be, in the situation of the testator at the time of executing the instrument; and if it can by aid of such circumstances ascertain from the language of the will which of the claimants was intended by the testator, a confusion as to names or titles will not be permitted to defeat such intent.[3] But, as has been seen,[4] this is inadmissible when the object is to substitute a materially imperfect for a perfect description.

In such cases all the extrinsic facts are to be considered.

§ 1000. In England, it has been held in equity that if legacies be given to a specific number of children (*e. g.*, four, £1,000 being given to each of them), and it turns out that at the date of the will the testator had a greater number of children, the sum awarded, if the estate holds out, will be decreed to each of the children actually so existing.[5]

Distribution among children presumed to mean all children.

§ 1001. To the rule admitting declarations as to latent ambiguities there has been proposed a qualification somewhat artificial. It has been said that if the description of the person or thing be partly applicable and partly inapplicable to each of several objects, though extrin-

When description is only partly applicable to each of

[1] Camoys *v.* Blundell, 1 H. of L. Cas. 786, per Parke, B., pronouncing the opinion of the judges. But see Drake *v.* Drake, 25 Beav. 642; 29 L. J. Ch. 850; *S. C.* in Dom. Proc.; 8 H. of L. Cas. 172, *S. C.*

[2] Drake *v.* Drake, 8 H. of L. Cas. 172, 177; Camoys *v.* Blundell, 1 H. of L. Cas. 778, 786, 792; Thomson *v.* Hempenstall, 7 Ec. & Mar. Cas. 141, per Dr. Lushington; 1 Roberts, 783, *S. C.*; though see In re Plunkett's Estate, 11 Ir. Eq. R. N. S. 361; Colclough *v.* Smythe, 14 Ir. Eq. N. S. 127; and 15 Ibid. 353; Garner *v.* Garner, 29 Beav. 116; Gillett *v.* Gane, Law Rep. 10 Eq. 29; 39 L. J. Ch. 818, *S. C.* Woolverton, in re, L. R. 7 Ch. D. 197; cited supra, § 996.

[3] Doe *v.* Huthwaite, 3 B. & A. 630; Doe *v.* Hiscocks, 5 M. & W. 368; Blundell *v.* Gladstone, 11 Sim. 467, 485–488; 1 Phill. 279, 282, 283, *S. C.*; 1 H. of L. Cas. 778, *nom.* Camoys *v.* Blundell; Bernasconi *v.* Atkinson, 10 Hare, 345; Charter *v.* Charter, L. R. 7 H. L. 364; Hodgson *v.* Clarke, 1 De Gex, F. & J. 394, reversing *S. C.* Rep. 1 Giff. 139; Re Gregory's Settl. & Wills, 34 Beav. 600; Re Noble's Trusts, 5 I. R. Eq. 140; Re Feltham's Trusts, 1 Kay & J. 518; Kilvert's Trusts, in re, L. R. 7 Ch. Ap. 170, reversing *S. C.* L. R. 12 Eq. 183; Wolverton Estates, L. R. 7 C. D. 197; Leonard *v.* Davenport, 58 How. N. Y. 384; Hawkins *v.* Garland, 76 Va. 149. And see particularly Ryall *v.* Hannam, 10 Beav. 538.

[4] Supra, § 994.

[5] Daniell *v.* Daniell, 4 De Gex & Sm. 337; Lee *v.* Pain, 4 Hare, 249; Scott *v.* Fenoulhett, 1 Cox Ch. R. 79; Yeates *v.* Yeates, 16 Beav. 170.

sic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which the language applies, evidence of the writer's declarations of intention in this respect cannot be received.[1]

several objects, then declarations of intent are inadmissible.

§ 1002. To solve latent ambiguities as to property, proof of extrinsic facts, including the testator's declarations, is always proper; as in such case the effect of the evidence is not to vary but to apply the will.[2] And under this head falls proof of the testator's usage in giving particular names to certain portions of his estate.[3]

Evidence admissible as to latent ambiguities.

§ 1003. Abbreviations of figures in a will may be explained by parol.[4] Thus, where a testator bequeathed to his children the sum of I. X. X., and O. X. X., parol evidence was received to the effect that the testator, in his business as a jeweller, had used the ciphers in dispute to indicate respectively £100 and £200.[5]

Abbreviations can be thus explained.

[1] Doe *v.* Hiscocks, 5 M. & W. 363. See, also, Drake *v.* Drake, 3 H. of L. Cas. 172; Douglass *v.* Fellows, 1 Kay, 114; Bernasconi *v.* Atkinson, 10 Hare, 345; overruling Thomas *v.* Thomas, 6 T. R. 677; Stinger *v.* Gardner, 27 Beav. 35; *S. C.* 41 De Gex & J. 468; Lewis *v.* Douglass, 14 R. I. 604; Taylor *v.* Marvis, 90 N. C. 619; Stephen's Evidence, 162; Taylor's Ev. § 1109. See supra, §§ 997 ff.

[2] Supra, § 942; Doe *v.* Martin, 4 B. & Ad. 785, per Parke, J.; Doe *v.* Burt, 1 T. R. 704, per Buller, J.; Castle *v.* Fox, 11 Law Rep. Eq. 542; 40 L. J. Ch. 302, *S. C.*; Webb *v.* Byng, 1 Kay & J. 580; Doe *v.* Ld. Jersey, 1 B. & A. 550; *S. C.* in Dom. Proc. 3 B. & C. 870; Herbert *v.* Reid, 16 Ves. 481; Okeden *v.* Clifden, 2 Russ. 300; Aldrich *v.* Gaskill, 10 Cush. 155; Melcher *v.* Chase, 105 Mass. 125; Cleverly *v.* Cleverly, 124 Mass. 314; Spencer *v.* Higgins, 22 Conn. 521; Crosby *v.* Mason, 32 Conn. 482; Dunham *v.* Averill, 45 Conn. 61; Benham *v.* Hendrickson, 32 N. J. Eq. 441; Domest. Miss. Appeal, 30 Penn. St. 425; Warner *v.* Miltenberger, 21 Md. 264; Young *v.* Twigg, 27 Md. 620; Ashworth *v.* Carleton, 12 Ohio St. 381; Hopkins *v.* Grimes, 14 Iowa, 73; Kinsey *v.* Rhem, 2 Ired. L. 192; McCall *v.* Gillespie, 6 Jones L. 533; Clements *v.* Hood, 57 Ala. 459; Riggs *v.* Myers, 20 Mo. 239; Creasy *v.* Alverson, 43 Mo. 13; Jones *v.* Dove, 7 Oregon, 467.

[3] Supra, §§ 954, 962; Castle *v.* Fox, L. R. 11 Eq. 542; Benham *v.* Hendrickson, 32 N. J. Eq. 441.

[4] See supra, §§ 704, 972.

[5] Kell *v.* Charmer, 23 Beav. 195.

As an illustration of the admissibility of parol evidence going to show to which of several objects an ambiguous testamentary expression applies, may be cited an interesting English case (Goblet *v.* Beechey, 3 Sim. 24), where the controversy turned on the word "mod," as used in the following codicil of the distinguished sculptor, Nollekens: "In case of my death, all the marble in the yard, the tools in the shop, bankers, *mod* tools for carving," etc., "shall be the property of Alex. Goblet." The plaintiff contended that

§ 1003 *a*. Wherever extrinsic facts are admissible, the testator's writings may be included among such facts. Thus, where a testator directed in his will that all moneys which he had advanced or might advance to his children, "as will appear in a statement in my handwriting," should be brought into hotchpot, the court, in addition to other extrinsic evidence of the nature and amount of the advances, admitted an unattested document, which, after the date of the will, had been drawn up by the testator, with the apparent view of furnishing a guide to his trustees on the subject.[1] On the same principle, proof of extrinsic facts will be admitted to identify an imperfectly executed testamentary paper, if the object be to incorporate that document with a duly attested codicil, which refers in general terms to the testator's "last will."[2]

Testator's own writing admissible among extrinsic facts.

§ 1004. We have already seen[3] that erroneous particulars in a description of property can be rejected when an object can be found answering justly and naturally to the body of the description. This rule is frequently applied to wills.[4] Thus, where a testator has devised to certain

Erroneous surplusage may be rejected.

the word meant "models;" the defendant, who was the executor, urged that either it was an abbreviation for "moulds," or that it should be read in connection with the words which immediately followed it, and meant "modelling tools for carving." On the one hand, it was proved that the legatee had been in the testator's service for thirty years, and was highly esteemed by him as one of his best workmen; and statuaries were called to prove that no such tools were known as modelling tools for carving, but that the word "mod" would be understood by any sculptor as a simple abbreviation of the word models. On the other hand, the executor showed that the testator's models were rare and curious works of art, which had sold for a large sum, but that all the other articles mentioned in the codicil were of trifling value; and he further gave in evidence, that the testator had a great number of moulds in his possession, which were not specifically disposed of by the will. Reading the codicil by the light of this extrinsic evidence, Vice Chancellor Shadwell came to a decision that the word in question sufficiently described the testator's models; and although this decree was subsequently reversed by Lord Brougham, the reversal rested, not on the inadmissibility of any portion of the evidence, but on the ground that the models had been distinctively bequeathed by will to another person. 2 Russ. & Myl. 624; Taylor's Ev. § 1083.

[1] Whately *v.* Spooner, 3 Kay & J. 542. But see cases cited infra, § 1006.

[2] Allen *v.* Maddock, 11 Moo. P. C. 427. See Almosino, in re, 1 Sw. & Tr. 508.

[3] Supra, § 945.

[4] Anstee *v.* Nelms, 1 H. & N. 225; Coleman *v.* Eberle, 76 Penn. St. 197.

legatees £1250, which he described as "part of his stock in the 4 per cent. annuities of the Bank of England;" and at the date of the will, and thence up to the time of his death, the testator had no such stock, but he had had some money in the 4 per cents. some years before, and had sold it out, and invested the produce in long annuities; upon proof of these facts being tendered, the master of the rolls admitted the evidence, not, indeed, "to prove that there was a mistake, for that was clear, but to show how it arose;" and he then held, that as the testator obviously meant to give the legacies, but mistook the fund, the only effect of the mistake as explained by the evidence was, that the legacies ceased to be specific, and must consequently be paid out of the general personal estate.[1] In a subsequent judgment, on a similar state of facts, Lord Langdale's conclusions rested on the same grounds. "It is very necessary to observe," he said, "that in the case of Selwood *v.* Mildmay the evidence was received only for the purpose stated by the master of the rolls in his judgment," that is, in order to show how the mistake arose; "and not, as it has been erroneously supposed,[2] for the purpose of showing that the testator, when he used the erroneous description of the 4 per cent. stock, meant to bequeath the long annuities, which he had purchased with the produce of the 4 per cent. stock; and that the result of the case was, not to substitute another specific subject in the place of a specific legacy which the will purported to bequeath; not to substitute the long annuities which the testator had, and did not purport to give, for the 4 per cent. bank annuities which he had not, and did purport to give;" but simply to render legacies, which were *primâ facie* specific, payable out of the general personal estate.[3]

§ 1005. On the other hand, if such alleged surplusage be introduced by way of exception or limitation, then it cannot be dis-

[1] Selwood *v.* Mildmay, 3 Ves. 306.

[2] In Miller *v.* Travers, 8 Bing. 252, 253; and Doe *v.* Hiscocks, 5 M. & W. 270.

[3] Lindgreen *v.* Lindgreen, 9 Beav. 363. See, also, Quennell *v.* Turner, 13 Beav. 240; Tann *v.* Tann, 2 New R. 412, per Romilly, M. R.; and Hunt *v.* Tulk, 2 De Gex, M. & G. 300; in which last case the lords justices, in order to set right what appeared to them to be an obvious clerical error, held that the words, "fourth schedule," in a will, should be read as if they were "fifth schedule." Taylor's Ev. § 1106. See, also, Ford *v.* Batley, 23 L. J. Ch. 225; Coltman *v.* Gregory, 40 L. J. 352.

charged, but must operate to defeat the devise, so far as concerns the object of the parol evidence.[1] So, if there be one object, as to which all the demonstrations in a will are true, and another as to which part are true and part false, the words of such will shall be viewed as words of true limitation to pass only that object as to which all the circumstances are true.[2] To this effect is a ruling as to a devise of "all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk," where it appeared that the testator had bought of the duke four houses very near Snig Hill, and two at some considerable distance from it, and in a place bearing a different name. The court held that the four houses only passed by the devise, though all the six had been purchased by one conveyance, and the testator had redeemed the land tax upon all by one contract.[3] So, also, where a testator devised to A. his *freehold* messuage, farm, lands, and hereditaments, in the county of B., and it appeared that he had a farm in that county, consisting of a messuage and 116 acres, the greater part of which was freehold, but a small portion was leasehold for a long term of years at a peppercorn rent, the court held that as the devise correctly described the freehold, the leasehold part was not included therein, though it was proved that this part was interspersed with, and undistinguishable from, the freehold, and that the whole farm had always been treated as freehold by the testator.[4]

Otherwise as to words of limitation or description.

§ 1006. Patent ambiguities cannot generally be resolved by parol; but as to such ambiguities the will must be regarded as insensible.[5]

[1] Taylor *v.* Parry, 1 M. & Gr. 623, per Maule, J. See supra, § 945.

[2] Doe *v.* Bower, 3 B. & Ad. 459, 460, per Parke, J.; Morrell *v.* Fisher, 4 Ex. R. 604, per Alderson, B. See, also, Boyle *v.* Mulholland, 10 Ir. Law, R. N. S. 150. See supra, § 994.

[3] Taylor's Ev. § 1108; Doe *v.* Bower, 3 B. & Ad. 453; Pogson *v.* Thomas, 6 Bing. N. C. 337; Doe *v.* Ashley, 10 Q. B. 663; Webber *v.* Stanley, 16 Com. B. N. S. 698; 33 L. J. C. P. 217, *S. C.*; Smith & Goddard *v.* Ridgway, 2 H. & C. 37; *S. C.* in Ex. Ch. 4 H. & C. 577; Pedley *v.* Dodds, 2 Law Rep. Eq. 819.

[4] Taylor's Ev. § 1108; Stone *v.* Greening, 13 Sim. 390; Hall *v.* Fisher, 1 Coll. 47; Quennell *v.* Turner, 13 Beav. 240; Evans *v.* Angell, 26 Beav. 202. See, also, Gilliat *v.* Gilliat, 28 Beav. 481; Mathews *v.* Mathews, 4 Law Rep. Eq. 278; Doe *v.* Bower, 2 B. & Ad. 459, per Parke, J.

[5] Miller *v.* Travers, 8 Bing. 254; Taylor *v.* Richardson, 2 Drew. 16; Turner *v.* Savings Inst., 76 Me. 527; St. Luke's Home, etc., *v.* Soc. for In-

Patent ambiguities not to be resolved by parol.

Parol evidence, therefore, is inadmissible to prove what is meant by a legacy to "——;"[1] or a legacy to "K., to L., to M.,"[2] etc.

Ademption of legacy may be proved by parol.

§ 1007. Parol evidence is admissible to establish the ademption or prepayment of a legacy. Thus, in an English case, the son, the residuary legatee under a will, was permitted to show by parol that a legacy given by the testator to his daughter had been partially anticipated by him, he having given her a portion of the sum bequeathed, stating at the same time that it was in anticipation of her legacy.[3] The same rule has been adopted in the United States.[4]

Parol proof of mistake in drafting not receivable.

§ 1008. Parol proof of mistake is usually inadmissible to correct a will. In contracts there is a distinction in this respect, arising from the fact that a scrivener's mistake is often the mistake of the agent of both parties, and therefore in such cases imputable to both. But in wills, the scrivener can be in no sense the agent of the legatees or devisees whose interests are affected by his supposed blunder, and to them, therefore, can such blunder be in no sense imputable. The mistake, therefore, if there be such, is one of the testator, or of the scrivener adopted by the testator; and to let the will be overridden by parol proof of such mistake would be to subordinate that which the testator declares to be his last will to something which he has not so sanctioned, and which passes through the treacherous medium of parol.[5] It is

digent Females, 52 N. Y. 191; Taylor *v.* Maris, 90 N. C. 619; Hill *v.* Felton, 47 Ga. 443. For other cases see supra, § 993; and supra, § 956, as to definition of patent ambiguities, and Clayton *v.* Lord Nugent, 13 M. & W. 200; Kell *v.* Charmer, 23 Beav. 195.

[1] Baylis *v.* A. J., 2 Atk. 239.

[2] Clayton *v.* Nugent, 13 M. & W. 209.

[3] Kirk *v.* Eddowes, 3 Hare, 509; Ferris *v.* Goodburn, 27 L. J. Ch. 574; Taylor's Evidence, § 1048.

[4] Rogers *v.* French, 19 Ga. 316; Nolan *v.* Bolton, 25 Ga. 352; May *v.* May, 28 Ala. 141.

[5] Newburgh *v.* Newburgh, 5 Mad. 361; Miller *v.* Travers, 8 Bing. 244; Francis *v.* Dichfield, 2 Cowp. 531; Hayes *v.* Hayes, 21 N. J. Eq. 265; Nevius *v.* Martin, 30 N. J. L. 465; Gaither *v.* Gaither, 3 Md. Ch. 158; Higgins *v.* Carlton, 28 Md. 115; Abercrombie *v.* Abercrombie, 27 Ala. 489. See supra, §§ 954, 995.

In Massachusetts, by Gen. Stat. c. 92, § 25, when a will omits to provide for a child, such child may take as if testator had died intestate, unless the child had been already provided for, or unless it appear that the omission was intentional. Under this act evidence is admissible to show directly as well as indirectly that the omission was intentional. Converse *v.* Wales, 4 Allen, 512; Ramsdill *v.* Wentworth, 101 Mass. 125; Buckley *v.* Gerard, 123 Mass. 8.

true that it has been held in England that the writer's habit of misnaming a particular person may be proved, for the purpose of showing whom he meant by a particular legatee.[1] But ordinarily a testator's mistake of fact, leading him to a provision he could not otherwise have made, cannot be proved to modify such provision.[2] Thus, it is inadmissible to prove that a statement made as to an advancement was a mistake,[3] to prove that testator meant a lot in section 31 of a town, and not in section 32, as expressed in the will,[4] and to prove by parol that the testatrix, who omitted to provide for a particular son, believed at the time of making the will that he was dead, when he was really alive, there being nothing in the will to

[1] Blundell *v.* Gladstone, 11 Sim. 467; Mostyn *v.* Mostyn, 5 H. of L. Cas. 155. See R. *v.* Wooldale, 6 Q. B. 549; Abbott *v.* Massie, 3 Ves. 148, explained by Rolfe, B., in Clayton *v.* Nugent, 13 M. & W. 204, 207; Rosaz, in re, L. R. 2 P. D. 66. In Lee *v.* Pain, 4 Hare, 251–253, where this doctrine was applied, a testatrix, by a codicil dated in 1836, had bequeathed "to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Rev. Mr. Bowden, £200 each." These legacies were claimed by a Mrs. Washbourne and her daughter. It appeared in evidence that Mrs. Washbourne was the daughter of the Rev. J. Bowden, who died in 1812, and the widow of the Rev. D. Washbourne, a dissenting minister at Hammersmith. Mrs. Bowden died in 1820, since which time no person had lived at Hammersmith answering the description in the codicil. It further appeared that the testatrix, who was of great age, had been intimately acquainted with the Bowdens and the Washbournes; that she had been in the habit of calling Mrs. Washbourne by her maiden name of Bowden; and that being often reminded of the mistake, she had always acknowledged that she had confounded the two names. Under these circumstances, Vice-Chancellor Wigram decided that the claimants were entitled to their respective legacies. The rule was pushed to a perilous extreme in Beaumont *v.* Fell, 2 P. Wms. 141, where a legacy, given to Catherine Earnley, was claimed by Gertrude Yardley; and it appearing that no such person was known as Catherine Earnley, proof was received that the testator usually called the claimant Gatty, which might easily have been mistaken by the scrivener who drew the will for Katy. On this and other similar proof, the court decided in favor of the claimant. In this case, as we have noticed, declarations of the testator were admitted; but the propriety of receiving such evidence was doubted by Ld. Abinger in Doe *v.* Hiscocks, 5 M. & W. 371. See De Rosaz, in re, L. R. 2 P. D. 56, supra, § 996, where the admissibility is reserved.

[2] Jackson *v.* Sill, 11 Johns. R. 201; McAllister *v.* Butterfield, 31 Ind. 25; Skipwith *v.* Cabell, 19 Grat. 758; Rosborough *v.* Hemphill, 5 Rich. (S. C.) Eq. 95. See, however, Lee *v.* Pain and Beaumont *v.* Fell, cited supra, and Geer *v.* Winds, 4 Desau. 85.

[3] Painter *v.* Painter, 18 Ohio, 247.

[4] Kurtz *v.* Hebner, 55 Ill. 514; Fitzpatrick *v.* Fitzpatrick, 36 Iowa, 674. See discussion in 19 Am. L. R. 94, 353. See supra, § 825.

indicate a belief in such death.[1] But the testator's declarations have been admitted to show that an interlineation in a will was made after its execution;[2] and a subscribing witness may be examined to the same effect.[3] And when it is doubtful whether an instrument is a deed or a will, declarations of the testator are admissible to resolve the doubt.[4] But ordinarily a testator will be rebuttably presumed to have known the contents of the will executed by him.[5]

§ 1009. Where, however, fraud or coercion is alleged in the concoction of a will, this may be proved by parol.[6] The proof in such cases, as the testator is out of the reach of examination, must rest upon extrinsic facts; and whatever circumstances would logically tend to establish or negative fraud or coercion are relevant. These circumstances may be evidenced as much by parol as by written proof.[7] Proof of undue influence overbearing the testator's free will may be in like manner made, and the testator's declarations of his feelings are admissible for this purpose.[8]

Fraud and undue influence may be proved by parol.

§ 1010. It should at the same time be remembered that as primary proof that a testator was influenced, in making the will, by

[1] Gifford *v.* Dyer, 2 R. I. 99. See Bush *v.* Bush, 87 Mo. 480.

[2] Doe *v.* Palmer, 16 Q. B. 747; Duffy, in re, 5 Irish Eq. 506; Dench *v.* Dench, L. R. 2 Pr. D. 60. See Johnson *v.* Lyford, L. R. 1 P. & D. 546; Quick *v.* Quick, 3 Sw. & Tr. 442.

[3] Charles *v.* Huber, 78 Penn. St. 448.

[4] Sugden *v.* Ld. St. Leonards, L. R. 1 P. D. (C. A.) 154; aff. 45 L. J. P. 1; 24 W. R. 209; White *v.* Hicks, 43 Barb. 64; Walston *v.* White, 5 Md. 297.

[5] Infra, § 1243; Fawcett *v.* Jones, 3 Phil. Ec. 476; Browning *v.* Budd, 6 Moo. P. C. 430; Maxwell's Will, 4 Halst. Ch. 251; Hosbauer *v.* Hoshauer, 26 Penn. St. 404.

[6] Doe *v.* Hardy, 1 M. & Rob. 525; Doe *v.* Allen, 8 T. R. 147; Longford *v.* Purdon, 1 L. R. Ir. 75; Lauglin *v.* McDevitt, 63 N. Y. 213. See supra, § 931.

[7] Whitman *v.* Morey, 63 N. H. 449; Shailer *v.* Bumstead, 99 Mass. 112; Taylor's Will case, 10 Abb. (N. Y.) Pr. N. S. 300. See Hoges's Est., 2 Brewst. 450; McKinley *v.* Lamb, 56 Barb. 284; Rollwagen *v.* Rollwagen, 5 Thomp. & C. 402; *S. C.* 3 Hun, 121; Turner *v.* Cheeseman, 15 N. J. Eq. 243; Parramore *v.* Taylor, 11 Grat. 220; Willett *v.* Porter, 42 Ind. 250; Rabb *v.* Graham, 43 Ind. 1; Lee *v.* Lee, 71 N. C. 139; Dennis *v.* Weekes, 51 Ga. 24; Roberts *v.* Trawick, 17 Ala. 65; Beaubien *v.* Cicotte, 12 Mich. 459; Smith *v.* Fenner, 1 Gall. 170.

[8] Lewis *v.* Mason, 109 Mass. 169; Marshall's case, App., 2 Penn. St. 388; Zimmerman *v.* Zimmerman, 23 Penn. St. 375; Harvey *v.* Sullens, 46 Mo. 147. But there must be casual relationship between the undue influence and the will. Thompson *v.* Kyner, 65 Penn. St. 368.

fraud or undue influence, his declarations are inadmissible. In such relation they are to be regarded as hearsay.[1] But while such declarations are not admissible to prove the actual fact of fraud or improper influence by another, they may be competent, to adopt a distinction made by Colt, J., in a Massachusetts case in 1868, "to establish the influence and effect of the external acts upon the testator himself."[2] Or, as has been elsewhere said, declarations of the testator alone "are not competent evidence to prove acts of others amounting to undue influence, although when the acts are proven the declarations of the testator may be given to show the operation they had on his mind."[3] But declarations uttered long afterwards, in no sense part of the transaction, cannot be received to prove fraud.[4] For such purpose, unless made against the declarant's interest, they are but hearsay.[5]

Declarations of testator inadmissible to prove fraud or compulsion as primary proof.

§ 1011. When the condition of the testator's mind, so far as concerns testamentary capacity, is in litigation, his declarations are admissible so far as bearing on such question of capacity.[6] It is otherwise as to declarations some time subsequent to execution of a will, as to its contents, when such declarations are not connected with evidence as to his prior state of mind.[7]

Such declarations are admissible to prove testator's mental condition.

§ 1012. But whenever a will is attacked on the ground that it does not exhibit the testator's real intent, he being in disturbed mind, or under undue influence at the time it was executed, it is admissible to put in evidence his prior declarations in support of the will.[8]

Parol evidence admissible to sustain will when attacked.

[1] Provis *v.* Reed, 5 Bing. 435; Marston *v.* Roe, 8 Ad. & El. 14; Shailer *v.* Bumstead, 99 Mass. 113; Comstock *v.* Hadlyme, 8 Conn. 254; Jackson *v.* Kniffen, 2 Johns. 31; Waterman *v.* Whitney, 1 Kern. 157. See Kennedy *v.* Upshaw, 64 Tex. 418.

[2] Shailer *v.* Bumstead, 99 Mass. 126.

[3] Rapello, J., Cudney *v.* Cudney, 68 N. Y. 152. See, to same effect, Lynch *v.* Lynch, 1 Lea (Tenn.), 526, and cases to § 1011.

[4] Gibson *v.* Gibson, 24 Mo. 227.

[5] Ibid. Supra, § 226.

[6] Robinson *v.* Adams, 62 Me. 369; Shailer *v.* Bumstead, 99 Mass. 113; Comstock *v.* Hadlyme, 8 Conn. 254; Waterman *v.* Whitney, 1 Kernan, 157; Boylan *v.* Meeker, 4 Dutch. 274; Moritz *v.* Brough, 16 S. & R. 403; McTaggart *v.* Thompson, 14 Penn. St. 149. See, however, Reel *v.* Reel, 1 Hawks, 248; Howell *v.* Barden, 3 Dev. 442; Dennis *v.* Weekes, 51 Ga. 24; Cawthorn *v.* Haynes, 24 Mo. 236; Rule *v.* Maupin, 84 Mo. 587.

[7] Davis *v.* Davis, 122 Mass. 590.

[8] Converse *v.* Wales, 4 Allen, 512;

§ 1013. It is scarcely necessary to add that a probate of a will is *primâ facie* proof of its due execution.[1] It may subsequently be contested, by proof of incompetency of testator, or defective execution.[2]

Probate of will only *primâ facie* proof.

IV. SPECIAL RULES AS TO CONTRACTS.

§ 1014. Where a written document is resorted to by the parties for the expression of their conclusions after a series of conferences, such document will be regarded as expressing their final views, and as absorbing all other parol understandings, prior or contemporaneous.[3] To permit evidence of prior or even of contemporaneous parol conditions to qualify the written document, would be not only to substitute media peculiarly fallible,—recollections of witnesses as to words,—for a medium whose accuracy the parties affirm, but often to substitute an abandoned for an adopted contract. Hence all prior conferences are regarded, unless there be fraud, as merged, in such case, in the final document.[4] Thus, it has been ruled that in an action

Prior conferences are merged in written coutract.

Dennison's Appeal, 29 Conn. 402; Starrett *v.* Douglass, 2 Yeates, 46; Neel *v.* Potter, 40 Penn. 484; Roberts *v.* Trawick, 17 Ala. 55; Levick *v.* Levick, 1 Lea, 526. See Doe *v.* Shallcross, 16 Ad. & El. N. S. 758, and cases above cited.

[1] See supra, § 811; infra, § 1278; Charles *v.* Huber, 78 Penn. St. 448.

[2] Supra, § 811.

[3] See Whart. on Contracts, §§ 643 *et seq.*, 684.

[4] Supra, § 920; Goss *v.* Nugent, 5 B. & Ad. 54; Adams *v.* Wordley, 1 M. & W. 74; Branton *v.* Griffits, L. R. 2 C. P. D. 212; Chicago *v.* Sheldon, 9 Wall. 50; Ins. Co. *v.* Lyman, 15 Wall. 664; Slocum *v.* Swift, 2 Low. 212; Chadwick *v.* Perkins, 3 Greenl. 399; City Bank *v.* Adams, 45 Me. 455; Millett *v.* Marston, 62 Me. 477; Wiggin *v.* Goodwin, 63 Me. 389; Mitchell *v.* Smith, 67 Me. 584; Smith *v.* Higbee, 12 Vt. 113; Daggett *v.* Johnson, 45 Vt. 345; Perkins *v.* Young, 16 Gray, 389; Wright *v.* Smith, 16 Gray, 499; Munde *v.* Lambie, 122 Mass. 336; Ward *v.* Commis., 122 Mass. 394; Dean *v.* Mason, 4 Conn. 428; Fitch *v.* Woodruff, 29 Conn. 82; Parkhurst *v.* Van Cortland, 1 Johns. Ch. 274; Stevens *v.* Cooper, 1 Johns. Ch. 425; Baker *v.* Higgins, 21 N. Y. 397; Jarvis *v.* Palmer, 11 Paige, 650; Delafield *v.* De Grauw, 9 Bosw. 1; Buckley *v.* Bentley, 48 Barb. 283; Bush *v.* Tilley, 49 Ibid. 599; Renard *v.* Sampson, 12 N. Y. 561; Halliday *v.* Hart, 30 Ibid. 474; Pollen *v.* Le Roy, Ibid. 549; Thorp *v.* Ross, 4 Keyes, 546; Kelley *v.* Roberts, 40 N. Y. 432; Riley *v.* City of Brooklyn, 46 N. Y. 444; Long *v.* N. Y. C. R. R. Co., 50 Ibid. 76; Collender *v.* Dinsmore, 55 N. Y. 204; Gage *v.* Jaqueth, 1 Lans. 207; Germania Co. *v.* R. R., 72 N. Y. 90; Corse *v.* Peck, 102 N. Y. 513; Cox *v.* Bennett, 13 N. J. L. 165; Conover *v.* Wardell, 20 N. J. Eq. 266; King *v.* Ruckman, 21 N. J. Eq. 599; Ellmaker *v.* Ins. Co., 5 Penn. St. 183; Sennett

against a married woman for breach of a written agreement for the purchase of land sold to her by auction, parol evidence is inadmis-

v. Johnson, 9 Penn. St. 335; Harbold *v.* Kuster, 44 Penn. St. 392; Kirk *v.* Hartman, 63 Penn. St. 97; Gedde's App., 84 Penn. St. 482; Tatman *v.* Barrett, 3 Houst. 226; Stoddert *v.* Vestry, 2 Gill & J. 227; Neil *v.* Trustees, 31 Ohio St. 15; Wiles *v.* Harshaw, 8 Ired. Eq. 308; Logan *v.* Bond, 13 Ga. 192; Cole *v.* Spann, 13 Ala. 537; Sanford *v.* Howard, 29 Ala. 684; Hart *v.* Clark, 54 Ala. 490; Herndon *v.* Henderson, 41 Miss. 584; Cocke *v.* Bailey, 42 Miss. 81; Walter *v.* Engler, 30 Mo. 130; Price *v.* Allen, 9 Humph. 703; Savercool *v.* Farwell, 17 Mich. 308; Cincin. R. R. *v.* Pearce, 28 Ind. 502; Smith *v.* Dallas, 35 Ind. 255; Emery *v.* Mohler, 69 Ill. 221; Conwell *v.* R. R., 83 Ill. 232; Weaver *v.* Fries, 85 Ill. 356; Johnson *v.* Wood, 84 Mo. 489; Wonderly *v.* Holmes Co., 56 Mich. 412; Skeels *v.* Starrett, 59 Mich. 350; Downie *v.* White, 12 Wis. 176; Merriam *v.* Field, 24 Wis. 640; Weiner *v.* Whipple, 53 Wis. 298; Her *v.* Hiller, 53 Wis. 415; Gelpcke *v.* Blake, 15 Iowa, 387; Pilmer *v.* Bank, 16 Iowa, 321; Hamilton *v.* Thrall, 7 Neb. 210; Thompson *v.* Libby, 34 Minn. 375. See, also, Flinn *v.* Calow, 1 M. & Gr. 589; Chase *v.* Jewett, 37 Me. 351; Kennedy *v.* Plank Road, 25 Penn. St. 224.

So as to shipping contracts, Slocum *v.* Swift, 2 Low. 212.

Unless prohibited by statute, contracts of insurance may be oral, even though by the rules of the company policies are required to be in writing or print. And oral contracts of insurance, to continue until a policy is formally issued, have frequently been sustained. Union Ins. Co. *v.* Connect. Ins. Co., 19 How. 318; Putnam *v.* Ins. Co., 123 Mass. 324; Patterson *v.* Ins. Co., 81 Penn. St. 454.

In England, under statute, contracts for marine insurance must now be in writing. Fisher *v.* Ins. Co., L. R. 8 Q. B. 418.

As a general rule parol evidence is inadmissible to vary a policy of insurance. Franklin Fire Ins. Co. *v.* Martin (10 Vroom), 40 N. J. L. 568; Bishop *v.* Ins. Co., 45 Conn. 430; Shaw *v.* Ins. Co., 69 N. Y. 286; Hartford Ins. Co. *v.* Davenport, 37 Mich. 609. But such contracts may be modified by subsequent parol action; infra, § 1017; and by proof of misstatements by agents. Infra, § 1172; see supra, §§ 955, 967.

Parol evidence is not admissible to show that the words "by a sea," when describing such losses of cattle as insurers are liable for, apply, by custom, only to shipments on deck. Snowden *v.* Guion, 101 U. S. 458.

A policy of life insurance is not more open to variation by parol evidence than any other written contract; and where the beneficiaries are therein described as the children of the assured, parol evidence is not admissible to show that a grandchild was intended to be included. Russel *v.* Russel, 64 Ala. 500.

"There are cases in which resort may be had to parol evidence to ascertain the subject insured, but they are cases of latent ambiguity. So, in the construction of other contracts, parol evidence is admissible to explain such ambiguities. In this particular the rule for the construction of all written contracts is the same. Lord Mansfield said long ago that courts are always reluctant to go out of a policy for evidence respecting its meaning. Loraine *v.* Tomlinson, Douglas, 567. And so are the authorities generally. Astor *v.* The Union Insurance Com-

sible that the plaintiff requested her to bid on the property as an under-bidder, and told her that she would not be bound to take the property, but might if her husband desired, and that she did not read the agreement or know its contents when she signed it.[1] So a limited warranty cannot be extended into a general warranty by proof of a parol agreement to that effect prior to or at the delivery of a deed;[2] nor can proof be received of an oral contemporaneous agreement by a grantor to discharge certain incumbrances not created by himself;[3] nor can proof enlarging the area of property specifically described in a deed.[4] Nor, as a general rule, when an executory contract is made, which is to be subsequently carried out in a deed, which deed is duly executed, can such executory contract be introduced to vary the deed, even though it be recited therein.[5]

pany, 7 Cowen, 202; Murray *v.* Hatch, 6 Mass. 465; Levy *v.* Merrill, 4 Greenl. 480; Baltimore Fire Ins. Co. *v.* Loney, 20 Md. 36; Arnould on Insurance, 1316–17, and notes; Greenl. Ev. vol. ii. 377. It is no exception to the rule, that, when a policy is taken out expressly, 'for or on account of the owner' of the subject insured, or 'on account of whomsoever it may concern,' evidence beyond the policy is received to show who are the owners, or who were intended to be insured thereby. In such cases the words of the policy fail to designate the real party to the contract, and, therefore, unless resort is had to extrinsic evidence, there is no contract at all. Finney *v.* The Bedford Ins. Co., 8 Met. 348." Strong, J., Home Ins. Co. *v.* Balt. Co., 93 U. S. 527.

"We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. There was a definite, concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, and this is demonstrated by legal and exact evidence, which removes all doubt as to the sense and understanding of the parties. In the attempt to embody the contract in a written agreement there has been a mutual mistake, caused chiefly by that contracting party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case is, we think, well settled by the authorities." Harlan, J., Snell *v.* Ins. Co., 98 U. S. 85; aff. Elliott *v.* Sackett, 108 U. S. 132. The rule applies to a written agreement between the parties, which has been delivered, accepted, and business transacted under it, although not signed. Farmer *v.* Gregory, 78 Ky. 471.

[1] Faucett *v.* Currier, 115 Mass. 20.

[2] Raymond *v.* Raymond, 10 Cush. 134.

[3] Howe *v.* Walker, 4 Gray, 318.

[4] Barton *v.* Dawes, 10 C. B. 261; Llewellyn *v.* Jersey, 11 M. & W. 183. See other cases, infra, § 1050.

[5] Leggott *v.* Barrett, 15 Ch. D. 306.

§ 1015. The rule which has just been expressed is open to several qualifications. The first is that a contract, which is not required by statute to be in writing, may be partly expressed in writing, and partly in an unwritten understanding between the parties; and if so, such understanding may be proved by parol.[1] "Where a verbal contract is entire, and a part only in part performance is reduced to writing, parol proof of the entire contract is competent."[2] So, if a written agreement has been treated as incomplete, parol evidence of a subsequent further and fuller agreement may be given.[3] Parol evidence is also admissible in explanation of a contract intended to be parol, but in part expression of which a written

When contract is partly written and partly oral, oral may be proved by parol.

[1] Sheffield *v.* Page, 1 Sprague, 285; Webster *v.* Hodgkins, 25 N. H. 128; Linsley *v.* Lovely, 26 Vt. 123; Winn *v.* Chamberlin, 32 Vt. 318; Houghton *v.* Carpenter, 40 Vt. 588; Cole *v.* Howe, 50 Vt. 35; Reynolds *v.* Hassam, 56 Vt. 449; Perry *v.* Dow, 56 Vt. 569; McCormick *v.* Chevers, 124 Mass. 262; Hutchins *v.* Hebbard, 34 N. Y. 24; Hope *v.* Balen, 58 N. Y. 382; Grierson *v.* Mason, 1 Hun, 113; Smith *v.* R. R., 4 Abb. (N. Y.) App. 262; Wentworth *v.* Buhler, 3 E. D. Smith, 305; Silliman *v.* Tuttle, 45 Barb. 171; Potter *v.* Hopkins, 25 Wend. 417; Breck *v.* Cole, 4 Sandf. 79; Sale *v.* Darragh, 2 Hilt. (N. Y.) 184; Brigg *v.* Hilton, 99 N. Y. 517; Park *v.* Miller, 27 N. J. L. 338; Crane *v.* Elizabeth Ass., 29 N. J. L. 302; Miller *v.* Fichthorne, 31 Penn. St. 252; Clarke *v.* Adams, 83 Penn. St. 309; Glenn *v.* Rogers, 3 Md. 312; Walker *v.* Schindel, 58 Md. 360; Cary *v.* Richardson, 35 La. An. 505; Randall *v.* Turner, 17 Ohio St. 262; Kieth *v.* Kerr, 17 Ind. 284; Taylor *v.* Galland, 3 G. Greene, 17; Keen *v.* Beckman, 66 Iowa, 672; Domestic Ins. Co. *v.* Anderson, 23 Minn. 57; Johnston *v.* McRary, 5 Jones N. C. L. 369; Nickelson *v.* Reves, 94 N. C. 559; Barclay *v.* Hopkins, 59 Ga. 562; Perry *v.* Hill, 68 N. C. 417; Moss *v.* Green, 41 Mo. 389; Lash *v.* Parlin, 78 Mo. 391; Mobile Co. *v.* McMillan, 31 Ala. 711; Young *v.* Jacoway, 17 Miss. 212; Cobb *v.* Wallace, 5 Coldw. 539; Hawkins *v.* Lee, 8 Lea, 42; Smith *v.* O'Donnell, 8 Lea, 468; Thomas *v.* Hammond, 47 Tex. 42. See supra, § 78; infra, § 1026.

"There can be no objection when an oral contract is made to prove that its principal terms were written down and a memorandum made of them and read at the time. The one is not a substitute to the other, and both are properly admissible without violating any rule of law." Miller, J., Lathrop *v.* Bramhall, 64 N. Y. 372.

As to statute of frauds, see supra, § 856.

[2] Grover, J., Hope *v.* Balen, 58 N. Y. 382. See, also, Hutchins *v.* Hebbard, 34 N. Y. 24; Blossom *v.* Griffin, 13 Ibid. 569; Barney *v.* Worthington, 37 Ibid. 112; Frink *v.* Green, 5 Barb. 455; Barry *v.* Ransom, 12 N. Y. 462; Batterman *v.* Pierce, 3 Hill, 171; Chester *v.* Bank of Kingston, 16 N. Y. 336; Whitney *v.* Cowan, 55 Miss. 639.

[3] Johnson *v.* Appleby, L. R. 9 C. P. 158; 22 W. R. 515; Courtenay *v.* Fuller, 65 Me. 156.

instrument is afterward executed.[1] When, also, a written contract refers to a collateral oral agreement, this necessarily involves proof of such agreement by parol.[2] And so, when two contracts are made at the same time in respect to two distinct voyages, one contract being in writing and the other made orally, the fact that the one is in writing does not exclude proof of the other by parol.[3]

§ 1016. Another exception to the rule before us is based on the fact that to make a written contract there must be a written assent by both parties.[4] Where, therefore, a written proposal is accepted by parol, this is an oral contract and may be proved by parol.[5] Hence a telegram accepted by parol may be modified, so far as concerns its contractual effect, by parol.[6] And the incidents of execution even of a bilateral contract may be sustained by parol proof. Thus, parol proof is admissible to establish the delivery of a deed,[7] and the occupancy of a tenant.[8] Ordinarily,

Oral acceptance of written offer makes oral contract, and may be proved by parol. So of delivery.

[1] "Where the parties have reduced an agreement to writing, the writing is supposed to contain all the agreement, and is the only evidence of it; and all prior or contemporaneous declarations and negotiations between the parties are excluded as evidence of the agreement, or any part of it. But here the agreement was not reduced to writing. It was intended by the parties to rest in parol, and the written instruments were subsequently executed in part execution of the parol agreement, and not for the purpose of putting that agreement in writing. It is well settled that a written instrument thus executed does not supersede a prior parol agreement." Earl, C. J., in Barker *v.* Bradley, 42 N. Y. 319; citing Renard *v.* Sampson, 12 N. Y. 561; Thomas *v.* Dickinson, 2 Kernan, 364; Hutchins *v.* Hebbard, 34 N. Y. 24; Bowen *v.* Bell, 20 Johns. 340; Johnson *v.* Hathorn, 3 Keyes, 126; McCullough *v.* Girard, 4 Wash. C. C. R. 289; Mowatt *v.* Ld. Londesborough, 3 E. & B. 307.

[2] Ruggles *v.* Swanwick, 6 Minn. 526. See Lathrop *v.* Bramhall, 64 N. Y. 272, cited supra.

[3] Page *v.* Sheffield, 2 Curt. 377. That contemporaneous writings can be received to piece out a contract, see Wilson *v.* Raudall, 67 N. Y. 338.

[4] Thornton *v.* Charles, 9 M. & W. 802; Heyman *v.* Neale, 2 Camp. 337; Sievewright *v.* Archibald, 17 Q. B. 115. See Plunkett *v.* Dillon, 4 Del. Ch. 198; Ponca *v.* Crawford, 18 Neb. 551; McQuade *v.* St. Louis, 78 Mo. 46.

After A. had signed a proposal for a contract in a certain form, B. altered it and signed it in the altered form and brought it to A. Parol evidence was received in an action against A. that he orally agreed that the altered document should be the contract. Hussen *v.* Stuart, 9 L. R. C. P. 317.

[5] Pacific Works *v.* Newhall, 34 Conn. 67.

[6] Beach *v.* R. R., 37 N. Y. 457.

[7] Armstrong *v.* McCoy, 8 Ohio, 128. As to parol proof of non-delivery, or non-execution of contracts, see supra, §§ 926–935.

[8] Hammon *v.* Sexton, 69 Ind. 37.

however, the delivery of a deed is presumed from the facts of signature, delivery, and transfer of possession.[1] That it is open to either party to show that his assent was procured by fraud or duress, we have already seen.[2] Defective or qualified delivery may be also shown.[3] It is admissible, also, to identify by parol certain specifications referred to in a written contract to erect a building; which specifications, when identified, are to be considered in connection with the contract on the issue whether the contract is void for uncertainty.[4]

Rescission of contract, and substitution of another, may be proved by parol.

§ 1017. If there be no statutory impediment, a written contract, aside from the prescriptions of the statute of frauds,[5] may at any time before breach be rescinded by parol,[6] and a new agreement, written or unwritten, adopted in the place of that which has been rescinded. When such rescission, there having been a sufficient consideration, is proved in such a way as to establish the fact beyond reasonable doubt, courts of equity will refuse to permit the rescinded contract to be enforced; and the doctrine of chancery in this respect is applied by such courts of common law as adopt equity remedies, and, when such is the practice, through common law forms. A party, however, seeking thus to rescind a contract, must be free from wrong on his own part, must move promptly, must offer to put the other party in *statu quo*, and must establish his case by strong and clear evidence.[7] Under these conditions, parol evidence is ad-

[1] Infra, § 1314.

[2] Supra, § 931.

[3] Supra, §§ 927–9.

[4] Bergin *v.* Williams, 138 Mass. 544.

[5] See supra, §§ 901–2.

[6] That a written contract for the sale of real estate may be rescinded by parol, see Boyce *v.* McCulloch, 3 W. & S. 429; supra, § 861.

[7] Goss *v.* Nugent, 2 B. & Ad. 58; Price *v.* Dyer, 17 Ves. 356; Warner *v.* Daniels, 1 Wood. & M. 90; Marshall *v.* Baker, 19 Me. 402; Medomak Bk. *v.* Curtis, 24 Me. 36; Brown *v.* Holyoke, 53 Me. 9; Wiggin *v.* Goodwin, 63 Me. 389; Burnham *v.* Dorr, 72 Me. 198; Buel *v.* Miller, 4 N. H. 196; Bank *v.* Woodward, 5 N. H. 99; Wheeden *v.* Fiske, 50 N. H. 125; Sanborn *v.* Batchelder, 51 N. H. 426; Manahan *v.* Noyes, 52 N. H. 232; Flanders *v.* Fay, 40 Vt. 316; Cutler *v.* Smith, 43 Vt. 577; Foster *v.* Purdy, 5 Met. 442; Priest *v.* Wheeler, 101 Mass. 479; Russell *v.* Barry, 115 Mass. 300; Cutter *v.* Cochrane, 116 Mass. 408; Connelly *v.* Devoe, 37 Conn. 570; Dearborn *v.* Cross, 7 Cow. 48; Field *v.* Holbrook, 6 Duer, 597; Parker *v.* Syracuse, 31 N. Y. 376; Comstock *v.* Johnson, 46 N. Y. 615; Murray *v.* Harway, 56 N. Y. 337; Cook *v.* Cole, 6 N. J. Eq. 522; Howell *v.* Sebring, 14 N. J. Eq. 84; Ryno *v.* Darby, 20 N. J. Eq. 231; Bell *v.* Hartman, 9 Phil. R. 1; Raffensberger *v.* Cullison, 28 Penn. St. 426; Graham *v.*

missible, so is the position stated by Sir J. Stephen,[1] to prove "the existence of any subsequent oral agreement to rescind or modify

Pancoast, 30 Penn. St. 89; Rockafellow *v.* Baker, 41 Penn. St. 319; Wilson *v.* Getty, 57 Penn. St. 266; Malone *v.* Dougherty, 79 Penn. St. 48; Shepler *v.* Scott, 85 Penn. St. 329; Creamer *v.* Stephenson, 15 Md. 211; Allen *v.* Sowerby, 37 Md. 410; Phelps *v.* Seely, 22 Grat. 592; McLean *v.* Ins. Co., 29 Grat. 361; Cain *v.* Guthrie, 8 Blackf. 409; Stewart *v.* Ludwick, 29 Ind. 230; Hume *v.* Taylor, 63 Ill. 43; Kirby *v.* Harrison, 2 Ohio St. 326; Thurston *v.* Ludwig, 6 Ohio St. 1; Rynear *v.* Neilin, 3 G. Greene, 310; Mather *v.* Butler, 28 Iowa, 253; Hubbell *v.* Ream, 31 Iowa, 289; Burge *v.* R. R., 32 Iowa, 101; Van Trott *v.* Weise, 36 Wis. 439; Murphy *v.* Dunning, 30 Wis. 296; Esham *v.* Lamar, 10 B. Mon. 43; Lee *v.* Lee, 2 Duv. 134; Holtzclaw *v.* Blackerby, 9 Bush, 40; Prothro *v.* Smith, 6 Rich. (S. C.) Eq. 324; Murray *v.* King, 7 Ired. (Eq.) 19; Johnstou *v.* Worthy, 17 Ga. 420; Lane *v.* Latimer, 41 Ga. 171; Dever *v.* Akin, 40 Ga. 423; Doll *v.* Kathman, 23 La. An. 486; Commer. Bk. *v.* Lewis, 21 Miss. 226; Henning *v.* Ins. Co., 47 Mo. 425; Bailey *v.* Smock, 61 Mo. 213; Paris *v.* Haley, 61 Mo. 453; Walker *v.* Wheatly, 2 Humph. 119; Todd *v.* Allen, 18 Kans. 543; Salmon *v.* Hoffman, 2 Cal. 138; Scanlan *v.* Gillan, 5 Cal. 182; Barfield *v.* Price, 40 Cal. 535; Waymack *v.* Heilman, 26 Ark. 449. See Goucher *v.* Martin, 9 Watts, 106.

In Grymes *v.* Sanders, 93 U. S. 55, the following rules are given:—

"A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. Kerr on Mistake and Fraud, 408; Trigg *v.* Read, 5 Humph. 529; Jennings *v.* Broughton, 17 Beav. 541; Thompson *v.* Jackson, 3 Rand. 507; Harrod's Heirs *v.* Cowan, Hardin's Rep. 543; Hill *v.* Bush, 19 Ark. 522; Jouzan *v.* Toulmin, 9 Ala. 662. . . .

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. Thomas v. Bartow, 48 N. Y. 200; Flint *v.* Wood, 9 Hare, 622; Jennings *v.* Broughton, 5 De G., M. & G. 139; Lloyd *v.* Brewster, 4 Paige, 537; Saratoga & S. R. R. Co. *v.* Rowe, 24 Wend. 74; Minturn *v.* Main, 3 Seld. 220; 7 Rob. Prac. Ch. 25, § 2, p. 432; Campbell *v.* Fleming, 1 Adolph. & E. 41; Sugd. on Vend. 14th ed. 335; Diman *v.* Providence, W. & B. R. R. Co., 5 R. I. 130.

"A court of equity is always reluctant to rescind, unless the parties can be put back in *statu quo*. If this cannot be done, it will give such relief

[1] Evidence, art. 90.

any such contract, grant, or disposition of property, provided that such agreement is not invalid under the statute of frauds or otherwise." Thus, it is competent to waive by parol a condition in an insurance policy that a particular act is to be evidenced by writing.[1]

only where the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. The imperfect and abortive exploration made by Bowman has injured the credit of the property. Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under these circumstances, the loss ought not to be borne by the appellant. Hunt *v.* Silk, 5 East, 452; Minturn *v.* Main, 3 Seld. 227; Okill *v.* Whittaker, 2 Phill. 340; Brisbane *v.* Davies, 5 Taunt. 144; Andrews *v.* Hancock, 1 Brod. & Bing. 37; Skyring *v.* Greenwood, 4 Barn. & Cr. 289; Jennings *v.* Broughton, 5 De Gex, M. & G. 139.

"The parties, in dealing with the property in question, stood upon a footing of equality. They judged and acted respectively for themselves. The contract was deliberately entered into on both sides. The appellant guaranteed the title, and nothing more. The appellees assumed the payment of the purchase-money. They assumed no other liability. There was neither obligation nor liability on either side beyond what was expressly stipulated. If the property had proved unexpectedly to be of inestimable value, the appellant could have no further or other claim. If entirely worthless, the appellees assumed the risk, and must take the consequences. Segur *v.* Tingley, 11 Conn. 142; Haywood *v.* Cope, 25 Beav. 140; Jennings *v.* Broughton, 17 Ibid. 232; Atwood *v.* Small, 6 Clark & Fin. 497; Marvin *v.* Bennett, 8 Paige, 321; Thomas *v.* Bartow, 48 N. Y. 198; Hunter *v.* Gondy, 1 Hamm. 451; Halls *v.* Thompson, 1 Sm. & M. 481."

While extrinsic evidence is inadmissible to contradict or vary a written instrument, "it is impossible to lay down, as a general rule, that extrinsic oral evidence is inadmissible to prove either the entire or partial dissolution of the original contract, or the substitution or annexation of a new verbal contract. But wherever it is attempted to superadd an oral to a written contract, there must be clear evidence of the actual words used." Per James, L. J., Thomson *v.* Simpson, 18 W. R. 1091; L. R. 9 Eq. 497.

On Goss *v.* Nugent, supra, Sir J. Stephen thus comments: "It was held in effect in Goss *v.* Lord Nugent, that if by reason of the statute of frauds the substituted contract could not be enforced, it would not have the effect of waiving part of the original contract; but it seems the better opinion that a verbal (oral) rescission of a contract good under the statute of frauds would be good. See Noble *v.* Ward, L. R. 2 Ex. 135; and Pollock on Contracts, 411, note (6)." Stephen's Evidence, note xxxiii. to art. 90.

In Dart's V. & P. 970, it is intimated that in Noble *v.* Ward it was held that there could at law be no "verbal waiver of a written agreement;" but as Mr. Pollock points out, in Noble *v.* Ward, the ground was that there was nothing to show an intention to enforce the first contract absolutely.

[1] Peohner *v.* Ins. Co., 65 N. Y. 195. See Stranahan *v.* Putnam, 65 N. Y. 591.

Parol evidence is also admissible to show that the forfeiture in a policy has been unconditionally waived, and that conditions inserted in receipts for back premiums were in contravention of this waiver.[1] So parol evidence is admissible to prove that a rescinded contract has been reinstated.[2]

It is true that a chancellor will not pronounce a debt to be released in equity unless released in law; and that it is held in equity that mere voluntary declarations indicating the intention of a creditor to forgive or release a debt, if they are not evidence of a release at law, do not constitute a release in equity.[3] But there may be considerations which would prevent the debt from being enforced in a court of equity, although it might be subsisting at law.[4] Hence where a voluntary declaration by a creditor has been acted upon by the debtor, the former may be required to make his representation good.[5]

It need scarcely be added that parol evidence is admissible to show that after signing a document the defendant assented to certain alterations made by the plaintiff before it was signed by the latter, for such evidence does not vary the contract, but only proves the condition of the document when it first became a contract.[6]

As has been already seen, where the statute of frauds requires a contract to be in writing, then, while the meaning of such a written contract can be brought out by parol, parol is not admissible materially to change its contents.[7] But, although a contract within the statute of frauds cannot be varied by parol,[8] it may be rescinded by parol.[9]

§ 1017 *a*. It is also admissible to show by parol that the document set up as a contract never came into existence as such.[10] "That a written agreement may be modified, explained, reformed, or altogether set aside by parol

And so of facts showing the contract never

[1] McLean *v.* Ins. Co., 29 Grat. 361.

[2] Flynn *v.* McKeon, 6 Duer, 203, and cases above stated.

[3] Cross *v.* Sprigg, 6 Hare, 552.

[4] Per Turner, L. J., Taylor *v.* Manners, L. R. 1 Ch. 56.

[5] Yeomans *v.* Williams, L. R. 1 Eq. 184; 38 L. J. Ch. 283; Powell's Evidence, 4th ed. 407.

[6] Stewart *v.* Eddowes, L. R. 9 C. P. 311; 43 L. J. C. P. 204. Supra, §§ 624, 927.

[7] Supra, §§ 901 *et seq.*; Whart. on Contracts, § 661.

[8] Supra, § 901.

[9] Supra, §§ 906, 927.

[10] See supra, § 927; U. S. *v.* Peck, 102 U. S. 54; Wilson *v.* Powers, 131 Mass. 539; Bradshaw *v.* Combs, 102 Ill. 428; Cuthrell *v.* Cuthrell, 101 Ind. 375.

became operative or became so on condition.

evidence of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to t, must now be regarded as a principle of law so well settled as to preclude discussion."[1]

Exception at law as to writings under seal.

§ 1018. No doubt, by the strict rule of English common law, an instrument under seal cannot be thus rescinded by parol.[2] Hence it has been ruled that a parol discharge cannot be set up to bar an action on a covenant for non-payment of money.[3] The same conclusion was reached in a case where an action had been brought by a landlord against his tenant, on a covenant by the latter to yield up, at the expiration of the term, all buildings erected during the tenancy; the defendant setting up as a defence an agreement between the parties that if the defendant built a greenhouse on the premises he should be at liberty to remove it.[4] It has been held at common law to make no difference whether the agreement in discharge of the deed be in writing or merely oral, or whether it be executory or executed; and, therefore, if an act is required by deed to be done within a certain time, evidence cannot be given to show that the period was extended by some instrument not under seal, and that the act was performed within the time so extended.[5] At the same time, when there has been an executed parol rescission of a contract under seal, the re-

[1] Gordon, J., Walker *v.* France, 112 Penn. St. 210. But this is not the case with mere one-sided declarations. Lane's Appeal, 112 Penn. St. 499.

[2] Fowell *v.* Forest, 2 Wms. Saund. 47 ff, 47 gg; Harris *v.* Goodwyn, 2 M. & Gr. 405; 2 Scott N. R. 459, *S. C.*; Doe *v.* Gladwin, 6 Q. B. 953, 962; Rawlinson *v.* Clarke, 14 M. & W. 187, 192; Miller *v.* Washburn, 117 Mass. 371. See, however, Brookshire *v.* Brookshire, 8 Ired. L. 74; Pickler *v.* State, 18 Ind. 226.

[3] Rogers *v.* Payne, 2 Wils. 376; recognized in West *v.* Blakeway, 2 M. & Gr. 751; Cordwent *v.* Hunt, 8 Taunt. 596. See Spence *v.* Healey, 8 Ex. R. 668; M. of Berwick *v.* Oswald, 1 E. & B. 295; The Thames Iron Works Co. *v.* The Roy. Mail St. Packet Co., 13 Com. B. (N. S.) 358.

[4] West *v.* Blakeway, 2 M. & Gr. 729; 3 Scott N. R. 199, *S. C.* But see Cort *v.* Ambergate, etc., Ry. Co., 17 Q. B. 127, 145, 146.

[5] Gwynne *v.* Davy, 1 M. & Gr. 857, 871, per Tindal, C. J.; Littler *v.* Holland, 3 T. R. 590. See Nash *v.* Armstrong, 10 C. B. (N. S.) 259. See, also, Albert *v.* The Grosvenor Invest. Co., L. R. 3 Q. B. 123; and 8 B. & S. 664, *S. C.* These cases, however, Mr. Taylor queries, § 1043.

scission being for an adequate consideration, equity will not permit the rescinded contract to be enforced. The obligee on the rescinded contract has, by his acts, estopped himself from enforcing such contract.[1]

Parol evidence admissible to reform a contract.

§ 1019. We have heretofore observed[2] that when a contract is shown to have been modified by the parties after its execution, and when one of the parties improperly (with fraud either express or implied) seeks to enforce the original contract in defiance of such modification, he should be restrained. Fraud, employed by one party to obtain the assent of the other party, may be always, as we have also seen, shown for the purpose of impeaching the contract,[3] or varying its terms, as where a wrong paper was fraudulently substituted for the one to which the parties agreed.[4] But a further step may be taken where it is shown that, before or concurrently with the execution of a contract, it was agreed, as part of the consideration of the contract, that it should be essentially modified in its operation. If such modification be clearly and plainly established and the statute of frauds be not in the way,[5] then, not only will the fact of such modification be a defence to a suit for a specific performance of the written contract,[6] but the proper court, on proof of what was the real agreement between the parties, will rectify the formal agreement so as to make the latter correspond with the former. The remedy, however, is applied reluctantly and cautiously, and only on strong proof that the reformation was one agreed to by the parties at the execution of the contract, and was prevented by mutual mistake or fraud. A party seeking this remedy, also, must be himself free from blame, and must be ready to put the other party in *statu quo*.[7] Thus parol evidence has been held admissible to

[1] Yeomans *v.* Williams, L. R. 1 Eq. 184; Gwynne *v.* Davy, 1 M. & Gr. 868, per Tindal, C. J.; Leathe *v.* Bullard, 8 Gray, 546; Whitcher *v.* Shattuck, 3 Allen, 319; Dearborn *v.* Cross, 7 Cow. 48; Hope *v.* Balen, 58 N. Y. 380; Shughart *v.* Moore, 78 Penn. St. 469; Sowers *v.* Earnhart, 64 N. C. 96; and see cases cited supra, § 1017, and infra, § 1019.

[2] Supra, § 1017.

[3] Supra, § 931. See Wright *v.* McPike, 70 Mo. 175; McKesson *v.* Sherman, 51 Wis. 303.

[4] Thorn *v.* Warflein, 100 Penn. St. 519.

[5] Supra, § 902.

[6] Watson *v.* Marston, 4 D. M. G. 230; Bradford *v.* Bank, 13 How. 57; Bradbury *v.* White, 4 Me. 391.

[7] Sugd. Vend. & P. 8th Am. ed. 262; Kerr on Fraud and Mist. 423; Price *v.*

show that a bond, payable on its face in current funds, was, by an agreement made coincidently with its execution, made payable in

Dyer, 17 Ves. 356; Fowler *v.* Fowler, 4 De G. & J. 265; Mortimer *v.* Shortall, 2 Dr. & War. 363; Filmer *v.* Gott, 4 4 Br. Pr. C. 230; Robinson *v.* Vernon, 7 C. B. N. S. 231; Bold *v.* Hutchinson, 5 De G., M. & G. 558; Bloomer *v.* Spittle, L. R. 13 Eq. 427; Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; Swift *v.* Winterbotham, L. R. 8 Q. B. 244; West Bank *v.* Addie, L. R. 1 H. L. Sc. 148; Van Ness *v.* Washington, 4 Pet. 232; Rhodes *v.* Farmer, 17 How. 467; Selden *v.* Myers, 20 How. 506; Grymes *v.* Sanders, 93 U. S. 55; Walden *v.* Skinner, 101 U. S. 577; Oliver *v.* Ins. Co., 2 Curt. C. C. 277; The Tarquin, 2 Lowell, 358; Marshall *v.* Baker, 19 Me. 402; Medomak Bank *v.* Curtis, 24 Me. 36; Brown *v.* Holyoke, 53 Me. 9; Buel *v.* Miller, 4 N. H. 196; Lyman *v.* Little, 15 Vt. 576; Mallory *v.* Leach, 35 Vt. 156; Flanders *v.* Fay, 40 Vt. 316; Cutler *v.* Smith, 43 Vt. 577; Foster *v.* Purdy, 5 Met. 442; Metcalf *v.* Putnam, 9 Allen, 97; Bruce *v.* Bonney, 12 Gray, 107; Priest *v.* Wheeler, 101 Mass. 479; Glass *v.* Hulbert, 102 Mass. 24; Stockbridge *v.* Hudson, 102 Mass. 45; Russell *v.* Barry, 115 Mass. 300; Diman *v.* R. R., 5 R. I. 130; Wheaton *v.* Wheaton, 19 Conn. 96; Brainerd *v.* Brainerd, 15 Conn. 575; Blakeman *v.* Blakeman, 39 Conn. 320; Gillespie *v.* Moon, 2 Johns. Ch. 596; Keisselbrack *v.* Livingston, 4 Johns. Ch. 144; Dorr *v.* Munsell, 13 Johns. R. 431; Gilchrist *v.* Cunningham, 8 Wend. 641; Coles *v.* Bowne, 10 Paige, 526; Wemple *v.* Stewart, 22 Barb. 154; Kent *v.* Manchester, 29 Barb. 595; New York Ice Co. *v.* Ins. Co., 31 Barb. 72; Bush *v.* Tilley, 49 Barb. 599; Cady *v.* Potter, 55 Barb. 463; Gillett *v.* Borden, 6 Lans. 219; Leavitt *v.* Palmer, 3 Comst. 19; Pitcher *v.* Hennessy, 48 N. Y. 415; Kilmer *v.* Smith, 77 N. Y. 226; Hay *v.* Ins. Co., 77 N. Y. 235; Wheeler *v.* Kirtland, 23 N. J. Eq. 13; Gower *v.* Sterner, 2 Whart. 75; Wager *v.* Chew, 15 Penn. St. 323; Reitenbaugh *v.* Ludwick, 31 Penn. St. 131; Balt. St. Co. *v.* Brown, 54 Penn. St. 77; Horn *v.* Brooks, 61 Penn. St. 407; Huss *v.* Morris, 63 Penn. St. 367; Martin *v.* Behrens, 67 Penn. St. 462; Whelen's Appeal, 70 Penn. St. 410; Coughenor *v.* Suhre, 71 Penn. St. 462; Wharton *v.* Douglass, 76 Penn. St. 273; Kostenbader *v.* Peters, 80 Penn. St. 438; Mays *v.* Dwight, 82 Penn. St. 462; Hall *v.* Clagett, 2 Md. Ch. 151; Farrell *v.* Bean, 10 Md. 368; Stair *v.* Bank, 31 Md. 254; Boyce *v.* Wilson, 32 Md. 122; Kearney *v.* Sarcer, 37 Md. 264; Starke *v.* Littlepage, 4 Rand. 368; White *v.* Denman, 16 Ohio, 59; Webster *v.* Harris, 16 Ohio, 490; City R. R. *v.* Veeder, 17 Ohio, 385; Worden *v.* Williams, 24 Ill. 64; Hunter *v.* Bilyeu, 30 Ill. 228; Cleary *v.* Babcock, 41 Ill. 271; Fleming *v.* McHale, 47 Ill. 282; Miller *v.* Price, 42 Ill. 404; Chicago *v.* Gage, 44 Ill. 593; Smith *v.* Wright, 49 Ill. 403; Keith *v.* Ins. Co., 52 Ill. 518; Parker *v.* Benjamin, 53 Ill. 225; Moore *v.* Munn, 69 Ill. 591; Wilson *v.* Hoecker, 85 Ill. 349; Linn *v.* Barkey, 7 Ind. 69; Morris *v.* Whitmore, 27 Ind. 418; Wray *v.* Wray, 32 Ind. 126; Monroe *v.* Skelton, 36 Ind. 302; Free *v.* Meikel, 39 Ind. 318; Cain *v.* Hunt, 41 Ind. 466; Goodell *v.* Labadie, 19 Mich. 88; Beers *v.* Beers, 22 Mich. 42; Vary *v.* Shea, 36 Mich. 388; Rogers *v.* Odell, 36 Mich. 411; Hunt *v.* Carr, 3 G. Greene, 581; Longhurst *v.* Ins. Co., 19 Iowa, 354; Mather *v.* Butler, 28 Iowa, 253; Barthell *v.* Roderick, 34 Iowa, 517; Larson *v.* Burke, 39 Iowa, 703; Van Duseu *v.* Parley, 40 Iowa, 170; Lake

Confederate currency, if paid before maturity;[1] and to insert the words "with interest" in an agreement respecting the purchase-

v. Meacham, 13 Wis. 355; Smith *v.* Jordan, 13 Minn. 264; Guernsey *v.* Ins. Co., 17 Minn. 104; McCurdy *v.* Breathitt, 5 T. B. Mon. 232; Inskoe *v.* Procter, 6 T. B. Mon. 311; Anderson *v.* Hutcheson, 4 Litt. (Ky.) 126; Coger *v.* McGee, 2 Bibb. 321; Harrison *v.* Howard, 1 Ired. Eq. 407; Potter *v.* Everitt, 7 Ired. Eq. 152; Newsom *v.* Bufferlow, 1 Dev. Eq. 379; McKay *v.* Simpson, 5 Ired. Eq. 452; Peebles *v.* Horton, 64 N. C. 374; Ferguson *v.* Haas, 64 N. C. 772; Gibson *v.* Watts, 1 McCord Eq. 490; Blakeley *v.* Hampton, 3 McCord, 469; Trout *v.* Goodman, 7 Ga. 383; Reese *v.* Wyman, 9 Ga. 430; Wyche *v.* Green, 11 Ga. 159; Ward *v.* Camp, 28 Ga. 74; Hamilton *v.* Conyers, 28 Ga. 276; Mitchell *v.* Mitchell, 40 Ga. 11; Dever *v.* Akin, 40 Ga. 423; Lane *v.* Latimer, 41 Ga. 171; Alston *v.* Wingfield, 53 Ga. 18; O'Neal *v.* Teague, 8 Ala. 345; Clopton *v.* Martin, 11 Ala. 187; Lockhart *v.* Cameron, 29 Ala. 355; Betts *v.* Gunn, 31 Ala. 219; Barrell *v.* Hanrick, 42 Ala. 60; Johnson *v.* Crutcher, 48 Ala. 368; Hardigree *v.* Mitchum, 51 Ala. 151; Robertson *v.* Walker, 51 Ala. 484; Harkins's Succession, 2 La. An. 923; Angomar *v.* Wilson, 12 La. An. 857; Summers *v.* U. S. Ins. Co., 13 La. An. 504; Davis *v.* Stern, 15 La. An. 177; Cox *v.* King, 20 La. An. 209; Willis *v.* Kerr, 21 La. An. 749; Mosby *v.* Wall, 23 Miss. 81; Gray *v.* Roden, 24 Miss. 667; Leitsendorfer *v.* Delphy, 15 Mo. 160; Hook *v.* Craighead, 32 Mo. 405; Tesson *v.* Ins. Co., 40 Mo. 23; Campbell *v.* Johnson, 44 Mo. 383; Thomas *v.* Wheeler, 47 Mo. 363; Henning *v.* Ins. Co., 47 Mo. 425; Schwear *v.* Haupt, 49 Mo. 226; Exchange Bank *v.* Russell, 50 Mo. 531; Pierson *v.* McCahill, 21 Cal. 122; Case *v.* Codding, 38 Cal. 191; Price *v.* Reeves, 38 Cal. 457; Gerdes *v.* Moody, 41 Cal. 335; Murray *v.* Dake, 46 Cal. 644; Taylor *v.* Moore, 23 Ark. 408; Williamson *v.* Simpson, 16 Tex. 436; Gammage *v.* Moore, 45 Tex. 170. See Maha *v.* Ins. Co., infra, § 1172. That the rule applies to specialties, see Canal Co. *v.* Ray, 101 U. S. 522.

The Pennsylvania practice is thus succinctly stated: "The principles which govern the admission of parol evidence affecting written instruments are well established. It may be received to explain and define the subject-matter of a written agreement; Barnhart *v.* Riddle, 5 Casey, 92; Aldridge *v.* Eshleman, 10 Wright, 420; Gould *v.* Lee, 5 P. F. Smith, 99; to prove a consideration not mentioned in the deed, provided it be not inconsistent with the consideration expressed in it; Lewis *v.* Brewster, 7 P. F. Smith, 410; to establish a trust; Cozens *v.* Stevenson, 5 S. & R. 421; to rebut a presumption or equity; Bank *v.* Fordyce, 9 Barr, 275; Musselman *v.* Stoner, 7 Casey, 265; to alter the legal operation of an instrument where it contradicts nothing expressed in the writing; Chalfant *v.* Williams, 11 Casey, 212; to explain a latent ambiguity; McDermot *v.* U. S. Ins. Co., 3 S. & R. 604; Iddings *v.* Iddings, 7 Ibid. 111; and to supply deficiencies in the written agreement; Miller *v.* Fichthorn, 7 Casey, 252; Chalfant *v.* Williams, supra; but, as a general rule, it is inadmissible to contradict or vary the terms of a written instrument. Hain *v.* Kalbach, 14 S. & R. 159; Barnhart *v.* Riddle, supra; Miller *v.* Fichthorn, supra; Harbold *v.*

[1] Meredith *v.* Salmon, 21 Grat. 762.

money of real estate.[1] So, where the evidence is clear and unequivocal, the court may insert the penalty in a bond, where this

Kuster, 8 Wright, 392; Lloyd *v.* Farrell, 12 Ibid. 73; Anspach *v.* Bast, 2 P. F. Smith, 356. In cases of fraud, accident, or mistake, the rule is different. Where equity would set aside or reform the instrument on either of these grounds, parol evidence is admissible to contradict or vary the terms of the agreement as written. Christ *v.* Diffenbach, 1 S. & R. 464; Iddings *v.* Iddings, 7 Ibid. 111; Miller *v.* Henderson, 10 Ibid. 290; Parke *v.* Chadwick, 8 W. & S. 96; Clark *v.* Partridge, 2 Barr, 13; Renshaw *v.* Gans, 7 Ibid. 117; Rearich *v.* Swinehart, 1 Jones, 233. But the evidence of fraud and mistake ought to be of what occurred at the execution of the agreement, and should be clear, precise, and indubitable; Stine *v.* Sherk, 1 W. & S. 195; otherwise it should be withdrawn from the jury; Miller *v.* Smith, 9 Casey, 386. Here there is no allegation in either affidavit that the defendants were induced to execute the lease on the faith of the alleged parol agreement, or that it was omitted from the lease by fraud or mistake. Being incapable of proof, it is the same as if it had never been made, and therefore it constitutes no defence to the action. Hill *v.* Gaw, 4 Barr, 493. Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement, and we are not disposed to relax the rule. It has been found to be a wholesome one; and now that parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative." Williams, J., Martin *v.* Berens, 67 Penn. St. 462.

In Kostenbader *v.* Peters, 80 Penn. St. 438, the suit was trespass for occupying and cultivating a strip of land. The defendant put in evidence a deed from the plaintiff for a tract of land, the boundaries of which included the land in dispute, though the courses and distances did not. The plaintiff then offered to prove that when the deed was drawn she refused to sign it; and the distances were then numbered, and the parties went to the ground and measured the quantity of land called for by the new distances, and which did not include the land in dispute; and that the words "more or less" after the quantity of acres in the deed were then stricken out, and A. signed the deed. It was held by the Supreme Court (reversing the judgment of the court below) that this evidence should have been admitted.

"The English rule," said Paxson, J., in giving the opinion of the court, "that parol evidence is inadmissible to vary the terms of a written instrument, does not exist in this state. A number of authorities settle the doctrine that in cases of fraud or mistake as to the material facts, parol evidence of what occurred at the execution of the writing is competent to explain the real meaning of the parties. As was said by Justice Woodward, in Chalfant *v.* Williams, 11 Casey, 212: 'We permit a deed absolute on its face to be proved a mortgage; we receive parol evidence to rebut a presumption or an equity; to supply deficiencies in the written agreement; to explain ambiguity in the

[1] Gump's Appeal, 65 Penn. St. 476.

was omitted by mutual mistake, and where an effort is made fraudulently to take advantage of the omission.[1] But it must always be kept in mind that the party calling for the relief must be himself ready to do equity ;[2] and must be free from any laches on his part.[3] *A fortiori*, he will not be aided if he himself is implicated in the fraud. Thus, one party cannot as against the other party set up that the writing was meant by both parties as a fraud against creditors.[4] Whether there can be this rectification of a contract on merely oral evidence has been doubted in England, there being authorities to the effect that rectification will be refused, when the testimony is exclusively oral, in all cases where the allegation of modification set up by the plaintiff is denied in the answer.[5] It is

subject-matter of writings ; to prevent frauds, and to correct mistakes.' To the same point are Dinkle *v.* Marshall, 3 Bin. 587 ; Woods *v.* Wallace, 10 Harris, 171 ; Bank *v.* Fordyce, 9 Barr, 279 ; Rearich *v.* Swinehart, 1 Jones, 238 ; Baruhart *v.* Riddle, 5 Casey, 92 ; Musselman *v.* Stoner, 7 Casey, 270." See, also, Beck *v.* Garrison, 1 Weekly Notes, 309.

In another case it was said :—

"Nothing is better settled in this state than that not only can the ambiguities of a written instrument be explained by parol, but it may in the same manner be varied, added to, or even contradicted, where it is shown that but for the oral stipulations made at the time the party affected would not have executed it. The authorities for, as well as the reasons given in support of this doctrine, so abound in our books that to cite the former, or to restate the latter, would be but a waste of time. But, it is said, this corporation was not bound by the declarations of its agents, they having exceeded their authority, and hence it was under no legal obligation to fulfil their undertakings. Grant this to be so ; but how then can it hold the defendant to his part of the covenant ? This plea would answer an excellent purpose were Caley seeking to enforce the contract against the company ; but it so happens that the stick is in the other hand. 'If one party be not bound, neither is the other.' Strong, J., in the case of the Railroad Co. *v.* Stewart, 5 Wr. 59. In this respect a corporation differs nothing from a natural person ; if it would enforce the contracts of its agents, it must first agree to adopt and be bound by them. In the foregoing we have discussed all the exceptions which we deem material or well taken ; the rest are dismissed without further comment." Gordon, J., Caley *v.* R. R., 80 Penn. St. 363.

Under the present English practice, parol evidence of mistake or fraud, while admissible in an action to reform a contract relative to real estate, is not admissible for the purpose of construing it. Caton *v.* Thompson, 9 Q. B. D. 620—C. A.

[1] State *v.* Frank, 51 Mo. 98. See Prior *v.* Williams, 3 Abb. (N. Y.) App. 624. See Grymes *v.* Sanders, 93 U. S. 55, quoted supra, § 1017.

[2] Supra, § 932.

[3] Ibid.

[4] Connor *v.* Carpenter, 28 Vt. 237.

[5] Pollock on Con. 452; Davies *v.* Fitton, 2 Dr. & War. 333 ; Mortimer *v.* Shortall, 2 Dr. & War. 363.

otherwise, however, when the error in the written document is not denied in the answer.[1] And in this country such evidence has been frequently received, even when the fact of the modification is denied.[2]

Deeds may be so reformed.

§ 1020. Deeds, as well as other contracts, may be reformed under the limitations specified above.[3] It should, at the same time, be remembered that the party seeking to reform a deed, in a specific particular, "cannot introduce parol evidence of an original parol contract, or terms or stipulations at variance with the other provisions of the written instrument, as to which no fraud, mistake, or surprise is alleged."[4]

Reformation granted in case of concurrent mistake.

§ 1021. Courts of equity and courts of law with equity powers, in cases also of concurrent mistake (*e. g.*, where the common agent of both parties made a mistake in engrossing an instrument, or where the instrument was concocted on the basis of a mutual misconception of fact), may refuse to permit such contracts to be enforced, or may admit proof of such mistake as a defence to a suit on the contract, or may decree the reformation of the contract. In such case the party seeking to take advantage of the blunder is virtually guilty of fraud, which will be checked under the limitations already prescribed.[5] Even an erroneous execution, leading to an erroneous

[1] Townsend *v.* Stangroom, 6 Ves. 328; Ball *v.* Story, 1 Sim. & St. 210; Druiff *v.* Parker, L. R. 5 Eq. 131; National Provincial Bk., ex parte, L. R. 4 Ch. D. 241.

[2] See cases cited in prior notes to this section. Canedy *v.* Marcy, 13 Gray, 373; McMullen *v.* Fish, 29 N. J. Eq. 610; Huss *v.* Morris, 63 Penn. St. 367; Coale *v.* Merryman, 35 Md. 382; Clayton *v.* Freet, 10 Oh. St. 544, and other cases cited. Wald's Pollock, 452. In Murray *v.* Parker, 19 Beav. 305, Lord Romilly held that parol evidence was admissible in such cases, "in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument."

[3] See cases cited in last section, and Loss *v.* Obry, 22 N. J. Eq. 52; Coale *v.* Merryman, 35 Md. 382; Brown *v.* Molyneux, 21 Grat. 539; Hutson *v.* Fumas, 31 Iowa, 154; Van Donge *v.* Van Donge, 23 Mich. 321; Adair *v.* McDonald, 42 Ga. 506; Barfield *v.* Price, 40 Cal. 535.

[4] McAllister, J., in Emery *v.* Mohler, 69 Ill. 227, citing 1 Sugd. on Vend. & P. 161.

[5] Bispham's Eq. 470; Mahaive Bk. *v.* Barry, 125 Mass. 20. Supra, §§ 856, 904, 933–4, 1019; Walsten *v.* Skinner, 101 U. S. 57; Fenwick *v.* Buff, 1 McArthur, 107; Peterson *v.* Grover, 20 Me. 363; Nat. Bk. *v.* Ins. Co., 62 Me. 519; Barry *v.* Harris, 49 Vt. 392; Paige *v.* Sherman, 6 Gray, 511; Hartford Ore Co. *v.* Miller, 41 Conn. 112; McNulty *v.* Prentice, 25 Barb. 204; Mageehan *v.* Adams, 2 Binney, 109; Gower *v.* Sterner, 2 Whart. R. 75; Huss *v.* Morris, 63 Penn. St. 367; Mayo *v.* Dwight, 82 Penn. St. 462; McIntosh *v.* Saun-

sheriff's title, may be thus corrected.[1] The qualification obtaining in the English chancery, to the effect that, while relief of this class will be granted to a defendant against whom a bill for specific performance is brought, it will be refused to a plaintiff seeking execution of a reformed agreement, is not generally recognized in the United States.[2]

A contract which the parties agreed at the time to treat as of moral and not of legal obligation equity will treat as a nullity, a clear case being shown.[3]

ders, 68 Ill. 128; Robins *v.* Swain, 68 Ill. 197; Milmine *v.* Burnham, 76 Ill. 362; Hoard *v.* Stone, 58 Mich. 578; Montgomery *v.* Shockey, 37 Iowa, 107; Larsen *v.* Burke, 39 Iowa, 703; Arbery *v.* Noland, 2 J. J. Marsh. 421; Blanchard *v.* Moore, 4 J. J. Marsh. 471; Goff *v.* Pope, 83 N. C. 123; Burke *v.* Anderson, 40 Ga. 535; Leggett *v.* Buckhalter, 30 Miss. 421; Clauss *v.* Burgess, 12 La. An. 142; Wood *v.* Steamboat, 19 Mo. 529; Mason *v.* Ryers, 26 Kan. 464; Ladd *v.* Pleasants, 39 Tex. 415; Gammage *v.* Moore, 42 Tex. 170.

If a note and a mortgage given to secure it, executed at the same time, do not correspond as to interest, extrinsic evidence is admissible to show which paper expresses the agreement of the parties. Payson *v.* Lamson, 134 Mass. 593.

[1] Wardlaw *v.* Wardlaw, 50 Ga. 544.

[2] 1 Story's Eq. Jur. § 161; Bispham's Eq. § 382. See, however, Elder *v.* Elder, 1 Fairfield, 80; Glass *v.* Hulbert, 102 Mass. 24; Osborn *v.* Phelps, 19 Conn. 63; Miller *v.* Chetwood, 1 Green Ch. 199; Westbrook *v.* Harbeson, 2 McCord Ch. 112; Dennis *v.* Dennis, 4 Rich. Eq. 307; Climer *v.* Hovey, 15 Mich. 18.

Mr. Bispham says, § 382: "In proper cases of fraud or mistake, a party ought to have the assistance of a chancellor in enforcing a written contract with a parol variation," and cites Gillespie *v.* Moon, 2 Johns. Ch. 585; Keisselbrack *v.* Livingston, 4 Johns. Ch. 144; Wall *v.* Arrington, 13 Ga. 88; Mosby *v.* Wall, 23 Miss. 81; Philpott *v.* Elliott, 4 Md. Ch. 273; Moale *v.* Buchanan, 11 Gill & J. 314; Bradford *v.* Bank, 13 How. 57.

As to evidence in such cases, see infra, § 1033.

[3] "As to the memorandum of Feb. 23, 1869, the evidence is full and conclusive that it was signed by the husband with the understanding that it would not be legally binding, or anything more than a moral or honorary obligation, upon either party; and by the wife after being informed that such was the husband's understanding of its effect, and after being advised by her counsel that it would not legally bind her. In short, both parties signed it with the understanding that they were not bound thereby, except so far as they might feel themselves morally obliged to carry out the intention therein expressed. Evidence of this character, though not competent to control the interpretation of the contract, is clearly admissible to show that the contract should be set aside, or treated as of no effect, in equity. Townshend *v.* Strangroom, 6 Ves. 328; Willan *v.* Willan, 16 Ves. 72; Bradford *v.* Union Bank of Tennessee, 13 How. 57; Western Railroad Co. *v.* Babcock, 6 Met. 346; Glass *v.* Hulbert, 102 Mass. 24, 35." Gray, J.,

Where the mistake was by one party alone, the remedy is application to rescind or annul ;[1] on the ground either that the mistake was induced, or fraudulently taken advantage of, by the other party, or that there was no agreement as to one and the same thing.[2]

The distinction between rectification and rescission is this: rescission may be maintained on proof of mistake by one party alone, based either on non-consent or fraud. Rectification (or reformation) can only be granted on proof of concurrent mistake. The object of the first is to destroy the contract *in toto ;* the object of the second is to substitute a real and true contract for a contract shown not to correctly exhibit the intention of the parties. But this can only be by proof that the parties agreed to make such amended contract. A contract is the agreement of two minds to one thing ; there must be proof that the contract thus set up was agreed to by both parties.[3]

By the distinctive practice of Pennsylvania, and other states following the same system, there is "an unbroken line of decisions" "permitting parol evidence to be given to show that a part of the actual agreement of the parties was omitted by mistake from the written contract," and such evidence is admissible in an ejectment as an equitable defence.[4]

Where the application is made to reform a contract on the ground of mistake, and the defendant denies the mistake, clear and strong proof is necessary to induce a court to interfere.[5] The mutual mis-

Earle *v.* Rice, 111 Mass. 20. See, also, Mitchell *v.* Kintzer, 5 Penn. St. 216.

[1] Bispham's Eq. § 191 ; Lyman *v.* U. S., 17 Johns. 377 ; Nevins *v.* Dunlap, 33 N. Y. 676 ; Delany *v.* Rogers, 50 Md. 524.

[2] Welles *v.* Yates, 44 N. Y. 525 ; Maher *v.* Ins. Co., 67 N. Y. 285. Infra, § 1029.

[3] Pollock on Cont. 450 ; Fowler *v.* Fowler, 4 De G., G. & J. 250 ; Bentley *v.* Mackay, 31 Beav. 151 ; Henkle *v.* Ex. Co., 1 Ves. Sen. 318 ; Brainerd *v.* Arnold, 27 Conn. 617 ; Dornan *v.* R. R., 5 R. I. 590 ; Bryce *v.* Ins. Co., 55 N. Y. 240 ; Mead *v.* Ins. Co., 64 N. Y. 453 ; Cooper *v.* Ins. Co., 50 Penn. St. 299, and cases cited supra, § 1019 ; and in Wald's Pollock, 453.

Where, in the preparation of a deed, there is "by mutual mistake, a failure to embody in the deed the actual agreement of the parties as evidenced by the prior written agreement," a court of equity will decree reformation. Elliott *v.* Sackett, 108 U. S. 132, affirming Snell *v.* Ins. Co., 98 U. S. 85, cited supra, § 1014.

[4] Green, J., Hyndman *v.* Hogsett, 111 Penn. St. 649.

[5] Supra, §§ 932, 1019 ; infra, § 1033 ; Whart. on Contracts, §§ 636 *et seq.* ; Bradford *v.* Bradford, 53 N. H. 463 ; Hudson *v.* Stockbridge, 102 Mass. 45 ; Frost *v.* Brigham, 139 Mass. 43 ; Board-

take must be proved "beyond reasonable doubt."[1] And a mere mistaken opinion as to value, though common to both parties, is no ground for rescission.[2]

Parol evidence not admissible to contradict document.

§ 1022. It must also be remembered that the admissibility of evidence, in cases of fraud or concurrent mistake, for the purpose of reforming a document, depends largely on the terms of the document which it is proposed to reform. If the evidence of fraud or mistake goes to the *execution* of the document, then, as we have seen, it makes no matter what are the terms of the document, for the question is, not modification, but existence.[3] But it is otherwise when the question is whether the terms of a document were varied by parol, the document itself, so far as concerns the obligation imposed by its execu tion, continuing in full force. Now it is absurd to suppose that A. and B., after executing a contract for the sale of a house, would agree to take out of the contract all its material parts, and turn it into a contract for the sale of a ship. Even were the statute of frauds not in the way, the court would refuse parol evidence to prove such a change, because (if for no other reason) it is inherently improbable that such a change could have been made; and, even if it were made, no party can claim in equity to enforce an agreement so negligent. It is otherwise indeed, as we have already seen, when the offer is to prove the rescission of a contract, or its extension, in a mode not incompatible with its tenor. But to change the operative parts of a contract, retaining merely its frame,

man *v.* Davidson, 7 Abb. Pr. (N. S.) 439; Jackson *v.* Andrews, 59 N. Y. 244; Hill *v.* Blake, 97 N. Y. 216; Hyer *v.* Little, 20 N. J. Eq. 443; Morrison *v.* Morrison, 6 Watts & S. 516; Irwin *v.* Shoemaker, 8 Watts & S. 75; Edmond's Appeal, 59 Penn. St. 220; Wallace *v.* Hussey, 63 Penn. St. 24; Monroe *v.* Behrens, 67 Penn. St. 459; Watsontown Car Co. *v.* Lumber Co., 99 Penn. St. 605; Gill *v.* Clagett, 4 Md. Ch. 470; Potter *v.* Potter, 27 Ohio St. 84; Miner *v.* Hess, 47 Ill. 170; Goltra *v.* Sanasack, 53 Ill. 456; McTucker *v.* Taggart, 27 Iowa, 478; Heaton *v.* Fryberger, 38 Iowa, 185; Winn *v.* Murehead, 52 Iowa, 64; Mast *v.* Pearce, 58 Iowa, 579; Tripp *v.* Hasceig, 20 Mich. 254; Murphy *v.* Dunning, 30 Wis. 296; Dupree *v.* McDonald, 4 Desau. Ch. 209; Westbrook *v.* Harbeson, 2 McCord Ch. 112; Ryan *v.* Goodwyn, 1 McMull. Eq. 451; Bunse *v.* Agee, 47 Mo. 270; State *v.* Frank, 51 Mo. 98; Makler *v.* McClelland, 21 La. An. 579.

[1] Story, Eq. Jur. § 157; Whart. on Cont. § 208.

[2] Sankey *v.* First Nat. Bank, 78 Penn. St. 48; Ludington *v.* Ford, 33 Mich. 123; Dortie *v.* Dugas, 55 Ga. 484.

[3] See supra, § 931.

parol evidence will not be received. Thus (fraud in obtaining execution not being shown), it is inadmissible to prove by parol that an assignment was meant as a discharge ;[1] or that the assignment is only for a moiety of what it purports to pass ;[2] or that it was meant to secure only a portion of the creditors it purported to secure ;[3] or that an assignment of "store goods" was to carry "store books ;"[4] or that "furring for the whole house" in a building contract was only such "furring" as was customary ;[5] or that a promissory note was simply intended as a receipt.[6] It is, in fine, not ordinarily competent[7] to prove by parol that a written contract has been modified by letting into it new provisions, where those provisions are not simply a development, or new application, of the written terms. It is not to be supposed (fraud not being proved) that, if the parties took the trouble to put one contract in writing, they would not take the trouble to put another contract in writing, if they desired ; nor, if a parol contract between them would be binding, is it to be supposed that they would capriciously engraft such new contract on an old written contract with conflicting provisions.[8] On the other hand, parol evidence may be received to show that certain provisions of a written contract, which could have been made by parol, have been waived, and a new parol contract substituted, when such new provisions are a reasonable modification of the old, and when it would work a fraud not to sustain the change.[9]

[1] Howard *v.* Howard, 3 Met. 548.

[2] Durgin *v.* Ireland, 14 N. Y. 322.

[3] Aldrich *v.* Hapgood, 39 Vt. 617.

[4] Taylor *v.* Sayre, 4 Zab. 647 (supra, § 944).

[5] Herrick *v.* Noble, 27 Vt. 1.

[6] City Bank *v.* Adams, 45 Mo. 455, supra, § 1014.

[7] Supra, §§ 927–33, 1017.

[8] Vallette *v.* Canal Co., 4 McL. 192 ; Young *v.* McGown, 62 Me. 56 ; Hale *v.* Handy, 26 N. H. 206 ; Field *v.* Mann, 42 Vt. 61 ; La Farge *v.* Rickert, 5 Wend. 187 ; Jackson *v.* Andrews, 59 N. Y. 244 ; Barnes *v.* Bartlett, 47 Ind. 98 ; Knowles *v.* Knowles, 86 Ill. 1 ; Casady *v.* Woodbury, 13 Iowa, 113 ; Randolph *v.* Perry, 2 Port. (Ala.) 376. See supra, § 920.

[9] Infra, § 1026 ; Brock *v.* Sturdivant, 12 Me. 81 ; Marshall *v.* Baker, 19 Me. 402 ; Rubber Co. *v.* Dunklee, 30 Vt. 29 ; Flanders *v.* Fay, 40 Vt. 316 ; Post *v.* Vetter, 2 E. D. Smith, 248 ; Wood *v.* Perry, 1 Barb. 114 ; Grierson *v.* Mason, 60 N. Y. 394 ; Raffensberger *v.* Cullison, 28 Penn. St. 426 ; Diotator *v.* Heath, 56 Penn. St. 290 ; Caley *v.* R. R., 80 Penn. St. 363 ; Creamer *v.* Stephenson, 15 Md. 211 ; Rigsbee *v.* Bowler, 17 Ind. 167 ; Willey *v.* Hall, 8 Iowa, 62 ; Adler *v.* Friedmann, 16 Cal. 138 ; Leeds *v.* Fassman, 17 La. An. 32.

In England a court of equity will

§ 1023. To reform a contract of sale on ground of fraud, it is necessary, according to the Pennsylvania practice, that the fraud should be specially set out in the declaration,[1] or, if it be set up in defence, that it should be averred in the pleas.[2] A party, seeking to rescind a contract

Reformation must be specially asked.

not interfere, unless it be clearly convinced, by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected. Mortimer *v.* Shortall, 2 Dru. & War. 371, per Sugden, C.; Bold *v.* Hutchinson, 5 De Gex, M. & G. 558; Wright *v.* Goff, 22 Beav. 207, 214; Ashhurst *v.* Mill, 7 Hare, 502; Gillespie *v.* Moon, 2 Johns. Ch. R. 585. See Bloomer *v.* Spittle, L. R. 13 Eq. 427. A *plaintiff* may seek the relief in equity by filing a bill, either to *reform* the writing,—in which event it will be necessary to satisfy the court that the mistake was made on *both* sides; Mortimer *v.* Shortall, 2 Dru. & War. 372, per Sugden, C.; Murray *v.* Parker, 19 Beav. 305; Rooke *v.* Ld. Kensington, 2 Kay & J. 753; Bentley *v.* Mackay, 31 Beav. 143, 151, per Romilly, M. R.; 4 De Gex, F. & J. 279, *S. C.*; Sells *v.* Sells, 29 L. J. Ch. 500; 1 Drew. & Sm. 42, *S. C.*; Fowler *v.* Fowler, 4 De Gex & J. 250; Elwes *v.* Elwes, 2 Giff. 545; 3 De Gex, F. &. J. 667, *S. C.*; Bradford *v.* Romney, 30 Beav. 431, 438; Gray *v.* Boswell, 13 Ir. Eq. R. N. S. 77; Fallon *v.* Robins, 16 Ibid. 422; Taylor's Ev. § 1042, from which the above is taken; or to *rescind* the instrument,—in which case (though conclusive proof of error or surprise on the plaintiff's part alone will suffice; 1 Taylor's Ev. *ut supra;* Mortimer *v.* Shortall, 2 Dru. & War. 372, per Sugden, C.; Murray *v.* Parker, 19 Beav. 305; Rooke *v.* Ld. Kensington, 2 K. & J. 753; Bentley *v.* Mackay, 31 Beav. 143, 151, per Romilly, M. R.; 4 De Gex, F. & J. 279, *S. C.*; Sells *v.* Sells, 29 L. J. Ch. 500; 1 Drew. & Sm. 42, *S. C.*; Fowler *v.* Fowler, 4 De Gex & J. 250; Elwes *v.* Elwes, 2 Giff. 545; Bradford *v.* Romney, 30 Beav. 431, 438; Gray *v.* Boswell, 13 Ir. Eq. R. N. S. 77; Fallon *v.* Robins, 16 Ibid. 422; see Harris *v.* Pepperell, 5 Law Rep. Eq. 1) it must appear that the mistake was one of vital importance. In either of these cases, if the defendant by his answer denies the case as set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses, and has no documentary evidence to adduce,—such, for instance, as a rough draft of the agreement, the written instructions for preparing it or the like,—the plaintiff's position will be well-nigh desperate; though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the court in granting the relief prayed. Mortimer *v.* Shortall, *ut supra;* Alexander *v.* Crosbie, Lloyd & G. 150.

[1] Butcher *v.* Metts, 1 Miles, 155; Jordan *v.* Cooper, 3 S. & R. 564; Huber *v.* Burke, 11 S. & R. 245; Irvine *v.* Bull, 4 Watts, 287; Clark *v.* Partridge, 2 Barr, 13; Renshaw *v.* Gans, 7 Barr, 117; Heebner *v.* Worrall, 38 Penn. St. 376; Bank *v.* Eyre, 60 Penn. St. 436.

[2] Partridge *v.* Clarke, 4 Penn. St. 166. See Hawkins *v.* Bevel, 61 Ga. 262.

on ground of fraud, cannot be heard until he offers to give up all the advantages of the contract.[1]

Under statute of frauds such reformation cannot pass land.

§ 1024. With an unlimited reformation of contracts as to realty the statute of frauds, as it exists in most of the United States, is, as we have seen, in conflict. By that statute, in its usual form of enactment, all uncertain interests in land, when created by parol, are to be treated merely as estates at will, saving only leases for a term not exceeding three years from date. Supposing a contract is duly executed in writing for the sale of land, but that, through mistake or fraud, a less quantity of land be inserted in the deed than the parties intended, can a chancellor, on the mistake or fraud being duly proved, reform the deed by inserting the greater instead of the lesser measurements? With this and cognate points the minds of chancellors have been much occupied. The statute of frauds, they have agreed, should not be permitted to work frauds; and certain broad conditions they have concurred in recognizing as exceptions to its provisions. (1) If the defendant, admitting the contract, does not set up the statute, it will not be set up by the court. (2) A part performance of the contract (*e. g.*, by going into possession) may be treated as a substitute for a written agreement. (3) A party who fraudulently prevents another from executing a written contract cannot set up the want of that contract. A discussion of these exceptions has been already attempted.[2] It is enough, at this point, to repeat that, where either of the exceptions is established, then parol evidence to reform a contract, in cases of mutual mistake or fraud, may be received under the limitations above expressed. If the defendant sets up the statute, if there has been no part performance, if there has been no clear proof of fraud preventing the execution of a written contract, then we are forced to hold that a written contract, no matter what may be the proof of fraud or mistake outside of the limit just noticed, cannot be reformed on parol proof so as to make it pass a larger interest in land than appears on its face. It may be made to pass a less interest, not a greater.[3] Hence, neither

[1] Young *v.* Stevens, 48 N. H. 133; Underwood *v.* West, 52 Ill. 397; Spurgin *v.* Traub, 65 Ill. 170; Lane *v.* Latimer, 41 Ga. 171; and cases cited supra, §§ 932, 1019.

[2] See supra, §§ 904–11; Bispham's Equity, §§ 383 *et seq.*

[3] 1 Sugd. Vend. & P. (8th Amer. ed.) 243; Woollam *v.* Hearn., 2 Lead. Cas. in Eq. 684; Jordan *v.* Sawkins,

plaintiff nor defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the statute of frauds.[1]

§ 1025. We may also, in obedience to the reasoning just given, conclude that under the statute, an oral contract, valid under the statute, cannot be turned by parol into a contract of a character which the statute requires to be in writing.[2] Hence, it is settled that where the substituted contract deals with an object which the statute requires to be in writing, such substituted contract must be in writing.[3] But this does not preclude the solving by parol ambiguities in documents solemnized in conformity with the statute, or rectifying such documents in case mutual mistake of parties be clearly proved.[4]

Parol contract substituted for written not sufficient under statute.

§ 1026. It may happen, however, to take an alternative already presented,[5] that the parties to a written contract, without changing its general purpose, may agree by parol that it is to be extended so as to apply to new and kindred objects; or that its terms, without being varied as between the original parties, are to be expanded so as to introduce new parties; or that new powers shall be grafted

Subsequent extension, variation, or abrogation may be proved by parol.

1 Ves. Jr. 402; Clinan *v.* Cooke, 1 Sch. & L. 22; Class *v.* Hulbert, 102 Mass. 24; Osborn *v.* Phelps, 19 Conn. 63; Gillespie *v.* Moon, 2 Johns. Ch. 585.

[1] Hickman *v.* Haynes, 10 L. R. C. P. 598; 44 L. J. C. P. 358.

[2] Supra, §§ 863 *et seq.*, 901 *et seq.*

[3] Powell on Evidence, 2d ed. 399. Therefore where the plaintiffs agreed in writing with the defendant to let him a public-house, as tenant, from year to year, with the option on his part to call for a lease for twenty-eight years, upon the terms, among others, that if he sold the lease for more than £1200 he was to give the plaintiffs half the excess; and subsequently, by verbal agreement, a lease was granted, the terms of which differed materially from those stipulated for in the written agreement, but the parties never abandoned the agreement as to the division of the excess of the purchase-money; and the defendant having sold the lease for £2500, the plaintiff sued him for a moiety of the £1300, the excess of the purchase-money over the £1200, it was held by the Court of Exchequer that the original agreement in writing was entirely superseded, and that the agreement under which the lease was taken was the verbal one, of which one term was the stipulation in the original contract as to the excess of the purchase-money; and that as the agreement was not in writing, as required by the statute of frauds, the plaintiffs were not entitled to recover. Sanderson *v.* Graves, 23 W. R. 797; L. R. 10 Ex. 234. See Stearns *v.* Hall, 9 Cush. 31; Musselman *v.* Stoner, 31 Penn. St. 265; Adler *v.* Freedman, 16 Cal. 138.

[4] Infra, § 1034; Boulter, in re, L. R. 4 C. D. 241; supra, § 901.

[5] Supra, § 1022.

on those which the instrument already gives, or that the period for its execution should be enlarged.[1] In such case such collateral extension can be proved by parol, there being no statutory bar.[2]

[1] Kane *v.* Cortery, 100 N. Y. 132.

[2] Supra, § 61 *a*; White *v.* Parkin, 12 East, 578; Morgan *v.* Griffith, L. R. 6 Ex. 70; Lindley *v.* Lacey, 17 C. B. (N. S.) 578; Malpas *v.* R. R., L. R. 1 C. P. 336; Brady *v.* Oastler, 3 H. & C. 112; Angell *v.* Duke, L. R. 1 Q. B. 174; 32 L. T. 320; Young *v.* Schuler, 11 Q. B. 651; Cottrill *v.* Myrick, 12 Me. 222; Bonney *v.* Morrill, 57 Me. 368; Courtenay *v.* Fuller, 65 Me. 156; Cummings *v.* Putnam, 19 N. H. 569; Herson *v.* Henderson, 21 N. H. 224; Field *v.* Mann, 42 Vt. 61; Buzzell *v.* Willard, 44 Vt. 44; Richardson *v.* Hooper, 13 Pick. 446; Rennell *v.* Kimball, 5 Allen, 356; Joannes *v.* Mudge, 6 Allen, 245; McCormick *v.* Chevers, 124 Mass. 262; Raymond *v.* Sellick, 10 Conn. 480; Smith *v.* Richards, 29 Conn. 232; Graves *v.* Johnson, 48 Conn. 160; Orguerre *v.* Luling, 1 Hilt. (N. Y.) 383; Van Brunt *v.* Day, 81 N. Y. 251; Hoagland *v.* Hoagland. 2 N. J. Eq. 501; Gilbert *v.* Duncan, 29 N. J. L. 133; Willis *v.* Fernald, 33 N. J. L. 206; Grove *v.* Hodges, 55 Penn. St. 514; Miller *v.* Miller, 60 Penn. St. 16; Everson *v.* Fry, 72 Penn. St. 330; Malone *v.* Dougherty, 79 Penn. St. 46; Whitney *v.* Shippen, 89 Penn. St. 22; Hoopes *v.* Beale, 90 Penn. St. 82; Eichelberger *v.* Gill, 104 Penn. St. 64; Basshor *v.* Forbes, 36 Md. 154; Planters' Ins. Co. *v.* Deford, 38 Md. 382; Fusting *v.* Sullivan, 41 Md. 170; Stearns *v.* Mason, 24 Grat. 484; Bryant *v.* Dana, 8 Ill. 343; Silsbury *v.* Blumb, 26 Ill. 287; Hartford Ins. Co. *v.* Wilcox, 57 Ill. 186; Danlin *v.* Daeglin, 80 Ill. 608; Harvey *v.* Million, 67 Ind. 90; Strange *v.* Wilson, 17 Mich. 342; Vanderkarr *v.* Thompson, 19 Mich. 82; Lamb *v.* Story, 45 Mich. 488; Keough *v.* McNitt, 6 Minn. 513; Domestic Sewing Co. *v.* Anderson, 23 Minn. 57; Page *v.* Einstein, 7 Jones (N. C.), L. 147; Lowry *v.* Pinson, 2 Bailey, 324; Wells *v.* Thompson, 50 Ala. 84; Couch *v.* Woodruff, 63 Ala. 406; Huckabee *v.* Shepherd, 75 Ala. 342; Vandegrift *v.* Abbett, 75 Ala. 487; Lytle *v.* Bass, 7 Coldw. 303; McDonald *v.* Stewart, 18 La. An. 90; Janney *v.* Brown, 36 La. An. 118; Dixon *v.* Cook, 47 Miss. 220; Cocke *v.* Blackburne, 58 Miss. 537; Bennett *v.* Peebles, 5 Mo. 132; Alexander *v.* Moore, 19 Mo. 143; Van Studdiford *v.* Hazlett, 56 Mo. 322; Weaver *v.* Fletcher, 27 Ark. 510; Babcock *v.* Deford, 14 Kans. 408; Polk *v.* Anderson, 16 Kans. 243; Collingwood *v.* Bank, 15 Neb. 536; Oregonian R. R. *v.* Wright, 10 Oregon, 162; Thomas *v.* Hammond, 47 Tex. 43; Kelly *v.* Taylor, 23 Cal. 11; Ingersoll *v.* Truebody, 40 Cal. 603. See Whart. on Cont. §§ 660, 661; Connell *v.* Vanderwerken, 1 Mackay, D. C. 242; Lockwood *v.* U. S., 5 Ct. of Cl. 379. As to annexing customary incidents to contracts, see supra, § 969.

That the statute of frauds will not be in the way of a collateral subsequent modification of a contract for the sale of lands, see supra, § 863.

In Wilgus *v.* Whitehead, 89 Penn. St. 131, it was held that an oral agreement made subsequently to a contract under seal, and upon a new consideration, may, in cases not within the statute of frauds, enlarge the time of performance specified in the contract, or vary any other of its unexecuted conditions.

"An oral agreement," said Trunkey, J., giving the opinion of the court,

In other words, to adopt Sir J. Stephen's statement,[1] a party is at liberty to prove "the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transactions between them."[2] And this applies to parol agreements as to how a written

"subsequently made on a new consideration, and before the breach of the contract, in cases falling within the general rules of common law, and not within the statute of frauds, may have the effect to enlarge the time of performance specified in the contract, or may vary any other of its terms, or may waive and discharge it altogether, and thus make a new contract. Emerson *v.* Slater, 22 How. 28; Munroe *v.* Perkins, 9 Pick. 298.

"In an action upon a written contract to deliver specific articles at a particular time and place, parol evidence is admissible to prove that, after the making of the original contract, the parties agreed that the articles should be delivered at a different time and place. At least such parol agreement will amount to a waiver of a tender at the time or place mentioned in the original contract. Robinson *v.* Bachelder, 4 N. H. 40. See McCombs *v.* McKennan, 2 W. & S. 216; Keating *v.* Price, 1 John. Cas. 22. In these and like cases, no consideration appears in the oral agreements, other than the mutual promise that the time or place of performance should be changed. The written contracts, thus altered, continued in force, and performance, or tender of performance, when and where orally agreed upon, was a good defence. The principle seems to be, that the party entitled was held to a waiver of the performance as required by the written contract, lest its enforcement would operate as a fraud upon the other.

"The time for the performance of a condition of a sealed, as well as a simple contract, may be enlarged by parol. Indeed, the enlargement of time is nothing more than a waiver of strict performance." Dearborn *v.* Cross, 7 Cow. 48; Munroe *v.* Perkins, supra.

[1] Evidence, art. 90. And see Ball *v.* Benjamin, 73 Ill. 39.

[2] "When the purpose for which a writing was executed is not inconsistent with its terms, it may properly be proved by parol. Truscott *v.* King, 2 Seld. 147, 161; Chester *v.* Bank of Kingston, 16 N. Y. 336, 343; Agawam Bank *v.* Strever, 18 Ibid. 502. The objection of the plaintiff to the evidence introduced for this purpose was therefore properly overruled." Porter, J., Hutchins *v.* Hebbard, 34 N. Y. 26.

In Bladen *v.* Wells, 30 Md. 577, it was held to be the settled law, "that parol evidence may be offered to prove any collateral independent fact about which the written agreement is silent," referring to Creamer *v.* Stephenson, 15 Md. 211; McCreary *v.* McCreary, 5 G. & J. 157; Dorsey *v.* Eagle, 7 G. & J. 331; but it was then said that in the case then before the court "the deed is neither silent nor inconclusive as to the matter about which the parol contract was made; it relates to and covers conclusively the whole subject of that contract, both as to

contract is to be performed.[1] "Such a subsequent oral agreement may enlarge the time of performance, or may vary the other terms

price and quantity, and is a full, complete, and executed contract between the parties, in reference to the whole land which was sold." On the other hand the same court, in the later case of Basshor *v.* Forbes, 36 Md. 354, declared the testimony offered by the defendant to prove that his individual liability as a stockholder was waived by an oral understanding with the plaintiffs, that they were to look to and rely upon the securities furnished by the company alone and exclusively, was admissible to prove an independent and collateral fact, not provided for by the terms of the contract. In support of this position the court referred, among others, to the cases cited in Bladen *v.* Wells, *supra;* also Lindley *v.* Lacy, 17 Com. B. (N. S.) 578; 2 Taylor's Evidence, §§ 1038, 1049.

"The case of Allen *v.* Sowerby, Adm'r, 37 Md. 420, also sanctions the admission of parol evidence to establish 'an additional suppletory agreement,' by which something is supplied that is not in the written contract, for which it relies on Coates & Glenn *v.* Sangston, 5 Md. 130; Atwell & Appleton *v.* Miller, 11 Md. 361. To these may be added the more recent English cases cited by the appellees. Lindley *v.* Lacy, 17 C. B. (N. S.) 586; 1 L. Rep. C. P. 336; Wallis *v.* Littell, 11 C. B. (N. S.) 369; 2 Taylor's Ev. §§ 1039, 1049." Bowie, J., Fusting *v.* Sullivan, 41 Md. 169, 170.

As Pennsylvania authorities to the extent to which a contract may be qualified by parol, see Miller *v.* Henderson, 10 S. & R. 290; Drinker *v.* Byers, 2 Penn. R. 528; Parke *v.* Chadwick, 8 W. & S. 96; Renshaw *v.* Gans, 7 Barr, 117; Bank *v.* Fordyce, 9 Barr, 275; Farrel *v.* Lloyd, 69 Penn. St. 239; Torrens *v.* Campbell, 74 Penn. St. 474.

"It is also well settled that in a case of a simple contract in writing, oral evidence is permissible 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 performance having been prevented by the act of the other party; or that the agreement itself was waived or abandoned. So it has been held competent to prove an additional and suppletory agreement by parol; as, for example, where the 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. Le Fevre *v.* Le Fevre, 4 S. & R. 241, supports the same general rule. Shughart *v.* Moore, 78 Penn. St. 469." Woodward, J., Malone *v.* Dougherty, 79 Penn. St. 46.

In Lloyd *v.* Farrel, 2 Weekly Notes, 38; 48 Penn. St. 73; 69 Penn. St. 239; which was a suit by A. (the vendor) for the purchase-money of land, the vendee set up failure of consideration on the ground that A. was equitably seised only of one-third of the title, having inherited the same from his father equally with his two sisters. In answer to this evidence was offered: (1) That the father had purchased with A.'s money, and at his request; (2) That the deed to the defendant had been made on the express parol

[1] Leather Co. *v.* Hieronymous, L. R. 10 Q. B. 10; Plevins *v.* Downing, L. R. 1 C. P. D. 220.

of the contract, or may waive and discharge it altogether. . . . In reference to contracts under seal, it was formerly held, especially in England, that they could not be thus varied. But in the United States the tendency of judicial decision has been to apply the same rule in this respect to sealed instruments as to simple contracts."[1] But in this way inconsistencies and repugnancies cannot be worked into the original contract.[2]

§ 1027. In conformity with the rule which has been just stated, parol evidence has been received of a parol agreement between two indorsers of a note to divide the loss between them;[3] of a parol agreement of an indorser of a note by which he waives demand and notice;[4] of a parol agreement by an agent that he should receive no compensation;[5] of a parol agreement for application of a payment under a written contract;[6] of a parol agreement for fixing the time for the performance of a contract under seal, as this does not change the substance of the contract;[7] of a parol agreement as to the obligations of a hold-over tenant;[8] of a parol agreement, collateral to a lease, by which the lessor agrees to destroy all the rabbits on a place leased;[9] of a parol agreement, collateral to a written bill of sale of furniture, that the vendee shall take up the vendor's acceptance;[10] of a parol agreement, by the vendor of a grocery store, that he would not carry on the business in the same neighborhood;[11] of a parol agreement as to the mode of payment;[12] of a parol agreement by the parties to an indenture of

Illustrations of above rule.

agreement that A. conveyed and warranted only his own title. This was held admissible, although the deed contained the usual warranty. See Farrel *v.* Lloyd, 69 Penn. St. 239.

[1] C. Allen, J., Hastings *v.* Lovejoy, 140 Mass. 264. See Munroe *v.* Perkins, 9 Pick. 298; Emery *v.* Ins. Co., 138 Mass. 398. See supra, § 1019.

"Notwithstanding what is said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement." Strong, J., Canal Co. *v.* Ray, 101 U. S. 527.

[2] Brady *v.* Reed, 94 N. Y. 631; Johnson *v.* Powers, 65 Cal. 179.

[3] Phillips *v.* Preston, 5 How. 278.

[4] Sanborn *v.* Southard, 25 Me. 409; Fullerton *v.* Rundlett, 27 Me. 31.

[5] Joannes *v.* Mudge, 6 Allen, 245.

[6] Forster *v.* McGraw, 64 Penn. St. 464.

[7] Lawrence *v.* Miller, 86 N. Y. 131; but see Spence *v.* Bowen, 41 Mich. 149.

[8] Atlantic Bank *v.* Demmon, 139 Mass. 420.

[9] Morgan *v.* Griffiths, L. R. 6 Ex. 70. See, however, discussion in Naumberg *v.* Young, 44 N. J. L. 331.

[10] Lindley *v.* Lacey, 17 C. B. (N. S.) 578.

[11] Pierce *v.* Woodward, 6 Pick. 206.

[12] Sowers *v.* Earnhart, 64 N. C. 96.

charter party to use the ship for a period which was to elapse before the charter party attached ;[1] and of a parol agreement designating the place for carrying into effect a contract, as to which it is silent.[2] To prove such collateral extensions usage may be appealed to.[3] "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."[4]

Parol evidence inadmissible to prove unilateral mistake of fact.

§ 1028. Were a person who signs a deed or other contract able to avoid performing it on the ground that he was mistaken as to its effect, it would be only necessary for him to omit reading the contract before signing it, in order to be bound or not as he chose.[5] It is the duty of every one executing such a writing to be aware of its contents before signing; it is against the policy of law to permit those neglecting this duty to benefit by their neglect.[6] Hence, a mere mistake of fact, such mistake not going to the essence of a contract, will be ordinarily no ground for annulling the contract.[7]

[1] White *v.* Packin, 12 East, 578; Seago *v.* Deane, 4 Bing. 459.

[2] Cummings *v.* Putnam, 19 N. H. 569; Musselman *v.* Stoner, 31 Penn. St. 265; Moore *v.* Davidson, 18 Ala. 209.

[3] Supra, § 969; Marsh *v.* Bellew, 45 Wis. 36; Bonham *v.* Craig, 80 N. C. 222.

[4] Per Parke, B., Hatton *v.* Warren, 1 M. & W. 475.

[5] See Whart. on Contracts, §§ 636 *et seq.*

[6] Infra, § 1243.

[7] Brown *v.* Allen, 43 Me. 590; Young *v.* McGown, 62 Me. 56; Webster *v.* Webster, 33 N. H. 18; Bradley *v.* Anderson, 5 Vt. 152; McDuffie *v.* Magoon, 26 Vt. 518; Locke *v.* Whiting, 10 Pick. 279; Fitzhugh *v.* Runyon, 8 Johns. R. 375; Cameron *v.* Irwin, 5 Hill N. Y. 272; Mills *v.* Lewis, 55 Barb. 179; Pitcher *v.* Hennessey, 48 N. Y. 415; Jackson *v.* Andrews, 59 N. Y. 244; Boyce *v.* Ins. Co., 55 N. Y. 240; Cooper *v.* Ins. Co., 50 Penn. St. 299; Wesley *v.* Thomas, 6 Har. & J. 24; Watkins *v.* Stockett, 6 Har. & J. 435; Boyce *v.* Wilson, 32 Md. 122; Kearney *v.* Sascer, 37 Md. 264; Harris *v.* Dinkins, 4 Desau. 60; Peques *v.* Mosby, 15 Miss. 340; Nixon *v.* Porter, 38 Miss. 401; Hathaway *v.* Brady, 23 Cal. 121; Robinson *v.* McNeil, 51 Ill. 225; Nelson *v.* Davis, 40 Ind. 366; Barnes *v.* Bartlett, 47 Ind. 98; Glenn *v.* Salter, 42 Iowa, 107; Snyder *v.* Ives, 42 Iowa, 157; Ludington *v.* Ford, 33 Mich. 123; Harter *v.* Christoph, 32 Wis. 248;

Evidence, however, is admissible to prove mistake on one side, and fraud on the other,[1] or to prove mistake caused even by non-fraudulent misrepresentations.[2] Thus, an excess of quantity in a conveyance of land may be proved by parol, and damages may be recovered therefor, when the mistake was concurrent, or induced by fraud.[3] So an action will lie for the value of a deficiency of quantity.[4] It is otherwise when land is sold as containing an approximate area, "be the same more or less."[5] And it is admissible to prove that one of the parties was so essentially mistaken as to the subject-matter that there was no consent, and hence no contract.[6]

Mistake of law no ground for relief.

§ 1029. Mistake of law, as is well settled, is no ground for the interposition of a chancellor for the purpose of reforming a contract. Sometimes this conclusion is based on the presumption that every one knows the law, and knowing it, cannot, without fraud, set up his subsequent ignorance. It is unnecessary, however, to resort to reasoning so artificial to support a proposition which is a necessary axiom of government.[7] It is sufficient to say that if a party mistaking the law could get rid of a contract which he made under the influence of the mistake, not only would there be very few losing contracts that would not be

Schwickerath *v.* Cooksey, 53 Mo. 75; Wade *v.* Pelletier, 71 N. C. 74; Henry *v.* Smith, 76 N. C. 311; and cases cited supra, § 1019; infra, § 1243. See Rawson *v.* Lyon, 23 Fed. Rep. 107.

[1] Supra, §§ 1019, 1021; Welles *v.* Yates, 44 N. Y. 525. See Bellows *v.* Steno, 14 N. H. 175, and cases cited supra, § 1021, as to mistake in contents of document, and § 945 as to fraud in execution. As to rejection of erroneous particulars, see supra, § 945.

[2] Pollock on Contracts, 400.

[3] Jordan *v.* Cooper, 3 S. & R. 564; Bank *v.* Galbraith, 10 Barr, 490; Jenks *v.* Fritz, 7 W. & S. 201; Fisher *v.* Deibert's Adm'r, 54 Penn. St. 460; Bartle *v.* Vosbury, 3 Grant, 279; Schettiger *v.* Hopple, Ibid. 56. See Tarbell *v.* Bowman, 103 Mass. 341. In Beck *v.* Garrison, Sup. Ct. of Pennsylvania, 1875, 1 Weekly Notes, 309, which was an equitable assumpsit to recover for an excess of land, the court said: "The questions in this case were really questions of fact. There was sufficient evidence to be submitted to the jury of a promise to pay for the excess contained in the deed, if the survey should be found to contain a greater quantity of land than was to be sold at the rate of $1000 for a single acre. There was also evidence tending to show that there was a mistake in the survey, and that the lines did actually contain an excess over the quantity intended to be sold and conveyed. These questions were fairly submitted to the jury and found in favor of the plaintiff, and therefore became a ground of recovery."

[4] See supra, § 945.

[5] Kreiter *v.* Bomberger, supra, § 945.

[6] Pollock on Contracts, 400. Supra, § 1021.

[7] See infra, § 1241.

got rid of, but a mad spirit of speculation would be generated by the assurance that no venture, no matter how desperate, would bring personal loss. Hence it is that the courts have united in accepting the principle that a contract cannot be reformed because it was entered into under a mistake of law.[1] If, however, one party mistakes the law through the other's fraud; or if the mistake of the one be promoted by the other; or if the mistake be a mixed one of law and fact, then there may be relief.[2] Of mutuality of mistake we have a marked illustration in an English case, where the oldest of three brothers divided lands, of which the second brother had died possessed, under the mistaken impression, which was confirmed by a mutual friend of both parties, that land could not ascend. Here relief was granted,[3] not because there was actual fraud, but because the contract rested on a mistake which the defending contracting party had furthered.

Mistake of form, when obvious, may be corrected.

§ 1030. Where from a writing itself it appears that words have been transposed or erroneously inserted by a clerical error, then this may be corrected on trial, and the writing read according to its intended meaning.[4] Thus, in Massachusetts, where S., who in the body of a bond was recited as a surety, signed as a witness, and W., an intended witness, whose name did not appear in the body of the bond, signed as surety in the place where S. should have signed, it was held that parol evidence was admissible to show that this transposition

[1] See cases cited to § 1028, and see Hunt *v.* Rousmanier, 8 Wheat. 174; Hoover *v.* Reilly, 2 Abb. (U. S.) 471; Freeman *v.* Curtis, 51 Me. 140; Potter *v.* Sewall, 54 Me. 142; Mellish *v.* Robertson, 25 Vt. 603; Dickinson *v.* Glenney, 27 Conn. 104; Shotwell *v.* Murray, 1 Johns. Ch. 512; Champlin *v.* Laytin, 18 Wend. 407; Garnar *v.* Bird, 57 Barb. 277; Zane *v.* Cawley, 21 N. J. Eq. 130; Gebb *v.* Rose, 40 Md. 387; Brown *v.* Armistead, 6 Rand. 594; Barnes *v.* Bartlett, 47 Ind. 98; Heavenridge *v.* Mondy, 49 Ind. 434; Goltra *v.* Sanasack, 53 Ill. 456; Moorman *v.* Collier, 32 Iowa, 138; Bledsoe *v.* Nixon, 68 N. C. 521; Thurmond *v.* Clark, 47 Ga. 500; Gwynn *v.* Hamilton, 29 Ala. 233; McMurray *v.* St. Louis, 33 Mo. 377; Smith *v.* McDougal, 2 Cal. 586.

[2] Infra, § 1241 *a*; Kerr on Fraud and Mistake, 400; Cooper *v.* Phibbs, L. R. 2 H. L. Cas. 149; Blakeman *v.* Blakeman, 39 Conn. 320; Wheeler *v.* Smith, 9 How. 55; Whelen's Appeal, 70 Penn. St. 425.

[3] Lansdown *v.* Lansdown, cit. 2 J. & W. 205.

[4] See supra, §§ 933, 939, 948; Loss *v.* Obry, 22 N. J. Eq. 52; Wheeler *v.* Kirtland, 23 N. J. Eq. 13; Barthell *v.* Roderick, 34 Iowa, 517; Fallon *v.* Kehoe, 38 Cal. 44; Exchange Bk. *v.* Russell, 50 Mo. 531; Moore *v.* Wingate, 53 Mo. 398; Miller *v.* Davis, 10 Kans. 541.

was a mistake; and on this evidence S. was held liable as surety.[1] So, in the same state, where a contract is agreed to and signed, but a wrong name is inserted by the scrivener at one point in place of the name of one of the contracting parties, this mistake, it has been held, can be rectified by parol.[2] As to strangers, this right of correction is always open.[3] Thus, where a debtor delivered a certificate of stock to his creditor, with power of attorney to transfer, as collateral security, it was held that in a contest with another creditor the purchaser might show by parol that the date in the power was entered by mistake, and that the title to the stock passed to the creditor at the time of the delivery of the certificate and the power of attorney.[4]

Trust may be proved by parol.

§ 1031. To permit a conveyance, absolute on its face, but virtually in trust, to be enjoyed by the nominal grantee in defiance of the trust, would be a fraud which equity would not tolerate; and hence courts of equity, when such trusts have been fully and plainly established, have treated the grantee as a trustee, and compelled him to execute the trust. It is no bar to the exercise of this jurisdiction that the deed so acted on was one the statute of frauds requires to be in writing. The statute of frauds cannot be used as an instrument of fraud, nor do its terms include cases of this class.[5] The trust, in such case, no statute intervening, may be proved by parol; and when such is the local practice, equitable remedies of this class can be applied through common law forms: and this principle applies to trusts of personalty as well as of realty.[6] But such a trust cannot

[1] Richardson *v.* Boynton, 12 Allen, 138.

[2] Brown *v.* Gilman, 13 Mass. 158; though see Crawford *v.* Spencer, 8 Cush. 418, where evidence was refused to show that a grantee's name was entered by mistake of the scrivener in the place of another person, who was the intended grantee, and who entered on and occupied the land. And as to refusal to correct similar mistakes, see Jackson *v.* Hart, 12 Johns. R. 77; Jackson *v.* Foster, 12 Johns. R. 488. Where the sons and sons-in-law of a decedent united in a written agreement, one of whose provisions allotted to the sons-in-law certain portions in their own right, parol evidence was held in Alabama inadmissible, in a common law procedure, to show that such portions were intended to have been given to the sons-in-law in right of their wives. Moody *v.* McCown, 39 Ala. 586. See, however, Mitchell *v.* Kintzner, 5 Penn. St. 216.

[3] See supra, § 923.

[4] Finney's Appeal, 59 Penn. St. 398. See infra, § 1078.

[5] Supra, § 903; infra, § 1034.

[6] Supra, § 931 *a*; Price *v.* Dyer, 17 Ves. 356; Sprigg *v.* Bank, 14 Pet. 201; Russell *v.* Southard, 12 How. 139;

be established unless on proof that the intervention of the grantee was the result of fraud, accident, mistake, or undue influence on

Rhodes *v.* Farmer, 17 How. 467; Babcock *v.* Wyman, 19 How. 289; Villa *v.* Rodriguez, 12 Wall. 323; Morgan *v.* Shinn, 15 Wall. 110; Peugh *v.* Davis, 96 U. S. 332; Andrews *v.* Hyde, 3 Cliff. 516; Amory *v.* Laurence, 3 Cliff. 523; Jackson *v.* Lawrence, 117 U. S. 679; Baxter *v.* Willey, 9 Vt. 276; Wing *v.* Cooper, 37 Vt. 178; Hill *v.* Loomis, 42 Vt. 562; Stackpole *v.* Arnold, 11 Mass. 27; Flint *v.* Sheldon, 13 Mass. 443; Flagg *v.* Mann, 14 Pick. 417; Eaton *v.* Green, 22 Pick. 526; Campbell *v.* Dearborn, 109 Mass. 130; McDonough *v.* Squire, 111 Mass. 219; Mechaive Bank *v.* Barry, 125 Mass. 20; Benton *v.* Jones, 8 Conn. 186; Sheldon *v.* Bradley, 37 Conn. 324; Gilchrist *v.* Cunningham, 8 Wend. 641; Van Dusen *v.* Worrall, 4 Abb. (N. Y.) App. 473; Despard *v.* Wallbridge, 15 N. Y. 378; Anthony *v.* Atkinson, 2 Sweeny, 228; Horn *v.* Keteltas, 46 N. Y. 605; McMahon *v.* Macy, 51 N. Y. 161; Mechan *v.* Forrester, 52 N. Y. 277; Carr *v.* Carr, 52 N. Y. 521; Chapman *v.* Porter, 69 N. Y. 276; Matthews *v.* Sheehan, 69 N. Y. 585; Sweet *v.* Parker, 22 N. J. Eq. 453; Freytag *v.* Hoeland, 23 N. J. Eq. 36; Heister *v.* Madeira, 3 W. & S. 385; Stair *v.* Bank, 55 Penn. St. 364; Odenbaugh *v.* Bradford, 67 Penn. St. 96; Baisch *v.* Oakeley, 68 Penn. St. 92; Maffit *v.* Rynd, 69 Penn. St. 387; Haines *v.* Thompson, 70 Penn. St. 434; Bank *v.* Whyte, 1 Md. Ch. 536; *S. C.* 3 Md. Ch. Dec. 508; Farrell *v.* Bean, 10 Md. 217; Dryden *v.* Hanway, 31 Md. 254; Smith *v.* Parks, 22 Ind. 59; Church *v.* Cole, 36 Ind. 34; Gingz *v.* Stumpf, 73 Ind. 209; Preschbaker *v.* Feaman, 32 Ill. 483; Fleming *v.* McHale, 47 Ill. 282; Latham *v.* Latham, 47 Ill. 185; Smith *v.* Wright, 49 Ill. 403; Price *v.* Karnes, 59 Ill. 276; Swetland *v.* Swetland, 3 Mich. 482; Holton *v.* Meighen, 15 Minn. 69; Trucks *v.* Lindsey, 18 Iowa, 504; Kay *v.* McCleary, 25 Iowa, 191; Wilson *v.* Patrick, 34 Iowa, 362; Volaw *v.* Diehl, 62 Iowa, 676; Fairchild *v.* Rassdall, 9 Wis. 379; Wilcox *v.* Bates, 26 Wis. 465; Ragan *v.* Simpson, 27 Wis. 355; Broskowitz *v.* Davis, 12 Nev. 446; Edrington *v.* Harper, 3 J. J. Marsh. 353; Thomas *v.* McCormack, 9 Dana, 109; Mallory *v.* Mallory, 5 Bush. 464; Nichols *v.* Cabe, 3 Head, 93; Turbeville *v.* Gibson, 5 Heisk. 565; McDonald *v.* McLeod, 1 Ired. Eq. 221; Glisson *v.* Hill, 2 Jones Eq. 256; Steel *v.* Black, 3 Jones Eq. 427; Elliott *v.* Maxwell, 7 Ired. Eq. 246; Moffatt *v.* Hardin, 22 S. C. 9; Brown *v.* Cave, 23 S. C. 251; Lockett *v.* Child, 11 Ala. 640; Brown *v.* Abell, 11 Ala. 1009; Locke *v.* Palmer, 26 Ala. 312; Brantley *v.* West, 27 Ala. 542; Parish *v.* Gates, 29 Ala. 254; Crews *v.* Threadgill, 35 Ala. 334; Bragg *v.* Massie, 38 Ala. 106; Barrell *v.* Hanrick, 42 Ala. 60; Ingraham *v.* Grigg, 21 Miss. 22; Vasser *v.* Vasser, 23 Miss. 378; Anding *v.* Davis, 38 Miss. 594; Weathersly *v.* Weathersly, 40 Miss. 469; Hogel *v.* Lindell, 10 Mo. 483; Tibeau *v.* Tibeau, 22 Mo. 77; Slowey *v.* McMurray, 27 Mo. 116; Thomas *v.* Wheeler, 47 Mo. 363; Summers *v.* Ins. Co., 13 La. An. 504; Moore *v.* Wade, 8 Kans. 380; Pierce *v.* Robinson, 13 Cal. 116; Lodge *v.* Turman, 24 Cal. 390; Case *v.* Codding, 38 Cal. 457; Henley *v.* Hotaling, 41 Cal. 22; Farmer *v.* Grose, 42 Cal. 169; Anthony *v.* Chapman, 65 Cal. 73; Hannay *v.* Thompson, 14 Tex. 142; Reeves *v.* Bass, 39 Tex. 618; Blakemore *v.* Byrnside, 7 Ark. 505; McCarron *v.* Cassidy, 18 Ark. 34; Chaires *v.* Brady, 10 Fla.

his part, or that he was using a position assigned him by mistake in order to work a fraud.[1]

§ 1032. For the same reason, a conveyance absolute on its face may be held, if the proof be clear, to have been taken as merely a security, and will in such case be treated as a mortgage, so far as concerns parties and privies.[2] "It

Or may be shown to be a mortgage.

133. In New Hampshire there is a statutory exclusion of such evidence. Lund *v.* Lund, 1 N. H. 39; Kingsley *v.* Holbrook, 45 N. H. 321. And so in Georgia. 7 Cobb's Dig. 1851, p. 274. In Maine, though resulting trusts may be so proved, for the creating or declaring of other trusts, writings are necessary. Thomaston *v.* Stimpson, 21 Me. 195; Bryant *v.* Crosby, 36 Me. 562; Richardson *v.* Woodbury, 43 Me. 206. On the Maine statute we have the following: "1. It is claimed that the estate in Oliver by deed from his father, of October 4, 1846, was in trust. But the deed is in common form, and it discloses no trust. Now, by the statutes of this state, all trusts must be 'created or declared by some writing signed by the party or his attorney,' except those 'arising or resulting by implication of law.' R. S. c. 73, § 11. The conversations and intentions of the family before the deed was given could not alter or change its effect. Parol evidence of the object and purpose for which the conveyance was made thereby, to convert the deed into one of trust, is not admissible. Flint *v.* Shelden, 13 Mass. 448. Nor is there a resulting trust. The payments by the different members of the family were made at different times after the title was in Oliver. Nothing was paid by any one when the conveyance was made, and it is well settled that no resulting trust can arise from the payment or advance of money after the purchase is completed. Farnham *v.* Clements, 51 Me. 426; Dudley *v.* Bachelder, 53 Me. 403." Appleton, C. J., Gerry *v.* Stimson, 60 Me. 188.

Certificates of stock absolute on their face can be shown by parol evidence to be held as collateral security. Burgess *v.* Seligman, 107 U. S. 20.

[1] Supra, § 903.

[2] Supra, § 903; Jones on Mortgages, ch. viii.; Peugh *v.* Davis, 96 U. S. 332: Brick *v.* Brick, 98 U. S. 514; Hills *v.* Loomis, 42 Vt. 562; Clark *v.* Clark, 43 Vt. 685; French *v.* Burns, 35 Conn. 359; Whitney *v.* Townsend, 2 Lansing, 249; Chapman *v.* Porter, 69 N. Y. 276; Matthews *v.* Sheehan, 69 N. Y. 585; Phillips *v.* Hulsizer, 20 N. J. Eq. 308; Crane *v.* DeCamp, 21 N. J. Eq. 414; Sweet *v.* Parker, 22 N. J. Eq. 453; McGinity *v.* McGinity, 63 Penn. St. 38; Harper's Appeal, 64 Penn. St. 315; Odenbaugh *v.* Bradford, 67 Penn. St. 96; Wilson *v.* Geddings, 28 Ohio St. 554; Snaveley *v.* Pickle, 29 Grat. 27; Klinik *v.* Price, 4 W. Va. 4; Shays *v.* Norton, 48 Ill. 100; Ruckman *v.* Atwood, 71 Ill. 155; Workman *v.* Greening, 115 Ill. 477; Kent *v.* Agard, 24 Wis. 378; Kent *v.* Lasley, 24 Wis. 654; Robertson *v.* Willoughby, 65 N. C. 520; Klein *v.* McNamara, 54 Miss. 90; Turner *v.* Kerr, 44 Mo. 429; Phillips *v.* Croft, 42 Ala. 477; Faris *v.* Dunn, 7 Bush. 276; Honore *v.* Hutchings, 8 Bush. 687; Raynor *v.* Lyons, 37 Cal. 452; McKinney *v.* Miller, 19 Mich, 142. The nature of the consideration will be of much weight in determining the equities. See Cornell *v.* Hall, 22 Mich. 377: supra, § 931 *a*.

is not questioned that an instrument absolute in its terms may be shown by parol evidence to be only a mortgage."[1] And this may

An administrator's lease, personal on its face, may be shown to have been for the benefit of the estate. Russell *v.* Erwin, 41 Ala. 292.

[1] Strong, J., in Morgan *v.* Shinn, 15 Wall. 110; citing Babcock *v.* Wyman, 19 How. 289; S. P. Russell *v.* Southard, 12 How. 139; Campbell *v.* Dearborn, 109 Mass. 130. As to rebutting evidence in such cases see Black's Appeal, 89 Penn. St. 201.

The practice in New York is stated in the following opinions:—

"It is now too late to controvert the proposition that a deed, absolute upon its face, may in equity be shown, by parol or other extrinsic evidence, to have been intended as a mortgage; and fraud or mistake in the preparation, or as to the form of the instrument, is not an essential element in an action for relief, and to give effect to the intention of the parties. The courts of this state are fully committed to the doctrine; and, whatever may be the rule in other states, here, in passing upon the question, we have only to stand upon the safe maxim of *stare decisis*. It is not enough, in view of the fact that the adjudications have entered into and controlled business transactions, and become a rule of property, to authorize a reconsideration of the questions, that the rule has been authoritatively adjudged otherwise as a rule of evidence in common law courts, and that eminent judges have contended earnestly against its adoption as a rule in courts of equity. Notwithstanding their protests, the rule has been, upon the fullest consideration, deliberately established, and cannot now be lightly departed from. The principle was recognized by the chancellor in Holmes *v.* Grant, 8 Paige, 243; although it was not applied in that case, and had been before asserted under like circumstances in Robinson *v.* Cropsey, 2 Edw. Ch. R. 138; affirmed 6 Paige, 480. It was expressly adjudged in Strong *v.* Stewart, 4 J. C. R. 167, that parol evidence was admissible to show that a mortgage only was intended by an assignment absolute in terms; and to the same effect is Clark *v.* Henry, 2 Cow. 324, which was followed by this court in Murray *v.* Walker, 31 N. Y. 399. In Hodges *v.* Tennessee Marine & Fire Insurance Co., 4 Seld. 416, the court says that 'from an early day in this state, the rule, that parol evidence is admissible for the purpose named, has been established as the law of our courts of equity; and it is not fitting that the question should be re-examined, and the cases in which it has been so adjudged are cited with approval.' In Sturtevant *v.* Sturtevant, 20 N. Y. 39, the same judge, pronouncing the opinion as in the case last cited, distinguishes between the case of a mortgage and trust; and it was decided that while a deed absolute in terms could be shown to be a mortgage, a trust in favor of the grantee could not be established by parol. And see Despard *v.* Walbridge, 15 N. Y. 374. The rule does not conflict with that other rule which forbids that a deed or other written instrument shall be contradicted or varied by parol evidence. The instrument is equally valid whether intended as an absolute conveyance or a mortgage. Effect is only given to it according to the intent of the parties; and courts of equity will always look through the forms of a transaction and give effect to it so as to carry out the substantial intent of the parties." Allen, J., Horn *v.* Keteltas, 46 N. Y. 609.

So in a later case:—

"It is always competent to show

be done by a court of law with equitable jurisdiction.[1] But equity will not relieve if the deed was made absolute on its face to effect a fraud on his creditors by the grantor.[2]

§ 1033. A deed, however, that is absolute on its face, and which is duly delivered, and possession taken under it, cannot be contradicted by parol evidence to the effect that it was intended only as a trust, unless fraud or concurrent mistake be shown, and the evidence be plain and strong, and relate to intention coincident with the execution.[3] A party

Evidence must be plain and strong.

that an assignment or conveyance, absolute in form, was only intended as a security. Hodges *v.* Tennessee M. & F. Ins. Co., 8 N. Y. 416; Despard *v.* Walbridge, 15 N. Y. 374; Sturtevant *v.* Sturtevant, 20 N. Y. 39." Earl, C., McMahon *v.* Macy, 51 N. Y. 161.

In Pennsylvania it is now settled that the fourth section of the Act 1856, requiring instruments of trust to be in writing, made no alteration in the rule theretofore existing, which allowed a deed, absolute on its face, to be shown by parol to be a mortgage. Ballentine *v.* White, 77 Penn. St. 20; Maffitt *v.* Rynd, 69 Penn. St. (19 P. F. Smith), 387.

[1] Gardner *v.* Cazenove, 14 N. H. 423; Blanchard *v.* Fearing, 4 Allen, 118.

[2] Hassam *v.* Barrett, 115 Mass. 256.

[3] Supra, § 904; Movan *v.* Hays, 1 Johns. Ch. 339; St. John *v.* Benedict, 6 Johns. Ch. 111; Barrett *v.* Carter, 3 Lansing, 68; Hutchinson *v.* Tindall, 3 N. J. Eq. 357; Whyte *v.* Arthur, 17 N. J. Eq. 521; Cook *v.* Barr, 44 N. Y. 156; Goucher *v.* Martin, 9 Watts, 106; Lingenfelter *v.* Richey, 62 Penn. St. 128; Com. *v.* Kreager, 78 Penn. St. 477; Stanley *v.* Hubbard, 27 W. Va. 743; Collier *v.* Collier, 30 Ind. 32; Minot *v.* Mitchell, 30 Ind. 228; Nicoll *v.* Mason, 49 Ill. 358; Lantry *v.* Lantry, 51 Ill. 451; Knowles *v.* Knowles, 86 Ill. 1; Burns *v.* Byrne, 45 Iowa, 285; Barkley *v.* Lane, 6 Bush, 587; Bonham *v.* Craig, 80 N. C. 224; Ely *v.* Early, 94 N. C. 1; Waddingham *v.* Loker, 44 Mo. 132; Shaw *v.* Shaw, 86 Mo. 595; Sloan *v.* Baxter, 34 Minn. 491; Markham *v.* Carothers, 47 Tex. 21; Thomas *v.* Hammond, 47 Tex. 42. See Parlin *v.* Small, 68 Me. 289; Hassam *v.* Barrett, 115 Mass. 256.

. . . . "In a case where a trust, or the conversion of an absolute estate into a mortgage, is attempted to be made out by parol evidence, the court and jury exercise the functions of a chancellor, and the evidence, assuming the testimony of the witnesses to be true, ought to be such as would satisfy his conscience. 'The judge alone is the chancellor. The province of the jury is to aid him in ascertaining the facts out of which the equities arise. If the facts are not disputed, he is to declare their effect and determine whether the claim or the defence is well founded. A chancellor is judge, both of the equity and of the facts. It is in his discretion whether he will send an issue to a jury; and if he does, their verdict is only advisory. It is not conclusive upon him. Whenever, therefore, upon the trial of an ejectment, founded upon an equitable title, the court is of an opinion that the facts proved do not make out a case in which a chancellor would decree a conveyance, it is their duty to give binding instructions to that effect to the jury.' Strong, J., in Todd *v.* Campbell, 8 Ca-

setting up a trust title of this class must do equity by an offer to redeem.[1]

Under statute of frauds sufficient if trust is manifested in writing.

§ 1034. We have already seen,[2] that the terms of the statute of frauds do not prevent a parol declaration of trust; though in England and in most states in this country, the trust must be sustained by some written proof. "It is not required by the statute that a trust should be created by writing, and the words of the statute are very particular in the clause respecting declarations of trust. It does not by any means require that all trusts shall be created only by writing, but that they shall be manifested and proved by writing, plainly meaning that there should be evidence in writing proving that there was such a trust. Therefore, unquestionably, it is not necessarily to be created by writing, but it must be evidenced by writing, and then the statute is complied with; and indeed the great danger of parol declarations, against which the statute was intended to guard, is entirely taken away. I admit that it must be proved *in toto*, not only that there was a trust, but what it was."[3] An answer in chancery has consequently been held sufficient to sustain the establishment of a trust; and so have, *a fortiori*, written admissions.[4]

Resulting trust may be proved by parol.

§ 1035. Where one person pays the purchase-money, and another takes the title, then in equity the person taking the title will be treated as trustee for the person paying the money. In such case parol evidence is admissible to prove the trust, though such evidence must be clear and strong.[5] The broad principle is, that whoever pays the purchase-

sey, 252." Sharswood, J., McGinity *v.* McGinity, 63 Penn. St. 44. And see, under statute of frauds, §§ 863, note, 903.

[1] Supra, §§ 850 *et seq.*; Thomas *v.* Wright, 9 S. & R. 87; Hughes *v.* Davis, 40 Cal. 117.

[2] Supra, § 903.

[3] Lord Alvanley in Foster *v.* Hale, 3 Ves. 707. See Smith *v.* Matthews, 6 W. R. 644, and in prior notes hereto; and see cases cited in 2 Wash. Real Prop. 50, 51 (4th ed.), and supra, § 903.

[4] 3 Sugd. V. & P. 252; Rob. on Frauds, 95; Randall *v.* Morgan, 12 Ves. 67. See supra, § 903.

[5] Dyer *v.* Dyer, 2 Cox, 92; Buck *v.* Pike, 2 Fairfield, 9; Baker *v.* Vining, 30 Me. 127; Page *v.* Page, 8 N. H. 187; Moore *v.* Moore, 38 N. H. 187; Hutchins *v.* Heywood, 50 N. H. 491; Penney *v.* Fellows, 15 Vt. 525; Peabody *v.* Tarbell, 2 Cush. 232; Kendall *v.* Mann, 11 Allen, 15; Blodgett *v.* Hildredth, 103 Mass. 487; Barrows *v.* Bohan, 41 Conn. 278; Boyd *v.* McLean, 1 Johns. C. R. 582; Swinburne *v.* Swinburne, 38 N.

money of land is entitled to the fruits of that which he purchases, though the legal title is in another.[1] To this rule exists a well-marked exception, that when the money is advanced by a parent, and the legal title taken in a child, the advance will be supposed to be for the benefit of the child.[2] Equity will also enforce a resulting trust where a conveyance is made in a trust declared only in part; while as to the residue there is no disposition on the face of the writing.[3] The doctrine, it should be observed, is analogous to the common law rule, that where there is a feoffment without consideration the use results to the feoffor.[4]

Parol evidence is as admissible to disprove as to prove the trust.[5]

§ 1036. In several states of the Union, among which may be

Y. 568; Richards *v.* Millard, 56 N. Y. 574; Jackman *v.* Ringland, 4 Watts & S. 149; McGinity *v.* McGinity, 63 Penn. St. 39; Hays *v.* Quay, 68 Penn. St. 263; Farrel *v.* Lloyd, 69 Penn. St. 239. See Lloyd *v.* Farrel, supra, § 1027; Creed *v.* Bank, 1 Ohio St. 1; Miller *v.* Stokely, 5 Ohio St. 194; Lewis *v.* White, 16 Ohio St. 44; Hollis *v.* Hayes, 1 Md. Ch. 479; Cecil Bk. *v.* Snively, 23 Md. 261; Dryden *v.* Hanway, 31 Md. 354; Bank U. S. *v.* Carrington, 7 Leigh, 566; Phelps *v.* Seely, 22 Grat. 587; Borst *v.* Nalle, 28 Grat. 423; Parmlee *v.* Sloan, 37 Ind. 469; Kane *v.* Herrington, 50 Ill. 232; Thomas *v.* Chicago, 55 Ill. 403; Roberts *v.* Opp, 56 Ill. 34; Smith *v.* Smith, 85 Ill. 189; McGuire *v.* McGowen, 4 Dess. Ch. 481; Price *v.* Brown, 4 S. C. 144; Harvey *v.* Ledbetter, 48 Miss. 95; McCarrol *v.* Alexander, Ibid. 128; Paul *v.* Chouteau, 14 Mo. 580; Rings *v.* Richardson, 53 Mo. 585; Kennedy *v.* Kennedy, 57 Mo. 73; Faris *v.* Dunn, 7 Bush, 276; Honore *v.* Hutchins, 8 Bush, 687; Holder *v.* Nunnelly, 2 Cold. 288; Pillow *v.* Thomas, 57 Tenn. 121; Byers *v.* Danley, 27 Ark. 77; Oberthier *v.* Stroud, 33 Tex. 522. See Nicklin *v.* Wythe, 2 Sawyer, 535.

The money must form a considerable part of the purchase. Roberts *v.* Ware, 40 Cal. 634.

In equity it is admissible to show that a certificate of stock issued to a party as owner was delivered to him as security for a loan of money. And the principle is that a court of equity will look beyond the terms of an instrument to the real transaction, and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. Brick *v.* Brick, 98 U. S. 514.

[1] Sugd. V. & P. 255; Wray *v.* Steele, 2 Ves. & B. 388; Lench *v.* Leuch, 10 Ves. 517; Houghton, ex parte, 17 Ves. 251; Hayden *v.* Denslow, 27 Conn. 335.

[2] Sayre *v.* Hughes, L. R. 5 Eq. 376; Hepworth *v.* Hepworth, L. R. 11 Eq. 10; Soar *v.* Foster, 4 Kay & J. 152; Tucker *v.* Burrow, 2 Hem. & M. 515.

[3] Lloyd *v.* Spillet, 2 Atk. 150.

[4] Grey *v.* Grey, 2 Swans. 598.

[5] Edwards *v.* Edwards, 2 Y. & C. Ex. 123; Brady *v.* Cubitt, 1 Dougl. 31; Beecher *v.* Major, 2 Dr. & Sm. 431. Supra, §§ 973–4.

A denial, under oath, by the trustee, is not an insuperable bar to relief. Bartlett *v.* Pickersgill, 3 East, 577, n. Supra, §§ 973–4.

Exception in several states.

mentioned Maine, Massachusetts, New York, Indiana, Michigan, and Wisconsin, resulting trusts are restricted by statute.[1]

Caution when alleged trustee is deceased.

§ 1037. The evidence to establish a parol trust must be weighed with peculiar caution where it consists of declarations of a deceased person; and nothing but proof of the strongest character will sustain a decree enforcing a trust in such a case.[2] The admissions of trust must come directly from the party charged with the trust.[3]

Person fraudulently obtaining or retaining title may be treated as trustee.

§ 1038. Parol evidence, also, will be received to prove an agreement to reconvey. Thus, in an English equity case, the evidence was that the plaintiff had conveyed an estate to the defendant without consideration, on the understanding that the defendant should, in certain events, reconvey it to him. On the plaintiff applying for a reconveyance, the defendant pleaded the statute of frauds; but the Court of Chancery made a decree for a reconveyance, on the ground that the statute of frauds was never intended to prevent a court of equity from giving relief in a case of a plain, clear, and deliberate fraud.[4] Generally, when a title is fraudulently obtained, equity will treat the person fraudulently obtaining the title as trustee for the real owner, though the case is proved only by parol.[5] So equity will relieve in a proper case between the *cestui que trust*

[1] Bispham's Eq. § 84. As to limitations of statutes restricting such trusts, see Foote *v.* Bryant, 47 N. Y. 544; Fisher *v.* Fobes, 22 Mich. 454; Johnson *v.* Johnson, 16 Minn. 512. As to Pennsylvania, Act of April 22, 1856, Roy *v.* Townsend, 78 Penn. St. 329. Supra, § 863, n.

[2] Hill on Trustees, *156; Wilkins *v.* Stephens, 1 Y. & C. Ch. C. 431; Groves *v.* Groves, 3 Y. & J. 170; Baker *v.* Vining, 30 Maine, 121; Boyd *v.* McLean, 1 Johns. Ch. 582; Botsford *v.* Burr, 2 Johns. Ch. 413; McGinity *v.* McGinity, 63 Penn. St. 42; Nixon's Appeal, Ibid. 279; Kistler's Appeal, 73 Penn. St. 400; Com. *v.* Kreager, 78 Penn. St. 477; Capehart *v.* Capehart, 2 Phila. 134; Johnson *v.* Quarles, 46 Mo. 423; Ringo *v.* Richardson, 53 Mo. 385. As has been already seen, a party is ordinarily inadmissible to prove such a case against the estate of a deceased party. Supra, §§ 464–7.

[3] Com. *v.* Kreager, 78 Penn. St. 477.

[4] Haigh *v.* Caye, L. R. 7 Ch. 469. See, also, generally, Cipperly *v.* Cipperly, 4 Thomp. & C. 342; Blaylock's Appeal, 73 Penn. St. 146; Anderson *v.* McCarty, 61 Ill. 64; Belohradsky *v.* Kuhn, 69 Ill. 548; McDill *v.* Gunn, 43 Ind. 315. As to statute of frauds, see supra, §§ 901–912.

[5] Church *v.* Sterling, 16 Conn. 388; Hunter *v.* Hopkins, 12 Mich. 227; Kennedy *v.* Kennedy, 2 Ala. 571.

and the trustee's vendee. Thus, where, on proceedings in partition, the administrator conveyed to the husband the wife's share of the land, the husband paying no money, it was held that the wife might prove these facts by parol as against a purchaser with notice.[1] To rebut equities of this class, parol evidence is necessarily admissible.[2]

Particular recitals may estop.

§ 1039. A recital in a deed is evidence against him who executed the deed, and against every person claiming under him.[3] Recitals, in this view, have been classed as particular and general. A *particular* recital is conclusive evidence of matters dependent on it, when offered in a suit directly on the deed. "If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is clear that, as between the parties to such instrument and in an action upon it, it is not competent for the party bound to deny the recital."[4] Among particular recitals the following may be enumerated: That a lot is bounded by a particular road, which does not mean, however, that such road was fit for travel;[5] that the title consists of certain specified links;[6] that the party conveying was entitled, as agent, to convey.[7] Eminently is an estoppel operative when the recital involves a bilateral agreement to admit a fact.[8] It is otherwise, however, when the recital

[1] Mitchell *v.* Kintzer, 5 Penn. St. 216. See, also, Earle *v.* Rice, 111 Mass. 20.

[2] Supra, §§ 973–74; and see cases cited supra, § 1035.

[3] Com. Dig. Evid. (B. 5); Gwyn *v.* Neath, Ex. 122; L. R. 3 Ex. 209.

[4] Parke, B., in Carpenter *v.* Buller, 8 M. & W. 212. See Shelly *v.* Wright, Willes, 9; Lainson *v.* Tremere, 1 Ad. & E. 792; Bowman *v.* Taylor, 1 Ad. & E. 278; Van Rensalaer *v.* Kearney, 11 How. 332; Green *v.* Clark, 13 Vt. 58; Stow *v.* Wyse, 7 Conn. 214; Bonner *v.* Metcalf, 58 Ga. 236.

[5] Parker *v.* Smith, 17 Mass. 540; Tufts *v.* Charlestown, 2 Gray, 271; Rodgers *v.* Parker, 9 Gray, 445; Stetson *v.* Dow, 16 Gray, 323; Gaw *v.* Hughes, 111 Mass. 296; Cox *v.* James, 45 N. Y. 562; Bellinger *v.* Burial Soc., 10 Penn. St. 137.

[6] Carver *v.* Jackson, 4 Pet. 85; Scott *v.* Douglass, 7 Ohio, 287; 3 Washburn on Real Prop. 100.

[7] Stow *v.* Wyse, 7 Conn. 214. See Huntington *v.* Havens, 5 Johns. Ch. 23.

[8] Bigelow on Estoppel (2d ed.) 269; Young *v.* Raincock, 7 C. B. 310; Stroughill *v.* Buck, 14 Q. B. 781; Carver *v.* Jackson, 4 Peters, 1; Bruce *v.* U. S., 17 How. 437; Parker *v.* Smith, 17 Mass. 413; Fox *v.* Union Sugar Ref. Co., 109 Mass. 292; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; Bower *v.* McCormick, 23 Grat. 310; Ballou *v.* Jones, 37 Ill. 95; Ill. Land Co. *v.* Bonner, 75 Ill. 315; Williams *v.* Swetland, 10 Iowa, 51; Comstock *v.* Smith, 26 Mich. 306; Courvoisier *v.* Bouvier, 3 Neb. 55.

is collateral to the purposes of the action. In such case, being a mere unilateral admission, it does not estop and may be contested.[1] Infants are not bound by recitals in deeds executed by their guardians,[2] but married women are estopped by recitals in deeds by which they are bound.[3] But recitals which amount to mere narratives, or to statements as to purchase-money, and which are not assurances on which the other party acted in closing the bargain, are open to explanation and contradiction.[4] Recitals in insurance policies and premium notes, unless contractual, are only *primâ facie* proof of the facts they state.[5]

Otherwise as to general recitals.

§ 1040. *General* recitals (*i. e.*, those which do not aver particular facts, or aver them non-contractually) may be *primâ facie*, but are never conclusive, evidence against the party making them, "since certainty is of the essence of an estoppel."[6] The very fact of indefiniteness leads to the inference that there is no contract between the parties as to the recital, but that it is a mere vague expression, open to correction by the party by whom it is made.[7] Where the recital involves a contract, it estops; if it does not involve a contract, it operates only as a unilateral general admission, and is open to explanation.[8] But a recital in a deed, though not estopping, may make, even against the heirs of the grantor, a *primâ facie* case.[9]

[1] Carpenter *v.* Buller, 8 M. & W. 212. Infra, § 1083.

[2] Milner *v.* Harewood, 18 Vesey, 274; Greenfield *v.* Camden, 74 Me. 86.

[3] Jones *v.* Frost, L. R. 7 Ch. 776.

[4] Infra, § 1041; Lowe *v.* Thompson, 86 Ind. 503.

[5] New England Ins. Co. *v.* Belknap, 7 Cush. 140; Williams *v.* Cheney, 3 Gray, 215.

[6] 3 Washburn on Real Prop. (1876), 101; Bigelow on Estoppel, 2d ed. 266; Lainson *v.* Tremere, 1 Ad. & E. 792; Hepp. *v.* Wiggett, 10 Com. B. 32; Right *v.* Bucknell, 2 Barn. & Ad. 278; Butcher *v.* Musgrave, 1 Man. & G. 625; Carpenter *v.* Buller, 8 M. & W. 212; Doane *v.* Wilcutt, 16 Gray, 368; Huntington *v.* Havens, 5 Johns. Ch. 23; Naglee *v.* Ingersoll, 6 Barr, 185; Hays *v.* Askew, 5 Jones (L.), 63; Newman *v.* Shelley, 36 La. An. 100. As to admissions by predecessor in title, see infra, § 1156.

[7] Miller *v.* Moses, 56 Me. 128; Wright *v.* Tukey, 3 Cush. 290; Doane *v.* Wilcutt, 16 Gray, 368; Naglee *v.* Ingersoll, 7 Barr, 185; Noble *v.* Cope, 50 Penn. St. 17. See Doe *v.* Shelton, 2 Ad. & El. 265, where it was held that a vendee was not estopped from disputing a recital of bankruptcy.

[8] South E. R. R. *v.* Wharton, 6 Hurl. & N. 520; Osborne *v.* Endicott, 6 Cal. 153; Carpenter *v.* Buller, 8 M. & W. 212; Davis *v.* Bromar, 55 Miss. 671. See infra, § 1156. Hence a recital in an undelivered deed does not estop. Bulley *v.* Bulley, L. R. 9 Ch. 739.

[9] Penrose *v.* Griffith, 4 Binn. 231;

§ 1041. So far as concerns third parties, a recital in a contract, unless for the purpose of proving reputation and tradition,[1] is hearsay.[2] Even when offered in evidence by a third person, against the party making the recital, a recital may be explained and disputed by parol.[3]

Recitals do not bind third parties.

§ 1042. Recitals of consideration and of receipt of purchase-money stand on a distinct basis, it being held that, though they may be called particular, they may be varied or explained by the parties by parol proof. They partake in this respect of the nature of receipts, which, as we will presently see,[4] are open to parol explanations.[5] "Even as

Recitals of purchase-money open to parol explanations.

Allen *v.* Allen, 9 Wright (Penn.), 473; Cumberland Valley R. R. *v.* McLanahan, 59 Penn. St. 23; Grubb *v.* Grubb, 74 Penn. St. 25.

[1] See supra, §§ 194, 210; Costello *v.* Burke, 63 Iowa, 361; Miller *v.* Miller, Ibid. 387; Ross *v.* Loomis, 64 Iowa, 432.

[2] "A recital in a conveyance is only evidence against the parties to it, and privies in blood or in estate. It does not bind strangers or those who claim by title paramount. Hill *v.* Draper, 10 Barb. 454; Sharp *v.* Speir, 4 Hill, 76; Penrose *v.* Griffith, 4 Binn. 231; Garver *v.* Jackson, 4 Peters, 1; Crane *v.* Lessee of Morris, 6 Ibid. 611." Allen, J., Hardenburgh *v.* Lakin, 47 N. Y. 111; Needles *v.* Hanifax, 11 Ill. Ap. 303. And see Carver *v.* Jackson, 4 Pet. 1, 83; Penrose *v.* Griffith, 4 Binn. 231; Schuylkill Ins. Co. *v.* McCreary, 58 Penn. St. 304; Yahoola Co. *v.* Irby, 40 Ga. 479; Lamar *v.* Turner, 48 Ga. 329; Smith *v.* Penny, 44 Cal. 161; and see fully supra, §§ 171, 173, 923.

[3] See supra, § 923; infra, § 1044.

[4] Infra, § 1064.

[5] R. *v.* Scammonden, 3 T. R. 474; Barbank *v.* Gould, 15 Me. 118; Bassett *v.* Bassett, 55 Me. 127; Baxter *v.* Greenleaf, 65 Me. 405; Vogt *v.* Ticknor, 48 N. H. 242; White *v.* Miller, 22 Vt. 380; Thayer *v.* Viles, 23 Vt. 494; Davenport *v.* Mason, 15 Mass. 85; Wilkinson *v.* Scott, 17 Mass. 249; Clapp *v.* Tirrell, 20 Pick. 247; Livermore *v.* Aldrich, 5 Cush. 431; Trott *v.* Irish, 1 Allen, 481; Estabrook *v.* Smith, 6 Gray, 572; Miller *v.* Goodwin, 8 Gray, 542; Clark *v.* Houghton, 12 Gray, 38; Drury *v.* Tremont Imp. Co., 13 Allen, 168; Belden *v.* Seymour, 8 Conn. 304; Shephard *v.* Little, 14 Johns. 210; Whitbeck *v.* Whitbeck, 9 Cow. 266; Vechte *v.* Brownell, 8 Paige, 212; Lloyd *v.* Lynch, 28 Penn. St. 419; Bratt *v.* Bratt, 21 Md. 578; Andrews *v.* Andrews, 12 Ind. 348; Swope *v.* Forney, 17 Ind. 385; Elder *v.* Hood, 38 Ill. 533; Groesbeck *v.* Seeley, 13 Mich. 329; Reynolds *v.* Vilas, 8 Wis. 471; Dayton *v.* Warren, 10 Minn. 233; Gordon *v.* Gordon, 1 Metc. Ky. 285; Dudley *v.* Bosworth, 10 Humph. 9; Wesson *v.* Stephens, 2 Ired. Eq. 557; Kennedy *v.* Kennedy, 2 Ala. 571; Parker *v.* Foy, 43 Miss. 260; Beard's Succession, 14 La. An. 121; Rabsuhl *v.* Lack, 35 Mo. 316; Coles *v.* Soulsby, 21 Cal. 47; Hicks *v.* Morris, 57 Tex. 658; Taylor *v.* Merrill, 64 Tex. 494.

Where a deed stated the consideration to be $2000, it was held admissible, in an action for that amount, for the grantee to show that the deed was given on a different consideration, viz., on a promise to do something which

against a party to a deed, the recital of the consideration paid is not conclusive, and is admissible as *primâ facie* evidence only because one party has signed and the other has accepted the deed containing the recital.[1] As between third persons, such recitals are no evidence whatever."[2] Where, however, a vendor, without fraud or

was done accordingly. Twomey *v.* Crowley, 137 Mass. 184; Mason *v.* Buchanan, 62 Ala. 110; Hannibal R. R. *v.* Green, 68 Mo. 169; Meyer *v.* Casey, 57 Miss. 615; Stufflebeem *v.* Arnold, 57 Cal. 11.

The cases are well stated in the following opinion:—

"The only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantor. For every other purpose it may be varied or explained by parol proof. The grantor may show, notwithstanding the acknowledgment of payment, that no money was paid and recover the price in whole or in part against the grantee. Wilkinson *v.* Scott, 17 Mass. 249. This clause is *primâ facie* evidence only of payment, and may be controlled or rebutted by other proof. Clapp *v.* Tirrell, 20 Pick. 247. The recitals in the deed of the amount and payment of consideration do not estop the grantee from sustaining an action for the price. Thayer *v.* Viles, 23 Vt. 494; White *v.* Miller, 22 Vt. 380. 'This clause is either formal or nominal,' says Daggett, J., in Belden *v.* Seymour, 8 Conn. 304, 'and not designed to fix conclusively the amount either paid or to be paid.' The amount of consideration and its receipt is open to explanation by parol proof in every direction. It may be shown that the price of the land was less than the consideration expressed in the deed, as in Bowen *v.* Bell, 20 Johns. 338; or that it was contingent, depending upon the price the grantee may obtain upon a resale of the land, as in Hall *v.* Hall, 8 N. H. 129; or that it was in iron, when the deed expressed a money consideration, as in McCrea *v.* Purmort, 16 Wend. 460; or that no money was paid, but that it was an advancement, as in Meeker *v.* Meeker, 16 Conn. 387; or that a portion of the price was to be paid by the grantee, and the balance was an advancement, as in Hayden *v.* Mentzer, 10 S. & R. 329; or that it was paid by some one other than the grantee, and thus raise a resulting trust, as in Scoby *v.* Blanchard, 3 N. H. 170; Pritchard *v.* Brown, 4 N. H. 397; Dudley *v.* Bosworth, 10 Humph. 9. The damages for the breach of the covenants in a deed may be increased or diminished, as between the parties, by proof of a greater or less price paid for the land than is expressed in the deed. Belden *v.* Seymour, 8 Conn. 304; Morse *v.* Shattuck, 4 N. H. 229. The entire weight of authority tends to show that the acknowledgment of payment in a deed is open to unlimited explanation in every direction." Appleton, J., Goodspeed *v.* Fuller, 46 Me. 147.

Against prior creditors of a husband, or a purchaser at a sheriff's sale, the recitals in his deed to his wife are not evidence of the actual consideration. Tutwiler *v.* Munford, 68 Ala. 124.

[1] Paige *v.* Sherman, 6 Gray, 511.

[2] Gray, C. J., Rose *v.* Taunton, 119 Mass. 100, citing Spaulding *v.* Knight, 116 Mass. 148, 155. See Brown *v.* Summers, 91 Ind. 151; Ewaldt *v.* Farlow, 62 Iowa, 212; Pique *v.* Arendale,

concurrent mistake, accepts the engagement of a third party for the stipulated consideration, and on the faith of such engagement acknowledges the receipt of the consideration, he will not be permitted, in a controversy with the vendee, to show that the consideration was not received.[1]

§ 1043. Whether in an action of ejectment the recital of receipt of purchase-money is *primâ facie* evidence of payment has been much disputed. It is indubitably so when a party buys on the faith of a recorded deed which contains such a recital, and then proceeds against the vendor. But it is otherwise as to strangers.[2] Thus, where T., a party holding a prior (though unrecorded) deed from S., brings ejectment against P., a subsequent purchaser (though with a prior recorded title), under a statute which enables a deed of subsequent date, but of prior record, to hold, when *bonâ fide*, and for good consideration, against a prior unrecorded deed; the recital of payment of purchase-money in the latter deed is not even *primâ facie* proof of payment.[3]

Not admissible against strangers.

71 Ala. 91; Mobile R. R. *v.* Wilkinson, 72 Ala. 286.

In New Hampshire we have the following: "In Preble *v.* Baldwin, 6 Cush. 549, parol evidence, proving an additional consideration to that stated in the deed, was objected to as inadmissible, as tending to vary and contradict the terms of the deed. The court overruled the objection, remarking, 'We do not consider this an open question;' and in Davenport *v.* Mason, 15 Mass. 85, it was held that parol evidence, though not admissible to contradict or vary the terms of the deed, may be permitted to establish an independent fact, or to prove a collateral agreement incidentally connected with the stipulations of a deed or other written contract. Swisher *v.* Swisher's Adm'r, 1 Wright's Rep. 755, cited in 3 Phill. Ev. 1479 (ed. 1843), and cited in the defendant's brief, is exactly in point. It was there held that an agreement between the grantor and grantee contemporaneous with the deed, that the grantor should occupy the premises rent free, might be received in evidence, not being inconsistent with the deed, but an independent fact." Smith, J., Quimby *v.* Stebbins, 55 N. H. 422.

[1] McMullin *v.* Glass, 27 Penn. St. 151. Infra, §§ 1045, 1066.

[2] See cases cited infra, § 1044; Rose *v.* Taunton, 119 Mass. 200.

[3] The following opinion discusses the authorities bearing upon this point:—

"He may have taken the deed in entire good faith, within the meaning of the statutes, though he paid no consideration; or he may have purchased in bad faith, and yet have paid a valuable consideration. Good faith *and* a valuable consideration are both required to give (by the statute) the record precedence over the prior unrecorded deed.

"But at law the authorities are conflicting as to the burden of proving

Consideration may be proved or disproved by parol.

§ 1044. We have just seen that recitals of receipt of purchase-money are open to explanation by the parties to a contract.[1] The right so to explain is not confined to cases where consideration is recited. It applies to all cases of consideration, whether recited or not. And generally at common law, as between the parties to a written contract, the consideration may be attacked by the party against whom suit is brought on the instrument, and parol proof is admissible to assail the consideration stated, to show a consideration when none is recited, or vary that of which there is a recital.[2] Thus, where

the consideration or the want of it. In Jackson *v.* McChesney, 7 Cowan, 360, the Supreme Court of New York, while admitting the rule to be as above stated, yet held that, in an action of ejectment, when the strict legal title only is in question, the recital of the consideration in the deed is *primâ facie* evidence of its payment. And the same doctrine was reiterated (though the point was wholly unnecessary to the decision) in Wood *v.* Chapin, 13 N. Y. 509. Now, if there were any difference in the effect to be given to the fact of payment or non-payment, at law or in equity, there might be some tangible ground for such a distinction in the mode or burden of proof. But, as the fact of the payment of the consideration will equally support the deed, and the want of its payment will equally defeat it in both courts, it is not easy to discover any solid foundation for the distinction. Besides, the recital in the deed in such a case as the present would seem to be *res inter alios*, mere hearsay, and to stand upon no other ground than the mere declaration of the grantor, which would be no evidence against any party not claiming under the deed, but against it. It would be otherwise with a recorded deed upon the faith of which the party has purchased, as in such a case the law has made the record evidence upon which he has a right to rely. And the Supreme Court of Alabama, in Nolen et al. *v.* Heirs of Gwyn, 16 Ala. 725 (and see McGintry et al. *v.* Reeves, 10 Ala. 137), repudiate the distinction, and fully adopt at law the rule which, we have already stated, seems to us the more reasonable and just, whenever the question is whether the immediate purchase of the party to the suit was for a valuable consideration. The recital, therefore, of the consideration in the deed from Bacon to the defendant was not, in our opinion, any evidence of its payment, and no other evidence of it was given." Christiancy, J., Shotwell *v.* Harrison, 22 Mich. 418. See infra, § 1048.

[1] See, also, Dean *v.* Adams, 44 Mich. 117; Leach *v.* Shelby, 58 Miss. 684; Jackson *v.* Miller, 32 La. An. 432.

[2] Foster *v.* Jolly, 1 C. M. & R. 707; Solly *v.* Hinde, 2 C. & M. 516; Abbott *v.* Hendricks, 1 M. & Gr. 791; Doe *v.* Statham, 7 D. & Ry. 141; Llanelly R. R. *v.* London R. R., L. R. 8 Ch. 955; Townsend *v.* Toker, L. R. 1 Ch. Ap. 459; Bank U. S. *v.* Dunn, 6 Pet. 51; Quimby *v.* Morrill, 47 Me. 470; Nutting *v.* Herbert, 37 N. H. 346; Wilkinson *v.* Scott, 17 Mass. 249; Paget *v.* Cook, 1 Allen, 522; Holden *v.* Parker, 110 Mass. 324; Hannan *v.* Hannan, 123 Mass. 441; Belden *v.* Seymour, 8 Conn.

the language of a guarantee leaves it doubtful whether the consideration be past or present, and, consequently, whether the instrument be valid or invalid, parol evidence of extrinsic circumstances may be received to solve the doubt.[1] So when a consideration

304; Purmort *v.* McCrea, 5 Paige, 620; Wheeler *v.* Billings, 38 N. Y. 263; Hebbard *v.* Haughian, 70 N. Y. 57; Farnum *v.* Burnett, 21 N. J. Eq. 87; Fitler *v.* Beckley, 2 Watts & S. 458; Strawbridge *v.* Cartledge, 7 Watts & S. 394; Galway's Appeal, 34 Penn. St. 242; Watterston *v.* R. R., 74 Penn. St. 208; Cunningham *v.* Dwyer, 23 Md. 219; Clarke *v.* Dederick, 31 Md. 148; Fusting *v.* Sullivan, 41 Md. 162; Wrightsman *v.* Bowyer, 24 Grat. 433; Jones *v.* Buffum, 50 Ill. 277; Huebsch *v.* Scheel, 81 Ill. 281; Morris *v.* Tillson, 81 Ill. 607 (as to Illinois statute, see Gage *v.* Lewis, 68 Ill. 613, cited supra, § 931); Collier *v.* Mahon, 21 Ind. 492; McMahan *v.* Stewart, 23 Ind. 590; McDill *v.* Gunn, 43 Ind. 315; Burdit *v.* Burdit, 2 A. K. Marsh. 143; Haywood *v.* Moore, 2 Humph. 584; Gaugh *v.* Henderson, 2 Head, 628; Nichols *v.* Bell, 1 Jones L. 32; Wade *v.* Carter, 76 N. C. 171; Curry *v.* Lyles, 2 Hill S. C. 404; Clements *v.* Lundrum, 26 Ga. 401; Eckles *v.* Carter, 26 Ala. 563; Thomas *v.* Barker, 36 Ala. 392; Stead *v.* Hinson, 76 Ala. 298; Miller *v.* McCoy, 50 Mo. 212; Hollocher *v.* Hollocher, 62 Mo. 267; Aull *v.* Aull, 80 Mo. 199; Lockwood *v.* Canfield, 20 Cal. 126; Dickson *v.* Burks, 11 Ark. 307; Clinton *v.* Estes, 20 Ark. 216; Waymack *v.* Heilman, 26 Ark. 449; Perry *v.* Smith, 34 Tex. 277.

"The amount or kind of consideration is not considered an essential part of the contract, and is open to contradiction or explanation, like a common receipt. Frink *v.* Green, 5 Barb. 456; Bingham *v.* Weiderwax, 1 N. Y. 509; Murray *v.* Smith, 1 Duer, 412; McCrea *v.* Purmort, 16 Wend. 460." Ingalls, J., Barker *v.* Bradley, 42 N. Y. 320.

"Where a grantor has conveyed a farm, reserving in the deed the use of the buildings thereon for a period of time afterwards, the grantee is not estopped by the deed to show that there was an oral agreement, at the time, that he should have what manure should be made by the grantor's cattle on the place in the mean time, for the use of the premises. Farrar *v.* Smith, 64 Me. 74.

"In Weaver *v.* Woods, 9 Barr, 220, it was decided by this court that, where a written contract is executed for a consideration therein mentioned, a party is not concluded in an action for the breach of a parol contract from showing that the agreement evidenced by the writing was the consideration for the contemporaneous parol contract." Sharswood, J., Everson *v.* Fry, 72 Penn. St. 330.

S., after conveying a dwelling-house to P., continued to occupy it several weeks after the deed. In an action of assumpsit by P. against S., for use and occupation of the premises during this period, it was held, that parol evidence of a contract that S. should thus occupy as part of the consideration of the conveyance did not tend to contradict the deed, and was properly admitted in answer to the claim for rent. Quimby *v.* Stebbins, 55 N. H. 420.

How far the recital of consideration in sealed instruments can in law be disputed, see infra, § 1045.

[1] Goldshede *v.* Swan, 1 Ex. R. 154, and cases there cited; Edwards *v.* Jevons, 8 Com. B. 436; Colbourn *v.*

expressed on an instrument has failed, another can be proved.[1] So where no consideration is expressed in writing, one may be proved by parol;[2] and it may be shown by parol that a bond is not in fact usurious, though apparently so on its face.[3] Parol evidence, also, is admissible to prove an extrinsic consideration varying that expressed;[4] and on an assignment for creditors, which does not expressly recite the amount due, parol evidence is admissible to prove such amount.[5] Again, when in a bill of sale of goods the whole consideration is not stated, parol evidence is admissible to supply the deficiency.[6] A recital of receipt of purchase-money, in a contract for sale, may be qualified by parol.[7] Such recitals, as we have seen, are not evidence in any sense between third parties;[8] though they are an impeachable admission which may be received against the party making them and his privies. Partial or entire failure of consideration of negotiable paper may also be shown by parol, so far as concerns parties with notice, although the averment, "value received," is *primâ facie* proof of consideration.[9]

Dawson, 10 Com. B. 765; Bainbridge *v.* Wade, 16 Q. B. 89; Hoad *v.* Grace, 31 L. J. Ex. 98; 7 H. & N. 494, *S. C.*; Wood *v.* Priestner, 4 H. & C. 681; Heffield *v.* Meadows, 4 Law Rep. C. P. 595. As to burden of proof being on party seeking to avoid such writing, see Steele *v.* Hoe, 14 Q. B. 431; Brown *v.* Batchelor, 1 H. & N. 255; Mare *v.* Charles, 5 E. & B. 978.

[1] Leifchild's case, L. R. 1 Eq. 231; Tull *v.* Parlett, M. & M. 472; Dorsey *v.* Hagard, 5 Mo. 420; Cowan *v.* Cooper, 41 Ala. 187. Otherwise in cases of fraud. Young's Est. 3 Md. Ch. 461.

"The consideration clause is open to explanation and can be varied by parol proof." Allen, J., Hubbard *v.* Haughian, 70 N. Y. 59; citing Purmort *v.* McCrea, 16 Wend. 460; Bingham *v.* Werderwax, 1 Comst. 509; Battle *v.* Bank, 3 Comst. 88. See Wade *v.* Carter, 76 N. C. 171.

[2] Leifchild's case, L. R. 1 Eq. 231; Peacock *v.* Monk, 1 Ves. Sen. 128; Hilton *v.* Homans, 23 Me. 136; Hope *v.* Smith, 35 N. Y. Sup. Ct. 458; Hayden *v.* Mentzer, 10 S. & R. 329; Weaver *v.* Wood, 9 Barr, 220; Bowser *v.* Cravener, 56 Penn. St. 132; Booth *v.* Hynes, 54 Ill. 363; Laudman *v.* Ingram, 49 Mo. 212; and see cases cited infra, § 1054.

[3] Campbell *v.* Shields, 6 Leigh, 517.

[4] Lewis *v.* Brewster, 57 Penn. St. 410; Malone *v.* Dougherty, 72 Penn. St. 48; Holmes's Appeal, 79 Penn. St. 279; Taylor *v.* Preston, 79 Penn. St. 436.

[5] Platt *v.* Hedge, 8 Iowa, 386.

[6] Nedvikek *v.* Meyer, 46 Mo. 600.

[7] Supra, § 1039; infra, § 1064.

[8] Spaulding *v.* Knight, 116 Mass. 148; Weaver *v.* Wood, 9 Penn. St. 220; Smith *v.* Conrad, 15 La. An. 579.

[9] Herrick *v.* Bean, 20 Me. 51; Wise *v.* Neal, 39 Me. 422; Bourne *v.* Ward, 51 Me. 191; Cross *v.* Rowe, 22 N. H. 77; Sowles *v.* Sowles, 11 Vt. 146; Parish *v.* Stone, 14 Pick. 198; Black River Bk. *v.* Edwards, 10 Gray, 389; Corlies *v.* Howe, 11 Gray, 125; Stacy

§ 1045. By the English common law, a seal, attached to a written instrument, is held to be conclusive proof of consideration. In equity, however, the recital can be overhauled on proof of fraud or mistake; and this doctrine is in the United States generally accepted by common law courts.[1]

Seal is evidence of consideration, but may be impeached by proof of fraud or of mistake.

§ 1046. But even in equity, a party claiming under a sealed document is bound by the general character of the consideration stated in the document, unless a mutual mistake be shown. He cannot, otherwise, for instance, as part of his own case, if money be averred, prove natural love and affection; or if natural love and affection be averred, prove money.[2] Yet where a deed is

Consideration expressed in contract cannot be disputed by those claiming under it, but other considera-

v. Kemp, 97 Mass. 166; Pettibone *v.* Roberts, 2 Root, 258; Edgerton *v.* Edgerton, 8 Conn. 6; Slade *v.* Halsted, 7 Cow. 322; Sawyer *v.* McLouth, 46 Barb. 350; Snyder *v.* Wilt, 15 Penn. St. 59; Druley *v.* Hendricks, 13 Ind. 478; Great West. Ins. Co. *v.* Rees, 29 Ill. 272; Foy *v.* Blackstone, 31 Ill. 538; Davis *v.* Strohm, 17 Iowa, 421; Thomas *v.* Thomas, 7 Wis. 476; Hubbard *v.* Galusha, 23 Wis. 398; Folger *v.* Donsman, 37 Wis. 620; Austin *v.* Kinsman, 13 Rich. S. C. Eq. 259; Smith *v.* Brooks, 18 Ga. 440; Cartwright *v.* Clopton, 25 Ga. 85; Knight *v.* Knight, 28 Ga. 214; Boynton *v.* Twitty, 53 Ga. 214; Murrah *v.* Bank, 20 Ala. 392; Newton *v.* Jackson, 23 Ala. 335; Wynne *v.* Whisenant, 37 Ala. 46; Matlock *v.* Livingston, 17 Miss. 489; Klein *v.* Keves, 17 Mo. 326; Klein *v.* Dinkgrave, 4 La. An. 540; Byrne *v.* Grayson, 15 La. An. 457; Griffin *v.* Cowan, 15 La. An. 487. See Benton *v.* Sumner, 57 N. H. 117. Infra, § 1060.

[1] Lowe *v.* Peers, 4 Burr. 2225; Emmons *v.* Littlefield, 13 Me. 233; Ely *v.* Alcott, 4 Allen, 506; Treadwell *v.* Buckley, 4 Day, 395; Farnum *v.* Burnett, 21 N. J. Eq. 87; Campbell *v.* Tompkins, 32 N. J. Eq. 170; Strawbridge *v.* Cartledge, 7 Watts & S. 394; Hoeveler *v.* Mugele, 66 Penn. St. 348; Jones *v.* Noe, 35 Ohio St. 368; Kenzie *v.* Penrose, 2 Scam. 315; Jones *v.* Jones, 12 Ind. 389; Lawton *v.* Buckingham, 15 Iowa, 22; Jeter *v.* Tucker, 1 S. C. 246; Johnson *v.* Boyles, 26 Ala. 576; Brooks *v.* Hartmann, 1 Heisk. 36; McLean *v.* Houston, 2 Heisk. 37; Bennett *v.* Solomon, 6 Cal. 134; Splawn *v.* Martin, 17 Ark. 146. As to the strict common law rule, see Rountree *v.* Jacob, 2 Taunt. 131; Lowe *v.* Peers, 4 Burr. 2225; Hill *v.* Manchester, 2 B. & Ald. 544; Jones *v.* Sasser, 1 Dev. & Bat. L. 452.

In New Jersey the rule in the text is established by statute. Wakeman *v.* Illingsworth, 10 Vroom, 431.

As to proof of what constitutes a seal, see supra, §§ 692–5; infra, § 1314.

[2] Peacock *v.* Monk, 1 Ves. Sen. 128; Gale *v.* Williamson, 8 M. & W. 408; Morse *v.* Shattuck, 4 N. H. 229; Holbrook *v.* Holbrook, 30 Vt. 432; Morris *v.* Ryerson, 28 N. J. L. 97; Clagett *v.* Hall, 9 Gill & J. 80; Christopher *v.* Christopher, 64 Md. 583; Rockhill *v.* Spraggs, 9 Ind. 30. See O'Connor *v.* Kelly, 114 Mass. 97; Thornburg *v.* Newcastle R. R., 14 Ind. 499; Lufbur-

tion may be proved in rebuttal if fraud be charged.

assailed by third parties on the ground of fraud, a larger field is opened, and, as relevant evidence to the issue of fraud, it is admissible to show, in addition to the consideration of affection expressed, a valuable consideration paid, or the converse.[1]

§ 1047. But no matter what may be the consideration averred in a deed, a party collaterally attacking such deed for fraud may impeach by parol such consideration.[2] Thus, where a conveyance was expressed to have been made in consideration of £10,000, and natural love and affection, the court, on a motion to set it aside, allowed parol proof to show that the estate was worth £30,000, and that there was no natural love and affection in the case.[3]

When fraud is charged strangers may disprove consideration.

§ 1048. It has been indeed ruled that the consideration necessary in such case to sustain a deed must be of the same general character as that expressed in the deed, unless the deed should aver other considerations.[4] But it must be remembered that the issue here is *fraud*. Did the parties to the deed intend to defraud third parties? To rebut this

To disprove fraud *bona fides* is admissible.

row *v.* Henderson, 30 Ga. 482; Mead *v.* Steger, 5 Port. 498. Parol evidence may prove a consideration usurious. See Kidder *v.* Vandersloot, 111 Ill. 133.

[1] Filmer *v.* Gott, 7 Br. C. C. 70; Gale *v.* Williamson, 8 M. & W. 405; Pott *v.* Todhunter, 2 Coll. 76; Clifford *v.* Turrell, 1 Y. & C. (Ch. R.) 138; Brown *v.* Lunt, 37 Me. 423; Abbott *v.* Marshall, 48 Me. 44; Wait *v.* Wait, 28 Vt. 350; Goward *v.* Waters, 98 Mass. 596; Buckley's Appeal, 48 Penn. St. 491; Lewis *v.* Brewster, 57 Penn. St. 410; Potter *v.* Everitt, 7 Ired. Eq. 152; Gordon *v.* Gordon, 1 Metc. Ky. 285; Miller *v.* Bagwell, 3 McCord S. C. 562; Hair *v.* Little, 28 Ala. 236; Eystra *v.* Capelle, 61 Mo. 578; Stiles *v.* Giddens, 21 Tex. 783; Reynolds *v.* Vilas, 8 Wis. 481.

[2] See §§ 923–8; Estabrook *v.* Smith, 6 Gray, 572; Hannah *v.* Wadsworth, 1 Root, 458; Bowen *v.* Bell, 20 Johns. R. 338; Bolton *v.* Jacks, 6 Robt. (N. Y.) 166; Miller *v.* Fichthorn, 31 Penn. St. 252; Hoevler *v.* Mugele, 66 Penn. St. 348; Triplett *v.* Gill, 7 J. J. Marsh. 438; Whittaker *v.* Garnett, 3 Bush. 402; Johnson *v.* Taylor, 4 Dev. L. 355; Myers *v.* Peeks, 2 Ala. 648; Tutwiler *v.* Munford, 68 Ala. 124. See O'Connor *v.* Kelly, 114 Mass. 97. As to other cases of impeaching consideration, see infra, § 1055.

[3] Filmer *v.* Gott, 7 Br. C. C. cited by Lord Kenyon in R. *v.* Scammonden, 3 T. R. 475–6; Taylor's Ev. § 1040.

[4] Emery *v.* Chase, 5 Greenl. 232; Griswold *v.* Messenger, 9 Pick. 517; Maigley *v.* Hauer, 7 Johns. R. 341; Hurn *v.* Soper, 6 Har. & J. 276; Sewell *v.* Baxter, 2 Md. Ch. 447; Ellinger *v.* Crowl, 17 Md. 361; Duval *v.* Bibb, 4 Hen. & M. 113; Harrison *v.* Castner, 11 Ohio St. 339; Galbraith *v.* Cook, 30 Ark. 417.

charge, general evidence of *bona fides* is properly admissible.[1] Such is, *a fortiori*, the case where the deed, in addition to the specified consideration, avers "divers other considerations."[2] And in any view, where a deed recites no consideration, or a nominal or inadequate consideration, then the party claiming under the deed may prove a substantial consideration;[3] though, as against a third party contesting the deed, the onus of proving the consideration will lie on the party claiming under the deed; for the mere statement, in the operative part of a document, that it was made for good and valuable consideration, will not suffice to raise a presumption (when contested by innocent purchasers without notice), that any substantial consideration has ever in fact been given.[4] So, as we have seen, if a contract or other deed under seal specifies any particular consideration, as, for instance, love and affection, and omits all mention of any other consideration, no extrinsic proof of another can in general be given, because such proof would contradict the deed.[5] It is otherwise, as has been just noticed, if the object be to establish or negative the existence of fraud, in which case such proof will be admissible.

§ 1049. It is scarcely necessary to add that not only a *bonâ fide* purchaser without notice is entitled to assail a deed for want of consideration, but that the same right belongs to the bankrupt assignee of the grantor, and to purchasers of the estate at sheriff's sale.[6] Hence judgment creditors, as well as subsequent innocent purchasers

Bonâ fide purchasers and judgment vendees may assail consideration.

[1] Gale *v.* Williamson, *ut supra*; Miller *v.* Goodwin, 8 Gray, 542; McKinster *v.* Babcock, 26 N. Y. 378; Hayden *v.* Mentzer, 10 Serg. & R. 329; Bank U. S. *v.* Brown, Riley (S. C.) Ch. 138.

[2] Pomeroy *v.* Bailey, 43 N. H. 118; Benedict *v.* Lynch, 1 Johns. Ch. 370; Chesson *v.* Pettijohn, 6 Ired. L. 121.

[3] Peacock *v.* Monk, 1 Ves. Sen. 128; Tull *v.* Parlett, M. & M. 472; Leifchild's case, L. R. 1 Eq. 231; Hilton *v.* Homans, 23 Me. 136; Wood *v.* Beach, 7 Vt. 522; Pierce *v.* Brew, 43 Vt. 292; Frink *v.* Green, 5 Barb. 455; Benedict *v.* Lynch, 1 Johns. Ch. 370; Hope *v.* Smith, 35 N. Y. Sup. Ct. 458; White *v.* Weeks, 1 Penn. 486; Hayden *v.* Mentzer, 10 S. & R. 323; Weaver *v.* Wood, 9 Barr, 220; Bowser *v.* Cravener, 56 Penn. St. 132; Booth *v.* Hynes, 54 Ill. 363; Laudman *v.* Ingram, 49 Mo. 212.

[4] Kelson *v.* Kelson, 10 Hare, 385. Supra, § 1043.

[5] Peacock *v.* Monk, 1 Ves. Sen. 128, per Ld. Hardwicke; cited by Alderson, B., in Gale *v.* Williamson, 8 M. & W. 408. But see Clifford *v.* Turrell, 1 Y. & C. Ch. R. 138; 9 Jur. 633, *S. C.* on appeal; Taylor's Ev. § 1040.

[6] Estabrook *v.* Smith, 6 Gray, 572; Cheney *v.* Gleason, 117 Mass. 557; Sweetzer *v.* Bates, 117 Mass. 466; Rose *v.* Taunton, 119 Mass. 100; Hitchcock

from the grantor, may show that the deed was a mere gift,[1] or that it was simply an advancement,[2] or that the nominal was greater than the real consideration.[3]

V. SPECIAL RULES AS TO DEEDS.

Deeds not open to variation by parol proof.

§ 1050. To deeds the rules just expressed are eminently applicable, for the reason that the more solemn are the formalities prescribed by a dispositive document, and the more permanent are meant to be the dispositions it makes, the more unjust is its variation by an agency so liable to careless or fraudulent falsification as is unwritten speech. Hence it is that the courts are uniform in their refusal to admit, except in cases of fraud, or gross concurrent mistake, parol evidence to contradict or to vary the terms of a deed as between the parties.[4] The same

v. Kiely, 41 Conn. 611; Hecht *v.* Koegel, 25 N. J. Eq. 135; Carpenter *v.* Carpenter, 25 N. J. Eq. 194; Phelps *v.* Morrison, 25 N. J. Eq. 538; Ellinger *v.* Crowl, 17 Md. 361; Sanborn *v.* Long, 41 Md. 107; Dietrich *v.* Koch, 35 Wis. 618; Bigelow *v.* Doolittle, 36 Wis. 115; Duvall *v.* Bibb, 4 Hen. & M. 113; Swift *v.* Lee, 65 Ill. 336; Andrews *v.* Andrews, 12 Ind. 348; Harrison *v.* Castner, 11 Ohio St. 339; Johnson *v.* Taylor, 4 Dev. L. 355; Wade *v.* Saunders, 70 N. C. 270; Johnson *v.* Lovelace, 51 Ga. 18; Myers *v.* Peek, 2 Ala. 648; Carter *v.* Happel, 49 Ala. 539; Patten *v.* Casey, 57 Mo. 118; Ames *v.* Gilmore, 59 Mo. 337; Turbeville *v.* Gibson, 5 Heisk. 565; Groesbeck *v.* Seeley, 13 Mich. 329; Shotwell *v.* Harrison, 22 Mich. 418 (quoted supra, § 1043); Peck *v.* Vandenberg, 30 Cal. 11; Menton *v.* Adams, 49 Cal. 620.

[1] Gelpcke *v.* Blake, 19 Iowa, 263; Johnson *v.* Taylor, 4 Dev. N. C. 355; Myers *v.* Peek, 2 Ala. 648.

[2] Gordon *v.* Gordon, 1 Metc. (Ky.) 285.

[3] Abbott *v.* Marshall, 48 Me. 44; McKinster *v.* Babcock, 26 N. Y. 378; Foster *v.* Reynolds, 38 Mo. 553; Metzner *v.* Baldwin, 11 Minn. 150. See Rose *v.* Taunton, 119 Mass. 100.

[4] See cases cited supra, §§ 1014, 1045; Jenkins *v.* Einstein, 3 Biss. 128; Kimball *v.* Morrell, 4 Greenl. 368; Pride *v.* Lunt, 19 Me. 115; Gerry *v.* Stimpson, 60 Me. 186; Whitmore *v.* Learned, 70 Me. 276; Proctor *v.* Gilson, 49 N. H. 62; Vermont R. R. *v.* Hills, 23 Vt. 681; Butler *v.* Gale, 27 Vt. 739; Childs *v.* Wells, 13 Pick. 121; Harlow *v.* Thomas, 15 Pick. 66; Raymond *v.* Raymond, 10 Cush. 134; Dodge *v.* Nichols, 5 Allen, 548; Howe *v.* Walker, 4 Gray, 318; Winslow *v.* Driskell, 9 Gray, 363; Warren *v.* Cogswell, 10 Gray, 76; Stowell *v.* Buswell, 135 Mass. 340; Hall *v.* Eaton, 139 Mass. 217; Howes *v.* Barker, 3 Johns. R. 506; Jackson *v.* Steamburg, 20 Johns. R. 49; Kenney *v.* Atken, 9 Daily, 500; Eighmie *v.* Taylor, 98 N. Y. 288; Hyer *v.* Little, 20 N. J. Eq. 443; Snyder *v.* Snyder, 6 Binn. 483; Stine *v.* Sherk, 1 Watts & S. 195; Caldwell *v.* Fulton, 31 Penn. St. 475; Tobin *v.* Gregg, 34 Penn. St. 461; Timms *v.* Shannon, 19 Md. 296; Richmond R. R. *v.* Sneed, 19 Grat. 354; Trullinger *v.* Webb, 3 Ind. 198; Burns *v.* Jenkins, 8 Ind. 417; New Albany Co.

protection is applied to plans which are annexed to and made part of deeds,[1] though in such case the incorporation must be clearly made out.[2] To deeds also, with peculiar rigor, is the rule applied, that to what is written no new ingredients can be added by parol.[3] But a specialty may be varied by a subsequent parol agreement as effectually as by an unsealed document.[4]

Party and privy cannot contradict averments.

§ 1051. That which is averred in a deed neither party nor privy can contradict. Thus, where a wife signed a deed with her husband, which deed contained no release of dower, it was held inadmissible, after his death, to defeat her claim for dower, by proving that at executing the deed, for five dollars paid her, she agreed to release her dower.[5] A covenant of warranty, also, against "all the world claiming under the grantor," cannot be enlarged by parol into a warranty against

v. Fields, 10 Ind. 187; Sage *v.* Jones, 47 Ind. 122; Taylor *v.* Trulock, 55 Iowa, 448; August *v.* Seeskind, 6 Coldw. 166; Porter *v.* Jones, 6 Coldw. 313; Bryan *v.* Walsh, 7 Ill. 557; Lindsey *v.* Lindsey, 50 Ill. 79; Case *v.* Peters, 20 Mich. 298; Beers *v.* Beers, 22 Mich. 60; Orton *v.* Harvey, 23 Wis. 99; Marshall *v.* Dean, 4 J. J. Marsh. 583; Dickinson *v.* Dickinson, 2 Murph. N. C. 279; Williamson *v.* Wilkinson, 2 Dev. Eq. 376; Patton *v.* Alexander, 7 Jones (N. C.) L. 603; Atkinson *v.* Scott, 1 Bay, 307; Milling *v.* Crankfield, 1 McCord, 258; Bratton *v.* Clawson, 3 Strobh. 127; Norwood *v.* Byrd, 1 Rich. (S. C.) 135; Logan *v.* Bond, 13 Ga. 192; Hanby *v.* Tucker, 23 Ga. 132; Sawyer *v.* Vories, 44 Ga. 662; Phillips *v.* Costley, 40 Ala. 486; Parsons *v.* Woodward, 73 Ala. 348; Wade *v.* Percy, 24 La. An. 173; Caldwell *v.* Layton, 44 Mo. 220; Turner *v.* Turner, 44 Mo. 535; King *v.* Fink, 51 Mo. 209; Westbrooks *v.* Jeffers, 33 Tex. 86. So as to governor's patents. Iowa Falls R. R. *v.* Woodbury Co., 38 Iowa, 498.

Thus parol evidence is inadmissible to vary the description unambiguously given in a deed of the land conveyed thereby; Stowell *v.* Buswell, 135 Mass. 340; to insert a warranty; Naumberg *v.* Young, 44 N. J. L. 331; see Eighmie *v.* Taylor, 98 N. Y. 288; to show that a chattel mortgage was intended to embrace property not specifically included therein; Evera *v.* Davis, 51 Iowa, 637; to show that land was sold by the acre, where the contract describes a gross tract sold as an entirety for a gross sum; Wadhams *v.* Swan, 109 Ill. 46; to show where there was a warranty against all claims except certain taxes, that the warrantor contemporaneously and orally agreed to pay such taxes. MacLeod *v.* Skiles, 81 Mo. 595; *S. C.* 51 Am. Rep. 254.

[1] Renwick *v.* Renwick, 9 Rich. (S. C.) 50; Way *v.* Arnold, 18 Ga. 181.

[2] Chesley *v.* Holmes, 40 Me. 536.

[3] See supra, § 936; Barton *v.* Dawes, 12 C. B. 261; Llewellyan *v.* Jersey, 11 M. & W. 183; Noble *v.* Bosworth, 19 Pick. 314; Clark *v.* Houghton, 12 Gray, 38; Swick *v.* Sears, 1 Hill (N. Y.) 17; Acker *v.* Phœnix, 4 Paige, 305; Rathbun *v.* Rathbun, 6 Barb. 98; Machir *v.* McDowell, 4 Bibb. 473.

[4] Canal Co. *v.* Ray, 101 U. S. 522; supra, §§ 1018, 1045.

[5] Lothrop *v.* Foster, 51 Me. 367.

all the world in general.[1] Where a deed for a farm contains no reservation of the growing crop to the grantor, such reservation cannot be proved by parol.[2] And where the owner of land, in a conveyance of a portion thereof, granted "a right of way to be used in common over and upon the land of the grantor, on the easterly side of the land conveyed," parol evidence was held inadmissible to show that the grant was intended by the grantor to be only a right to reach a portion of the land conveyed.[3]

Certificate of acknowledgment open to parol dispute.

§ 1052. It has been said that parol evidence is inadmissible to contradict the certificate of acknowledgment of a deed.[4] But this conclusion is founded on a *petitio principii*. We cannot logically declare that a deed is acknowledged, when the acknowledgment is the point in dispute, for this is equivalent to saying that we know it is a deed because it is acknowledged, and that we know it is acknowledged because it is a deed. The true view is, that the certificate of acknowledgment is *primâ facie* proof of the facts it contains, if within the officer's range, but is open to rebuttal, between the parties, by proof of gross concurrent mistake or fraud. In favor of purchasers for valuable consideration without notice, it is conclusive as to all matters which it is the duty of the acknowledging officer to certify, if he has jurisdiction.[5] As to all other persons it is open.

[1] Raymond *v.* Raymond, 10 Cush. 134.

[2] Austin *v.* Sawyer, 9 Cow. 39; Wintermute *v.* Light, 46 Barb. 278; Smith *v.* Porter, 39 Ill. 28; McIlvaine *v.* Harris, 20 Mo. 457. But see contra, Merrill *v.* Blodgett, 34 Vt. 480; Backenstoss *v.* Stahler, 33 Penn. St. 251; Harbold *v.* Kuster, 44 Penn. St. 392; Flynt *v.* Conrad, Phill. (N. C.) L. 190. And see Robinson *v.* Pritzer, 3 W. Va. 335.

[3] Miller *v.* Washburn, 117 Mass. 371.

[4] Greene *v.* Godfrey, 44 Me. 25; Kerr *v.* Russell, 69 Ill. 666.

[5] 3 Washb. on Real Prop. (4th ed.) 326; Smith *v.* Ward, 2 Root, 374; Jackson *v.* Schoonmaker, 4 Johns. R. 161; Thurman *v.* Cameron, 24 Wend. 87; Schrader *v.* Decker, 9 Barr, 14; Hale *v.* Patterson, 51 Penn. St. 289; Williams *v.* Baker, 71 Penn. St. 482; Duff *v.* Wynkoop, 74 Penn. St. 300; Heeter *v.* Glasgow, 79 Penn. St. 79; Miller *v.* Wentworth, 4 Weekly Notes, 88; Eyster *v.* Hathaway, 50 Ill. 521; Wannell *v.* Kem, 57 Mo. 478; Tatum *v.* Goforth, 9 Iowa, 247; Borland *v.* Walrath, 33 Iowa, 130; Pringle *v.* Dunn, 37 Wis. 449; Dodge *v.* Hollingshead, 6 Minn. 25; Edgerton *v.* Jones, 10 Minn. 427; Fisher *v.* Meister, 24 Mich. 447; Hourtienne *v.* Schnoor, 33 Mich. 274; Johnson *v.* Pendergrass, 4 Jones L. 479; Ford *v.* Teal, 7 Bush, 156; Woodhead *v.* Foulds, 7 Bush, 222; Hughes *v.* Colman, 10 Bush, 246; Bledsoe *v.* Wiley, 7 Humph. 507; Westbrooks *v.* Jeffers, 33 Tex. 86; Landers *v.* Bolton, 26 Cal. 406.

In Louisiana, "since the Act of 1858,

to dispute.[1] When executed in conformity with statute, it may be regarded as a judicial act; but even treating an acknowledgment as

where a married woman, with the authorization of her husband, and the sanction and certificate of the judge, borrows money, the creditor is not bound to show that the money was used for her separate benefit and advantage, but the debt may be enforced against her, . . unless she shows that with the knowledge and connivance of the lender, the money was borrowed and used, not for her separate benefit, but for that of her husband." Woods, J., Portier *v.* Bank, 112 U. S. 450.

As English authorities on this point, see Doe *v.* Lloyd, 1 M. & Gr. 671, 684; Kinnersley *v.* Orpe, 1 Doug. 58; and other cases cited and criticised supra, § 741.

The officer may himself be examined as to the competency of the party. Truman *v.* Lore, 14 Ohio St. 151.

As to effect of acknowledgments as entitling a document to be received in evidence, see supra, §§ 740–1.

As to acknowledgment of sheriff's deeds, see supra, §§ 981–2.

That in such cases the presumption is in favor of regularity, see Addis *v.* Graham, 88 Mo. 197. As to evidence to dispute acknowledgment, see Drew *v.* Arnold, 85 Mo. 129. That it is not necessary for the officer to explain the contents of the deed to the married woman, see Webb *v.* Webb, 87 Mo. 540.

[1] In Pennsylvania we have the following:—

"Under the Act of the 24th February, 1770, 1 Sm. 307, establishing a mode by which husband and wife may convey the estate of the wife, the official certificate of acknowledgment is the only evidence that the wife has acknowledged the deed in the form required by the statute, in order to make a valid conveyance of her interest in real estate, and, except in cases of fraud and duress, it is conclusive of every material fact appearing on its face. But, though it is not conclusive as between the parties in cases of fraud and imposition, or of duress, and may be overcome by parol evidence, it is conclusive as to subsequent purchasers for a valuable consideration without notice. Schrader *v.* Decker, 9 Barr, 14; Louden *v.* Blythe, 4 Harris, 532; Louden *v.* Blythe, 3 Casey, 22; Michener *v.* Cavender, 2 Wright, 334; Hall *v.* Patterson, 1 P. F. Smith, 289.

"But it is conclusive of such facts only as the magistrate is bound to record and certify, not of facts which he is not required to certify under the provisions of the statute. The general rule in regard to certificates given by persons in official station is, that the law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted in evidence. 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. So, where an officer's certificate is made evidence of facts, he cannot extend its effects to other facts by stating those also in the certificate; but such parts of the certificate will be suppressed. 1 Greenleaf's Evid. § 498; Omicbund *v.* Barker, Willes R. 549, 550; Wolfe *v.* Washburn, 6 Cowen, 261; Johnson *v.* Hocker, 1 Dall. 406; 3 Cowen & Hill's Evidence, note 701, p. 1044.

"As the magistrate is not required by the act to certify that the wife was

a judicial act, it follows that it may be collaterally impeached by proof, not only of fraud and want of jurisdiction, but of gross patent violation of the ordinary rules of justice.[1]

§ 1053. When an acknowledgment is defective in any of its averments, these may be supplied by parol proof.[2] It is enough if

of full age when she acknowledged the deed, she is not concluded by his certificate of the facts from showing that she was a minor when she signed and delivered it." Williams, J., Williams *v.* Baker, 71 Penn. St. 481; S. P., Ledger Co. *v.* Cook, 6 Weekly Notes, 421.

In Hector *v.* Glasgow, 79 Penn. St. 79, the rule is thus stated by Paxson, J.:—

"The certificate of a justice of the peace of the acknowledgment of a deed or mortgage is a judicial act. It is conclusive of the facts certified to in the absence of fraud or duress. This is the current of all the authorities in this state. Jamison *v.* Jamison, 3 Whart. 457; Hall *v.* Patterson, 1 P. F. Smith, 289; McCandless *v.* Engle, Ibid. 309. In the case first cited it was held that parol evidence of what passed at the time of the acknowledgment was not admissible for the purpose of contradicting the certificate, except in cases of fraud and imposition. In a number of cases parol evidence has been freely admitted to overthrow the certificate, as in Michener *v.* Cavender, 2 Wr. 337; Louden *v.* Blythe, 4 Harris, 541; and Schrader *v.* Decker, 9 Barr, 14. But in all these cases gross fraud and imposition had been practised, affecting the acknowledgment itself. There is another class of cases in which parol evidence has been admitted to show facts *dehors* the certificate, as in Keen *v.* Coleman, 3 Wr. 299, where a married woman fraudulently represented that she was a widow.

"The true rule deducible from the authorities is: that the certificate of the justice of the acknowledgment of a deed or mortgage is a judicial act, and, in the absence of fraud or duress, conclusive as to the facts therein stated. A purchaser *bonâ fide* and without notice of the fraud is protected against it, but as to all other persons parol evidence may be admitted to show fraud or duress connected with the acknowledgment."

Where a deed when offered in evidence appears to be duly attested and acknowledged, the presumption is that it was attested at the time of its execution; and this presumption can be overcome only by clear and satisfactory evidence to the contrary, such as is required for the reformation or rescission of a deed or other instrument on the ground of mistake. Pringle *v.* Dunn, 37 Wis. 449.

In Kerr *v.* Russell, 69 Ill. 666, the court held that on the uncorroborated testimony of the party an acknowledgment could not be set aside. S. P., Knowles *v.* Knowles, 83 Ill. 1; McPherson *v.* Sanborn, 88 Ill. 150.

In North Carolina, by statute, a married woman's acknowledgment may now be impeached on the same grounds as her husband's. Ware *v.* Nesbit, 94 N. C. 663, affirming Jones *v.* Cohen, 82 N. C. 85.

[1] Supra, § 495.

[2] Carpenter *v.* Dexter, 8 Wall. 513; though see Johnston *v.* Haines, 2 Ohio, 55; Ennor *v.* Thompson, 46 Ill. 214; Graham *v.* Anderson, 42 Ill. 514; Borland *v.* Walrath, 33 Iowa, 130. See Harty *v.* Ladd, 3 Oregon, 353.

there be a substantial compliance with the statute.[1] A defect in the wife's acknowledgment in a suit not involving the wife's dower has been held in Michigan not to exclude the deed when offered to prove the husband's transfer of his title.[2] And in New York, where a certificate of acknowledgment to a deed averred that the identity of the person acknowledging was proved to the officer by a witness named, who, being sworn, stated his place of residence, and that he knew the persons proposing to acknowledge to be the identical ones described in, and who executed the deed, it was ruled that the certificate was sufficient within the recording statute, it being the opinion of the court that it was not necessary to specify in the certificate that the officer had satisfactory evidence of the identity of the person acknowledging, and that the facts stated showed that he had such evidence.[3]

Defective acknowledgment may be explained by parol.

The certificate of the officer taking the acknowledgment, it should be added, is evidence of its own genuineness, when the officer is recognized by the local law as competent for the purpose.[4]

§ 1054. We have just seen that the sanctity attached to deeds has secured for them a peculiarly vigilant application of the rule that, between parties, a written contract is not to be varied by parol. The very sanctity, however, that invites this protection is an additional reason why there should be peculiar precautions to keep deeds from being used as the instruments of fraud, either actual or constructive. Hence it is that the courts have united in holding that evidence is admissible to show that a deed was in fact not executed,

Between parties, deeds may be varied on proof of ambiguity and fraud.

[1] Carpenter *v.* Dexter, 8 Wall. 513; Thayer *v.* Torrey, 37 N. J. L. 339; McIntire *v.* Ward, 5 Binney, 296; Jamison *v.* Jamison, 5 Whart. 457; Miller *v.* Wentworth, 4 Weekly Notes, 82; Simpson *v.* Montgomery, 25 Ark. 365; Calumet *v.* Russell, 68 Ill. 426; Dial *v.* Moore, 51 Mo. 589; Hughes *v.* Colman, 10 Bush. 246; Smith *v.* Elliott, 39 Tex. 201. See Hardin *v.* Kirk, 49 Ill. 153; Wannell *v.* Kem, 57 Mo. 478, laying down a stricter rule as to examination of married women.

[2] Conrod *v.* Long, 33 Mich. 78.

As to particular exceptions to acknowledgments, see Morton *v.* Smith, 2 Dill. 316; Woodruff *v.* McHarry, 56 Ill. 218; Crispen *v.* Hannavan, 50 Mo. 415; Callaway *v.* Fash, 50 Mo. 420.

[3] Ritter *v.* Worth, 58 N. Y. 628; reversing *S. C.* 1 N. Y. S. C. (T. & C.) 406.

[4] 3 Washb. Real Prop. (4th ed.) 326; Tracy *v.* Jenks, 15 Pick. 468; Thurman *v.* Cameron, 24 Wend. 87; People *v.* Snyder, 41 N. Y. 402; Keichline *v.* Keichline, 54 Penn. St. 76.

or that its execution was only conditional ;[1] that its execution was procured by fraud or duress,[2] or by concurrent mistake ;[3] that it was never delivered, or delivered only contingently ;[4] or that its purpose was illegal.[5] When a deed, also, uses ambiguous terms, these terms may be explained by parol ;[6] and, for the purpose of bringing out the true meaning, extrinsic circumstances may be shown, and proof introduced of all objects to which ambiguous terms may apply, so that such terms may be explained.[7] In deeds, as well as in other dispositive writings, erroneous particulars may be rejected, even between the parties, as surplusage ;[8] and the parties, when there is a latent ambiguity concerning them, may be identified by parol.[9] Even usage, in cases of doubtful terms, may be introduced to elucidate such terms ;[10] and a party to a deed may be examined, in cases of doubt, to explain his own intent.[11] So far as concerns consideration, the most solemn deed is open to collateral attack ; and the recital of consideration existing, while it precludes the grantor from disputing generally the fact that some consideration existed, does not prevent either him or the grantee from explaining, as against third parties, what the consideration really was.[12]

The limitations, also, which have been expressed as to contracts are to be strictly applied to deeds. Thus, all prior conferences between the parties are merged in and extinguished by a deed ;[13] yet in equity, if not at law, a deed may be rescinded, or even reformed, on parol proof of concurrent mistake or fraud.[14] It is true that under the statute of frauds a deed cannot in this way be ordinarily made to pass a larger interest in land ;[15] but even under that statute equity will sustain such a reformed deed, when there has been, on the one side, a performance of the contract.[16] And recitals of deeds, while inoperative (except to prove pedigree or ancient reputation) as to strangers, may be, in so far as they are general, open to variation and explanation by the parties.[17]

[1] Supra, § 927.
[2] Supra, § 931.
[3] Supra, § 933.
[4] Supra, § 930.
[5] Supra, § 935.
[6] Supra, § 937.
[7] Supra, §§ 942–6. See Vignee *v.* Brady, 35 La. An. 560.
[8] Supra, § 945.
[9] Supra, §§ 950 *et seq.*
[10] Supra, § 961.
[11] Supra, § 955.
[12] Supra, § 1042.
[13] Supra, § 1014.
[14] Supra, § 1019.
[15] Supra, § 1024.
[16] Supra, § 904.
[17] Supra, § 1040.

§ 1054 *a*. A deed may be invalid for the purpose of conveying title, but may be valid as an admission.[1]

Invalid deed may be an admission.

§ 1055. We have already seen that a *bonâ fide* purchaser from a party may attack a prior fraudulent conveyance of such party. The same right may be exercised by a party *bonâ fide* purchasing the property under an execution.[2] And averments of consideration do not bind third parties.[3]

Deed may be attacked by *bonâ fide* purchasers and judgment vendees.

§ 1056. A mortgage may be impeached for fraud on the same principles that have just been stated as applicatory to deeds.[4] When so impeached, the mortgagee may show other considerations than those recited in the mortgage.[5] But between the mortgagor and the mortgagee, at common law, the mortgagor cannot set up the falsity of the consideration as a defence.[6]

Mortgage can be impeached for fraud.

§ 1057. A deed, whether of realty or personalty, is subject to the rules we have already laid down in reference to contracts generally, that a conveyance, absolute on its face, may be shown to be a mortgage, or to be a trust. Ordinarily this is done by proceedings in equity; but in states where equity is administered through common law forms, a remedy may be had at common law.[7]

Deed may be shown to be in trust.

VI. SPECIAL RULES AS TO NEGOTIABLE PAPER.

§ 1058. Additional reasons come in to apply with distinctive stringency to negotiable paper the rule, that a document cannot, when sued on contractually, be varied by parol proof. It would destroy business if those who put their names to such paper could, when it is passed into the hands of *bonâ fide* holders, set up private understandings by which their liability could be qualified. Hence it is, that for the purpose of qualifying such liability, when negotiable paper is sued on, the parties signing such paper cannot set up parol evidence to affect

Negotiable paper not susceptible of parol variation.

[1] Supra, § 697; infra, § 1124.

[2] See supra, §§ 1046 *et seq.*

[3] Supra, §§ 923, 1044.

[4] Clark *v.* Houghton, 12 Gray, 38.

[5] Abbott *v.* Marshall, 48 Me. 44; McKinster *v.* Babcock, 37 Barb. 265; *S. C.*, 26 N. Y. 378; Foster *v.* Reynolds, 38 Mo. 553. See Metzner *v.* Baldwin, 11 Minn. 150.

[6] Meads *v.* Lansingh, Hopk. (N. Y.) 124.

[7] See supra, §§ 1031–5.

their liability to *bonâ fide* holders, nor, even as against parties in privity with themselves, can they set up such evidence unless for the specific purposes to be presently shown.[1] Even, therefore, between

[1] Johnson *v.* Roberts, L. R. 10 Ch. Ap. 505; Mosely *v.* Hanford, 10 B. & C. 729; Free *v.* Hawkins, 8 Taunt. 92; Brown *v.* Wiley, 20 How. 442; Forsythe *v.* Kimball, 91 U. S. 294; Spofford *v.* Brown, 1 McArthur, 223; Brown *v.* Spofford, 93 U. S. 474; Swift *v.* Smith, 102 U. S. 442; White *v.* Bank, Ibid. 658; Burnes *v.* Scott, 117 U. S. 582; Warren *v.* Starrett, 15 Me. 443; Crocker *v.* Getchell 23 Me. 392; Goddard *v.* Hill, 33 Me. 582; Fairfield *v.* Hancock, 34 Me. 93; City Bank *v.* Adams, 45 Me. 455; Porter *v.* Porter, 51 Me. 376; Simpson *v.* Currier, 60 N. H. 19; Rose *v.* Learned, 14 Mass. 154; Billings *v.* Billings, 10 Cush. 178; Prescott Bk. *v.* Caverley, 7 Gray, 217; Wright *v.* Morse, 9 Gray, 337; Davis *v.* Pope, 12 Gray, 193; Davis *v.* Randall, 115 Mass. 547; Alsop *v.* Goodwin, 1 Root, 196; Buckley *v.* Bentley, 48 Barb. 283; Ely *v.* Kilborn, 5 Denio, 514; Halliday *v.* Hart, 30 N. Y. 474; Meyer *v.* Beardsley, 30 N. J. L. 236; Stiles *v.* Vandewater, 48 N. J. L. 67; Mason *v.* Graff, 35 Penn. St. 448; Anspach *v.* Bast, 52 Penn. St. 356; Alter *v.* Langebartel, 5 Phila. 151; Coughenour *v.* Suhre, 72 Penn. St. 464; Wharton *v.* Douglass, 76 Penn. St. 276; Wilmer *v.* Harris, 5 Har. & J. 1; McSherry *v.* Brooks, 46 Md. 103; Holzworth *v.* Koch, 26 Ohio St. 33; Quaker City Bank, 26 W. Va. 48; Tucker *v.* Talbot, 15 Ind. 114; McClintic *v.* Cory, 22 Ind. 170; Campbell *v.* Robbins, 29 Ind. 271; Fow *v.* Blackstone, 31 Ill. 538; McEwan *v.* Ortman, 34 Mich. 325; Racine Bank *v.* Keep, 13 Wis. 209; Daniel *v.* Ray, 1 Hill S. C. 32; Hunter *v.* Graham, 1 Hill S. C. 370; Bartlett *v.* Lee, 33 Ga. 491; McLaren *v.* Bank, 52 Ga. 131; Henderson *v.* Thompson, 52 Ga. 149; Haley *v.* Evans, 60 Ga. 157; Holt *v.* Moore, 5 Ala. 521; Standifer *v.* White, 9 Ala. 527; West *v.* Kelly, 19 Ala. 353; Cowles *v.* Townsend, 31 Ala. 133; Adams *v.* Thomas, 54 Ala. 175; Heaverin *v.* Donnell, 15 Miss. 244; Inge *v.* Hance, 29 Mo. 399; Ewing *v.* Clark, 76 Mo. 545; Ragsdale *v.* Gosset, 2 Lea, 729; Borden *v.* Peay, 20 Ark. 293; San Jose Bank *v.* Stone, 59 Cal. 183; Daniel on Neg. Inst. § 80.

"Where the supposed defect or infirmity in the title of the instrument appears on the face at the time of the transfer, the question whether the party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law, as has been held by this court in several cases. Andrews *v.* Pond, 13 Pet. 65; Fowler *v.* Brantly, 14 Pet. 318. But it is a very different thing when it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Goodman *v.* Simonds, 20 How. 366; Collins *v.* Gilbert, 94 U. S. 758." Clifford, J., Brown *v.* Spofford, 95 U. S. 339.

In Collins *v.* Gilbert, *ut supra*, a draft was duly made and accepted and delivered to C., who received it as security for the performance of a contract. C. transferred it, and it, before maturity, came into plaintiff's hands, as he claimed, for value. It was ruled

parties in privity, there being no allegation of fraud, or duress, or concurrent mistake, it is inadmissible for a maker or acceptor to show that, at the time of the signature, it was agreed that it should not be binding except on contingencies, or was not meant to be a negotiable note ;[1] or that it was intended that the note should be renewed from time to time ;[2] though, as between the parties or those infected with notice, it is admissible to show that a local currency is intended to be the medium of the payment.[3]

that unless notice to plaintiff thereof could be shown, evidence of the circumstances attending the giving of the bill to C. could not be shown against plaintiff.

"Decided cases almost without number support that proposition, but if the note or bill is founded in fraud, or was fraudulently obtained and put in circulation, the indorsee must prove that he paid value for it before he can recover the amount. Tucker *v.* Morrill, 1 Allen, 528 ; Maither *v.* Maidstone, 1 C. B. (N. S.) 287 ; Sistermans *v.* Field, 9 Gray, 337 ; Brush *v.* Scribner, 11 Conn. 390." Clifford, J., Collins *v.* Gilbert, 94 U. S. 758.

As to presumption of regularity, see infra, § 1301.

On the general topic of variation of negotiable paper by parol, see Cunningham *v.* Wardell, 12 Me. 466 ; Boody *v.* McKenney, 23 Me. 517 ; Hatch *v.* Hyde, 14 Vt. 25 ; Trustees *v.* Stetson, 5 Pick. 506 ; Tower *v.* Richardson, 6 Allen, 351 ; Currier *v.* Hale, 8 Allen, 47 ; Hollenbeck *v.* Shutts, 1 Gray, 431 ; Allen *v.* Furbish, 4 Gray, 431 ; Billings *v.* Billings, 10 Cush. 178 ; Barnstable Savings Bank *v.* Ballou, 119 Mass. 487 ; Perry *v.* Bigelow, 128 Mass. 129 ; Erwin *v.* Saunders, 1 Cow. 249 ; Woodward *v.* Foster, 18 Grat. 200 ; Graves *v.* Clark, 6 Blackf. 183 ; Miller *v.* White, 7 Blackf. 491 ; Stack *v.* Beach, 74 Ind. 571 ; Foy *v.* Blackstone, 31 Ill. 538 ; Jones *v.* Albee, 70 Ill. 34 ; Wren *v.* Hoffman, 41 Miss. 616 ; Jones *v.* Jeffries, 17 Mo. 577 ; Smith *v.* Thomas, 29 Mo. 307.

[1] Woodbridge *v.* Spooner, 5 B. & Ald. 333 ; Free *v.* Hawkins, 8 Taunt. 92 ; 1 J. B. Moore, 535 ; Moseley *v.* Hanford, 10 B. & C. 729 ; Foster *v.* Jolly, 1 Cromp., M. & R. 703 ; Brown *v.* Wiley, 20 How. 442 ; Pierpont *v.* Longden, 46 Conn. 499 ; Sears *v.* Wright, 24 Me. 278 ; Underwood *v.* Simonds, 12 Met. 275 ; Barnstable Savings Bank *v.* Ballou, 119 Mass. 487 ; Perry *v.* Bigelow, 128 Mass. 129 ; McDonald *v.* Elfes, 61 Ind. 279 ; Wood *v.* Surrells, 89 Ill. 107 ; Schroer *v.* Wessell, 89 Ill. 113 ; Hypes *v.* Griffin, 89 Ill. 134 ; Bristow *v.* Catlett, 92 Ill. 17 ; Foster *v.* Clifford, 44 Wis. 569 ; Gliddens *v.* Harrison, 59 Ala. 481 ; Bostwick *v.* Duncan, 60 Ga. 383 ; Litchfield *v.* Falconer, 2 Ala. 280 ; McClanaghan *v.* Hines, 2 Strobh. 122.

As between parties it may be shown that a note was payable at a particular bank. See Brent *v.* Bank, 1 Peters, 92 ; McKee *v.* Boswell, 33 Mo. 567 ; Patten *v.* Newell, 30 Ga. 271.

[2] Diercks *v.* Roberts, 13 S. C. 338 ; Pilmer *v.* Bank, 16 Iowa, 321 ; Haddock *v.* Woods, 46 Iowa, 433. See Cowles *v.* Garrett, 30 Ala. 341. Supra, § 948.

[3] Thorington *v.* Smith, 8 Wall. 1, 12. Infra, § 1058 ; supra, § 948.

The exceptions to the rule above stated are as follows:—

As against an immediate party, or a party with notice, the defendant may prove that his signature was obtained by duress or fraud;[1] but against a remote party, taking the paper *bonâ fide*, and in due course of business, such duress or fraud cannot be set up, unless notice of it be brought home to him;[2] though, where the defendant shows his signature was obtained by duress or fraud, the plaintiff, though a remote indorsee, will be required to prove consideration.[3] In such cases, however, the evidence, to justify equitable relief, should be plain and strong.[4]

[1] Story's Eq. § 1531; Byles on Bills, 7th Am. ed. 181; supra, § 931; Hoare *v.* Graham, 3 Camp. 56; Forsythe *v.* Kimball, 91 U. S. 291; Brewster *v.* Brewster, 38 N. J. L. 119; Hill *v.* Gaw, 4 Barr, 493; Martin *v.* Berens, 67 Penn. St. 460; Coughenour *v.* Suhre, 71 Penn. St. 464; Wharton *v.* Douglass, 76 Penn. St. 276; Davidson *v.* Vorde, 52 Iowa, 354.

[2] Smith *v.* Martin, 9 M. & W. 304; C. & M. 58.

[3] Story on Bills, §§ 193–4; 2 Greenl. on Ev. § 172; Harvey *v.* Towers, 6 Ex. 656; Bailey *v.* Bidwell, 13 M. & W. 656; Berry *v.* Alderman, 14 C. B. 95. See, however, *contra*, as to the burden of consideration, Smith *v.* Martin, 9 M. & W. 304; C. & M. 58.

Whether the fraud that invalidates the transfer must be fraud intended at the time of delivery, or whether, to establish fraud, it is sufficient to show that there was a mistake between the parties which the plaintiff subsequently, fraudulently, and in violation of good faith, determined to avail himself of, has been much discussed. The English courts, and most of the courts of this country, including the Supreme Court of the United States, hold that fraud is only a defence when it entered into the original transaction. In Pennsylvania and other States, if it be proved that the signature was obtained on a statement that it was to impose only a qualified obligation on the signer, and if the party obtaining the signature seeks to enforce it absolutely, this by itself is a fraud which either *pro tanto* or totally precludes recovery. See Renshaw *v.* Gans, 7 Barr, 117; and note by Judge Sharswood to Byles on Bills, 7th Am. from 13th Eng. ed. 103. The course of the Pennsylvania courts in this relation (see authorities in following notes) may be explained (as is stated by McLean, J., in Bank U. S. *v.* Dunn, 6 Peters, 51, the leading case in which parol evidence in such cases is excluded) by the fact that in that State equitable defences are admissible in common law suits. In jurisdictions in which equitable defences are not so receivable, but where there is a distinct chancery jurisdiction, there is no reason why a bill in equity would not lie in such cases to restrain the party who thus improperly obtains another's signature from negotiating or suing on such paper. See Walden *v.* Skinner, 101 U. S. 577, and authorities hereafter cited.

[4] Brown *v.* Spofford, 95 U. S. 474; Battles *v.* Laudenslager, 5 Weekly Notes, 339. Supra, § 1033.

The English rule, prior to the passage of the judicature act, is given in Abrey *v.* Crux, L. R. 5 C. P. 37, which was an action by payee against drawer of a

It is admissible for the defendant, also, to show that the paper with the defendant's signature was given to the plaintiff only as an escrow ;[1] or that when delivered there was no agreement between defendant and plaintiff that the defendant should be liable on the paper according to the law merchant.[2] Even by courts holding that

bill, in which it was held that it was inadmissible for the defendant to prove that by an oral contemporaneous agreement he was only to be liable in case the plaintiff was not recompensed on the sale of certain securities held by him, which securities the plaintiff continued to hold. "The contract entered into by the defendant," said Bovill, C. J., "was a contract in writing by his signature to the bill as drawer, which imports a liability on the defendant to pay the amount on default of the acceptor and notice to the defendant of such default. That which the plea attempts to set up is, that the defendant, at the time he signed the bill as drawer, entered into a contract under which the payment was to be made at a different time and in a different manner from that which the bill imports—an agreement, in short, which contradicts the written contract, and oral evidence of which is inadmissible, according to the authority of numerous decisions; amongst others, Hoare *v.* Graham, 3 Camp. 57; and Free *v.* Hawkins, 8 Taunt. 92; which were confirmed by Moseley *v.* Hanford, 10 B. & C. 729, and other cases, and adopted in the recent case in this court of Young *v.* Austen, L. R. 4 C. P. 553." Keating and Brett, JJ., concurred. Willes, J., however, had "great doubt as to the propriety of excluding the parol evidence. . . . The agreement alleged in the third plea is, that if the bill should not be duly paid, the plaintiff would sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be sued upon the bill. That is not like the agreement set up in Hoare *v.* Graham, 3 Camp. 57; or in Young *v.* Austen, L. R. 4 C. P. 553, where the agreement was that the bill should be renewed; nor is it like the agreement in Free *v.* Hawkins, 8 Taunt. 92, which was set up for the purpose of postponing the time for payment out of a fund within the control of the maker of the note, and not, as here, under the control of the plaintiff, and providing for a means of payment of the bill. . . . These cases are all distinguishable, inasmuch as they were cases where the defendants were held not to be entitled to contradict by parol evidence a written contract which was as complete at the time it was entered into as it ever was intended to be; for, as Lord Ellenborough says, it would be contrary to first principles to incorporate with a written agreement an incongruous parol condition. . . . I do not see why we should not, in a novel case to which no distinct law is applicable, rather follow the justice of the case than strive to bring the case within a principle which will defeat justice." Abrey *v.* Crux, however, was decided before the passage of the judicature act, by which evidence on which a court of equity would enjoin negotiation of or proceedings on negotiable paper was made admissible in a suit on such paper in a court of law.

[1] Supra, § 930; Searfe *v.* Byrd, 39 Ark. 568.

[2] Supra, § 1017 *a*; Denton *v.* Peters, L. R. 5 Q. B. 475, cited more fully infra. In Connecticut it is held admissible to show by parol, in a suit by the

parol evidence is inadmissible to contradict or vary negotiable paper, it is conceded to be, as between the immediate parties, admissible to prove that by a written agreement contemporaneous with the making or accepting of negotiable paper, the obligation imposed by the law merchant on the maker or acceptor was modified;[1] though to such an agreement a good consideration is requisite.[2] It is difficult to understand, however, why, unless it be so required by statute, a written agreement, outside of the note or bill, should be admissible to correct its terms any more than an oral agreement, unless such written agreement be attached to the bill or note, so as to form part of it. If insolubility by extraneous testimony is an incident of negotiable paper, such insolubility precludes the operation of extraneous written testimony as much as it does that of extraneous oral testimony.

As will presently be more fully seen,[3] latent ambiguities in negotiable paper may be solved by parol. Thus, while under the limitations above given, it is inadmissible to show that it was in-

payee against the maker of a note, that it was agreed by the parties at the time the note was given that it was only to be used to further a special purpose, which purpose had fallen through. Schindler *v.* Muhlheiser, 45 Conn. 153 (1877). "Instead of preventing fraud," said Carpenter, J., "such an application of the rule (excluding parol evidence when offered to vary a contract) would perpetrate a fraud of the grossest character, and bring a reproach upon the law and the administration of justice. It would be unfortunate indeed if such a salutary rule of law could be perverted so as to apply to a case like this."

"In analogy with a deed, it has been held that a written and signed simple contract may be delivered with an express parol condition that it is not to take effect except in a certain event. And the instrument may be so delivered, not only to a stranger, but by one party to the other." Byles on Bills, 7th Am. from 13th Eng. ed. 103, citing Davis *v.* Jones, 17 C. B. 625; Pym *v.* Campbell, 6 E. & B. 370; Rogers *v.* Handley, 32 L. J. Ex. 241. And evidence of the parol condition is admissible, not only when it is relied on as a condition, but also when an action is brought upon it as an agreement. Byles on Bills, *ut sup.*, citing Hindley *v.* Lacy, 34 L. J. C. P. 7. See Foy *v.* Blackstone, 31 Ill. 538. But to a *bonâ fide* holder for value without notice, it is no defence that as between the original parties the paper was delivered as an escrow. Fearing *v.* Clark, 82 Mass. 74; Bank *v.* Strang, 72 Ill. 559; Jones *v.* Shaw, 67 Mo. 667.

[1] Byles on Bills, 100; Bowerbank *v.* Monteiro, 4 Taunt. 844; McManus *v.* Bark, L. R. 5 Ex. 65; Young *v.* Austen, L. R. 4 C. P. 553; Carr *v.* Stephens, 9 B. & C. 758; Davis *v.* Brown, 94 U. S. 420.

[2] McManus *v.* Bark, L. R. 5 Ex. 65.

[3] Infra, § 1062.

tended that the note was to be paid in other than legal currency,[1] yet when by universal local custom "dollar" has a particular meaning assigned to it (*e. g.*, that of Confederate dollar), it is admissible to prove this meaning as to those necessarily aware of such meaning.[2] But local custom cannot ordinarily be introduced to affect the liability of parties to negotiable paper, or to cheques, as fixed by the law merchant.[3]

§ 1059. So far as concerns the immediate contracting parties, a blank indorsement exhibits at the best a contract by implication. It is true that, as to *bonâ fide* holders of papers regularly negotiated, it establishes a liability indisputable if the signature be genuine.[4] As to holders with notice, or parties taking paper after maturity, however, the liability may be modified by parol, on proof of fraud, or of facts which make it inequitable for the plaintiff to recover.[5] On the

Blank indorsements may be explained by parol.

[1] Linville *v.* Holden, 2 McArthur, 329; McMinn *v.* Owen, 2 Dall. 173; Lang *v.* Johnson, 24 N. H. 302; Bradley *v.* Anderson, 5 Vt. 152; Gilman *v.* Moore, 14 Vt. 457; Woodin *v.* Foster, 16 Barb. 146; Hair *v.* La Bronse, 10 Ala. 548; Smith *v.* Elder, 15 Miss. 507; Cockrill *v.* Kirkpatrick, 9 Mo. 688; Baugh *v.* Ramsey, 4 T. B. Mon. 155; Noe *v.* Hodges, 3 Humph. 162; Fields *v.* Stunston, 1 Coldw. 140; Self *v.* King, 28 Tex. 552. See Bryan *v.* Harrison, 76 N. C. 360; Davis *v.* Glenn, 76 N. C. 427.

[2] Thorington *v.* Smith, 8 Wall. 1, 12; see Pilmer *v.* Bank, 16 Iowa, 324; Haddock *v.* Woods, 46 Iowa, 433; Cowles *v.* Garrett, 30 Ala. 341. Supra, § 1058. As to other latent ambiguities see supra, § 957 ff.; supra, § 948.

[3] Merchants' Bank *v.* State Bank, 10 Wall. 604; Higgins *v.* Moore, 34 N. Y. 417; Lawrence *v.* Maxwell, 53 N. Y. 19; Security Bank *v.* National Bank, 67 N. Y. 458. Supra, § 958 ff.

It has, however, been held in England that it is admissible to prove the custom of bill-brokers in the city of London not to indorse bills given to them to deal with, but instead to give the bankers who discount such notes a general guarantee, the object being to show that brokers were guarantors of such bills. Bishop, ex parte, 15 Ch. D. 400, cited in full supra, § 959.

[4] Union Bank *v.* Willis, 8 Met. 504; Brown *v.* Butler, 99 Mass. 179; Way *v.* Butterworth, 108 Mass. 509; Allen *v.* Brown, 124 Mass. 77; Hill *v.* Shields, 82 N. C. 250.

[5] Infra, § 1060. Phillips *v.* Preston, 5 How. 278; Susquehanna Co. *v.* Evans, 4 Wash. C. C. 480; Nat. Bank of Rising Sun *v.* Brush, 10 Biss. 188; Smith *v.* Morrill, 54 Me. 48; Sylvester *v.* Downer, 20 Vt. 355; Barker *v.* Prentiss, 6 Mass. 430; Clapp *v.* Rice, 13 Gray, 403; Smith *v.* Barber, 1 Root, 207; Perkins *v.* Catlin, 11 Conn. 213; Herrick *v.* Carman, 10 Johns. 224; Bruce *v.* Wright, 5 Thom. & C. 81; Boynton *v.* Pierce, 79 Ill. 145; Love *v.* Wall, 1 Hawks, 313; Gomez *v.* Lazarus, 1 Dev. Eq. 205; Davis *v.* Morgan, 64 N C. 570; Mendenhall *v.* Davis, 72 N. C. 150; Marietta Bank *v.* Janes, 66 Ga. 286; Galceron *v.* Noble, 66 Ga. 367.

broad question here involved, there is a strong current of authority to the effect that an indorsement in blank, being but a short-hand expression of a contract, may be expanded and explained by parol between the parties with notice.[1] On the other hand, we have high authorities to the effect that such an indorser cannot show, against his indorsee, or against any other party either with or without notice, that it was agreed that the indorsement was to be without recourse, or for other reasons inoperative.[2]

[1] See Kidson *v.* Dilworth, 5 Price, 564; Castrique *v.* Battigieg, 10 Moore P. C. 94; and see to same effect Susquehanna Co. *v.* Evans, 4 Wash. C. C. 480; Smith *v.* Morrill, 54 Me. 49; Brewer *v.* Woodward, 54 Vt. 581; Derry Bank *v.* Baldwin, 41 N. H. 434; 44 Id. 174; Hamburger *v.* Miller, 48 Md. 317; Bruce *v.* Wright, 3 Hun, 548; Ross *v.* Espy, 66 Penn. St. 481; Hudson *v.* Wolcott, 39 Ohio St. 618; Bailey *v.* Stoneman, 41 Ohio St. 148; Rothchild *v.* Grix, 31 Mich. 150; Grensel *v.* Hubbard, 51 Mich. 95; Heiske *v.* Brousard, 55 Tex. 201; see Preston *v.* Gould, 64 Iowa, 14.

[2] Daniel on Neg. Inst. § 718; Alvey *v.* Crux, 5 L. R. C. P. 37; Free *v.* Hawkins, 8 Taunt. 92; Hoare *v.* Graham, 3 Camp. 57; Bank U. S. *v.* Dunn, 6 Pet. 51; Brown *v.* Wiley, 20 How. 442; Bank U. S. *v.* Higginbottom, 9 Pet. 51; Cox *v.* Bank, 100 U. S. 704; Marten *v.* Cole, 104 U. S. 30; Specht *v.* Howard, 16 Wall. 564; Prescott Bk. *v.* Caverly, 7 Gray, 217; Howe *v.* Merrill, 5 Cush. 80; Dale *v.* Gear, 38 Conn. 15; Bank of Albion *v.* Smith, 27 Barb. 489; Chaddock *v.* Vanness, 35 N. J. L. 522, overruling Johnson *v.* Mortimer, 9 N. J. L. 144; Woodward *v.* Foster, 18 Grat. 205; Beattie *v.* Brown, 64 Ill. 360; Skelton *v.* Dustin, 92 Ill. 491; Courtney *v.* Hogan, 93 Ill. 101; Campbell *v.* Robins, 29 Ind. 271; Stack *v.* Beach, 74 Ind. 571; Levering *v.* Washington, 3 Minn. 323; First Nat. Bank *v.* Nat. Marine Bank, 20 Minn. 23; Rodney *v.* Wilson, 67 Mo. 123. See Bigelow, Bills, etc., 168. But see Levan *v.* Vannevar, 137 Mass. 132; Winchester *v.* Whitney, 138 Mass. 549; Barnard *v.* Gaslin, 23 Minn. 192; Smith *v.* Case, 9 Or. 278.

From a learned Maine judge we have the following review of cases:—

"In Brewster *v.* Dana, 1 Root, 267, it is said by the court that a blank indorsement has no certain import until filled up. In Barker *v.* Prentiss, 6 Mass. 430, the indorsement was in blank, which implies *primâ facie* an absolute transfer of the note, but the court held that parol evidence was admissible to show what the real contract was, and that the note was indorsed for collection only. The same doctrine was advanced in Herrick *v.* Carman, 10 Johns. 224. Same in Lawrence *v.* Stonington Bank, 6 Conn. 521. In Boyd *v.* Cleveland, 4 Pick. 525, the plaintiff was permitted to show by parol evidence, that at the time of the indorsement of the note to him the defendant agreed to pay it if the maker did not, and that the implied conditions requiring demand and notice were dispensed with. Same in this state. Fullerton *v.* Rundlett, 27 Me. 31.

"In Weston *v.* Chamberlin, 7 Cush. 404, the precise question was determined which is raised in this case: whether a prior indorser of a promissory note can maintain an action for contribution against a subsequent indorser, on proving that, by an oral agreement

The conflict may in some measure be reconciled by accepting the following conclusions:—

(1) The contract of an indorser in blank is governed by the same principles, as to variation by parol, as is the contract made by the

between the indorsers, at the time of indorsing the note, they were, as between themselves, co-securities; and the court held that he could. The same doctrine was affirmed in Clapp *v.* Rice, 13 Gray, 403. Also in Phillips *v.* Preston, 5 How. U. S. R. 278; 16 Curtis, 396. . . .

"It is idle to attempt to reconcile these decisions with the doctrine that a blank indorsement is in effect a contract in writing not to be varied by parol, and that in these cases it is not varied. In all these cases the contracts implied in the blank indorsements are varied, in fact swallowed up and extinguished, so far as they are in conflict, by the express verbal agreements. So far as both are alike, or not in conflict, both are permitted to stand. But when they are in conflict the implied contract yields, and the express contract, whether written or verbal, prevails.

"In Taunton Bank *v.* Richardson, 5 Pick. 436, the plaintiff offered to prove that by a verbal agreement, made prior to the indorsement of the note in suit, demand and notice had been dispensed with. This was resisted upon the ground that it would vary the written contract created by the blank indorsements. The answer of the court was, 'That the evidence did not attempt to change the contract, but to show that a condition beneficial to the defendants had been *waived* by them; that they had agreed to dispense with notice, not that by the contract itself notice would not be necessary.' It is not surprising that legal minds should not rest satisfied with the logic of this decision. If by a previous or contemporaneous verbal agreement an important condition of a written contract is waived, is not the written contract *varied* by the verbal agreement? And is not the rule violated, which holds that all previous and contemporaneous negotiation and discussion on the subject are merged or extinguished by the writing, and cannot be shown to vary it? If not, then one condition after another might in this way be waived, until nothing would be left of the written contract, and yet the rule referred to would not be violated. Conditions in written contracts may unquestionably be waived by subsequent verbal agreements without violating any rule of law, but not by previous or contemporaneous ones—a distinction which seems to have been overlooked in the case just noticed.

"The only rational ground on which to justify the admission of evidence of a verbal agreement to control the contract implied by law in a blank indorsement is that laid down by Mr. Justice Washington, in Susquehanna Bridge Co. *v.* Evans, 4 Wash. C. C. 480 (U. S. D. p. 396, § 2132), namely, 'The reasons which forbid the admission of parol evidence, to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note in hand.'

"The evidence is offered in conformity with the familiar rule that the law does not imply a contract where an express one has been made. 'Expressum facit, cessare tacitum.' Perkins *v.* Catlin, 11 Conn., on page 226, a case in which this question is very

makers and accceptors of negotiable paper; following in this respect the rulings of the Supreme Court of the United States in Martin *v.* Cole, 104 U. S. 30 (cited below), and of the English Privy Council in Macdonald *v.* Whitfield, 8 H. of L. & P. C. 745 (also cited below), and differing from the rulings of Judge Washington and the Pennsylvania courts.

(2) Wherever a court of equity would interpose to restrain suit on a negotiation of paper where the signature of maker or acceptor

fully and ably discussed, and the conclusion reached that a blank indorsement is not a contract in writing; that the law implies a contract, as in a great variety of other cases, simply because the parties have failed to make an express one, and because otherwise the indorsement would be meaningless; that a blank indorsement is only *primâ facie* evidence of the contract implied by law; and that it is competent, as between the parties to the indorsement, to prove, by parol evidence, the agreement which was in fact made, at the time of the indorsement." Walton, J., in Smith *v.* Morrill, 54 Me. 49. See, to same general effect, Downer *v.* Chesebrough, 26 Conn. 39; Ross *v.* Espy, 66 Penn. St. 481.

In North Carolina we have the following ruling:—

"There is no written contract to be altered; the whole (except the signature, which by itself does not make a contract) exists in parol, and must be established by such proof. It may be admitted, and the authorities seem that way, that when a person, other than the payee or indorsee of a note, writes his name across the back of it, after it has been delivered by the maker, and not as a part of the original transaction, and delivers it for value to another, the law presumes that he intended to become a guarantor of the note. But this presumption is not one of law, but of fact merely, and may be rebutted. In Love *v.* Wall, 1 Hawks, 313, a second indorser of a promissory note was allowed, in defence of an action brought against him by the first indorser, to prove an agreement different from what the law presumes from the order of their names on the back of the instrument, and that in fact they were jointly liable as sureties for the maker. In Gomez *v.* Lazarus, 1 Dev. Eq. 205, it was taken as clear that the acceptor of a bill of exchange, as between him and an indorser, might prove that they were joint sureties for the drawer. In Davis *v.* Morgan, 64 N. C. Rep. 570, the payee of a note who had written his name in blank across the back was permitted to prove that such signature was not intended as an indorsement, but as a receipt of payment from the maker. In Sylvester *v.* Downer, 20 Vt. 355, the court held that by an indorsement in blank the defendant became presumptively bound as a joint promisor. But Redfield, J., adds, 'But the signature being blank, he may undoubtedly show that he was not understood to assume any such obligation.' See, to the same effect, Clapp *v.* Rice, 13 Gray, 403. See, also, Perkins *v.* Catlin, 11 Conn. 213, and numerous other cases cited in a note on page 121 of 2 Parsons on Notes & Bills." Rodman, J., in Mendenhall *v.* Davis, 72 N. C. Rep. 154; but see Norton *v.* Coons, 6 N. Y. 33.

was unduly obtained, it will interpose where an indorsement in blank was unduly obtained, with this difference, that where the question is whether a person unacquainted with business, or a person of weak intellect, is fraudulently imposed on, a less potent degree of proof of such fraudulent imposition may be required when all that the signer did was to write his name on a blank piece of paper with nothing on top of it than when he put his name under a specific engagement in writing which on its face bound him to payment.[1]

(3) What evidence is sufficient to establish fraud or concurrent mistake is a question dependent on the concrete case. It is agreed on all sides that the evidence must be plain and strong.[2] The difference between the Pennsylvania courts, and courts following in the same line, and the Supreme Court of the United States and the courts of Massachusetts, and of other states, is that by the former courts it is held that, as between the parties, to press a suit on negotiable paper in the teeth of an agreement between the parties to the contrary, is an act of fraud which equity would restrain, whereas the last-mentioned line of courts hold that to sustain the intervention of equity the party obtaining the signature under a false statement of its effect must have made such statement with fraudulent intent.

(4) In England, under the judicature act, in Pennsylvania, and in courts adopting a similar system, evidence that the defendant's signature was obtained by fraud, or made under concurrent mistake, is admissible (subject to the above distinctions) in defence to a common law suit on the contested paper.[3]

[1] See supra, § 1058; Dale *v.* Gear, 38 Conn. 15; Benler *v.* Morris, 52 N. Y. 570; Hill *v.* Ely, 5 S. & R. 363.

[2] Supra, § 1033.

[3] "An indorsement may, perhaps, be excepted from the rule in the text on account of its twofold operation, it being at once an express assignment to the indorsee of the right of action against the acceptor, and containing incorporated therewith an implied conditional promise on the part of the indorser to pay on the acceptor's default. This conditional promise may be varied by parol, so as to increase the indorser's liability. Phipson *v.* Kelner, 4 Camp. 285; Burgh *v.* Legge, 5 M. & W. 418; Brett *v.* Lovett, 13 East, 214. It may therefore, by analogy, well be varied by parol so as to diminish his liability." Byles on Bills (7th Am. from 13th Eng. ed. 103, note).

"If there be a written or even verbal agreement between an indorser and his immediate indorsee that the indorsee shall not sue the indorser but the acceptor only, it has been held that such an agreement is a good defence on the part of the indorser against his immediate indorsee suing in breach of the

§ 1060. Generally as between parties with notice, or parties

agreement." Byles on Bills, 154, citing Pike *v.* Street, 1 M. & M. 226 ; 1 Dans. & L. 159 ; Clark *v.* Pigott, 1 Salk. 126 ; 12 Mod. 193; Goupy *v.* Harden, 7 Taunt. 159 ; Soares *v.* Glyn, 8 Q. B. 24; Thompson *v.* Clubly, 1 M. & W. 212. "*Indeed, the contract between indorser and indorsee does not consist exclusively of the writing popularly called an indorsement, though that indorsement be a necessary part of it.* The contract consists partly of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser and received by the indorsee. That intention may be collected from the words of the parties to the contract, whether spoken or written, from the usage of the place or of the trade, from the course of dealing between the parties, or from their relative situation." Byles on Bills, 154, citing Kidson *v.* Dilworth, 5 Price, 564; Castrique *v.* Battigieg, 10 Moore P. C. 94.

In Martin *v.* Cole, 104 U. S. 30, the question arose on a writ of error to the Supreme Court of the territory of Colorado, on a suit by Cole, the first indorsee of a promissory note, against Martin, the payee and the first indorser. The defendant, on the trial, offered to prove that by an agreement between him and the plaintiff, at the time of the indorsement, "Martin should indorse his name on the note in blank, to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note." This evidence was excluded in the trial court, and its exclusion approved by the territorial supreme court, and finally approved by the Supreme Court of the United States. In giving the opinion of the latter court, Matthews, J., rejects the position taken by the Supreme Court of Pennsylvania in Ross *v.* Espy, 66 Penn. St. 481, that "the contract of indorsement is one *implied* by the law from the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes the proof to alter or vary the terms of an express agreement." He declares that such an indorsement "is an express contract, and is in writing, some of the terms of which, according to the custom of merchants, and for the convenience of commerce, are usually omitted, but not the less on that account perfectly understood. All its terms are certain, fixed, and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full. It is spoken of by Wharton (Law of Evidence, § 1059) as a contract at *short* hand. The same view is taken in Daniel on Negotiable Instruments, § 718, where the author states, as a resulting conclusion, that embodies the true principles applicable to the subject, that 'in an action by immediate indorsee against an indorser, no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer, against him.'" It is further stated that the tenor of a blank indorsement

taking the paper out of the ordinary course of business, agreements is fixed by the law merchant as definitely as is that of the engagement of the maker of a note or acceptor of a bill; and no doubt it is of much importance to the business community that there should be such uniformity. But does the law merchant, as is argued by the eminent judge whose opinion is last quoted, prescribe that between the parties, evidence that *primâ facie* liability on an indorsement is not subject to variation by parol? In a case hereafter more fully cited, it was said by Lord Watson, in 1883, giving the opinion of the English Privy Council, that "it is a well-established rule of law that the whole facts and circumstances attendant on the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signature upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, *are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them.*" Macdonald *v.* Whitfield, 8 H. of L. & P. C. 745. As sustaining this view will hereafter be given citations from American courts to the same effect, aside from those from Pennsylvania, Iowa, and Tennessee. If this view, however, be correct, we may accept as part of the law merchant the rule which admits parol testimony of the relations of the parties, for the purpose of qualifying or explaining their engagements as exhibited by their indorsements in blank. Nor is this position necessarily inconsistent with the statement of Mr. Justice Matthews in Martin *v.* Cole, where, after relying on Bank of the U. S. *v.* Dunn, 6 Pet. 51 (where, as we have seen, the court left open the question whether the defence would not have been good in equity), he proceeds to say that in Forsythe *v.* Kimball, 91 U. S. 291, the doctrine that parol evidence cannot be received to vary negotiable paper is reaffirmed "with the addition that, in the absence of fraud, accident, or mistake, the rule is the same in equity as in law." In Forsythe *v.* Kimball, above cited, which was a suit on a note which it was attempted to modify by parol evidence, the decision was put by Swayne, J., who gave the opinion of the court, on the ground that "it is not claimed that there was either fraud, accident, or mistake touching the securities that were executed. Under these circumstances, the rule is the same in equity as at law. 2 Story's Eq., sect. 1531."

In harmony with Martin *v.* Cole is the doctrine of the Supreme Court of Illinois, given as follows: "It cannot be a parol contract where payee indorses a note in blank, for there is, in legal contemplation, written over his name, the extent and character of his undertaking, which cannot be varied by parol." Beattie *v.* Brown, 64 Ill. 360, adopted by Sheldon, J., in Skelton *v.* Duston, 92 Ill. 52, citing Prescott Bank *v.* Coverly, 7 Gray, 217; Howe *v.* Merrill, 5 Cush. 80; Dale *v.* Gear, 38 Conn. 15; Woodward *v.* Foster, 18 Grat. 200; Charles *v.* Denis, 42 Wis. 56; Rodney *v.* Wilson, 67 Mo. 123. See, also, Specht *v.* Howard, 16 Wall. 564; Skinner *v.* Church, 36 Iowa, 91; Forster *v.* Clifford, 44 Wis. 56. In Courtner *v.* Hogan, 93 Ill. 101, it was held that an indorser of a note cannot be permitted to prove in defence to a suit against him by his immediate indorsee, that it was orally agreed between them at the time of the indorsement that the in-

annexing modifying collateral incidents to the paper or to the

dorser was not to be personally liable. On the other hand, the following are to be noticed, in addition to prior citations to the same effect: In Brewer *v.* Woodward, 54 Vt. 581 (1882), it was held that parol evidence could be received to show that W., who indorsed his name in blank on a note, was not to be liable on the note unless the purchaser should return it on failure to collect it on maturity. In this case the note was payable to A. or bearer. "The law," said Taft, J., "is well settled that the undertaking evidenced by such an indorsement, as between the parties to it, is susceptible of being controlled by oral evidence of the real obligations intended to be assumed at the time of signing. This has, as Redfield, Ch. J., says in Sylvester *v.* Downer, 20 Vt. 355, been so often declared by this court, that it seems needless to refer to the decisions. Barrows *v.* Lane, 5 Vt. 161; Flint *v.* Day, 9 Vt. 345; Strong *v.* Riker, 16 Vt. 554." See to same effect, Rising Sun Bank *v.* Brush, 10 Bissell, 188.

Against A. first indorsee, the payee, who was indorser in blank, may show by parol that the object of the indorsement was to pass the title only. Otherwise in an action by a remote indorsee. Iredell *v.* Wasson, 82 N. C. 308; Hoffman *v.* Moore, Id. 313; see Braswell *v.* Pope, 82 N. C. 57. Or an agreement enlarging liability may be shown. Taylor *v.* French, 2 Lea, 257. Or that indorser waived demand and notice. Dye *v.* Scott, 35 Ohio St. 194.

"While there is much diversity in the English, as well as the American, decisions on the subject of admitting evidence to rebut the legal presumption that every indorser in blank of a negotiable instrument intends to incur the liability which the law attaches to the act of indorsement, in this state (North Carolina), it is settled that in an action by the first indorsee against the payee, a special agreement between them restricting the indorser's (payee's) liability when the indorsement is in blank, may be interposed as a defence to the action." Ashe, J., Iredell *v.* Watson, 82 N. C. 312; citing Mendenhill *v.* Davis, 72 N. C. 150; Davis *v.* Morgan, 64 N. C. 570.

"Between the immediate parties, their understanding of the obligation assumed may be shown by parol proof of the facts and circumstances attending the transaction, and the intention when ascertained will control and determine the liability." Smith, C. J., Hoffman *v.* Moore, 82 N. C. 315. See Hazzard *v.* Duke, 64 Ind. 220.

It is to be observed that by courts holding that blank indorsements cannot be contradicted by parol, parol evidence invalidating the indorsement is admitted whenever such evidence assails consideration. Infra, § 1060 *b*; Woodward *v.* Foster, 18 Grat. 205. Thus, such evidence is received to show that the consideration was upon an unperformed condition. Goggerley *v.* Cuthbert, 2 B. & P. 170; Bell *v.* Ingestre, 12 Q. B. 317; Chaddock *v.* Vanness, 35 N. J. L. 517; or that it was made merely as an agent for remittance to the indorsee; Pollock *v.* Bradbury, 8 Moore, P. C. 227; or that it was merely for the accommodation of the party suing; Dale *v.* Gear, 38 Conn. 15.

In Denton *v.* Peters, L. R. 5 Q. B. 475, it was held that to constitute a valid indorsement as against an immediate indorsee, it is necessary that there should be (1) a writing of the indorser's name, and (2) a delivery of the paper by him to the indorsee with

liabilities of the maker or indorsers, may be shown by parol.[1]

intent not only to pass the property in it, but to guaranty the payment if the acceptor or maker refuse to pay. Parol evidence, therefore, is admissible either (1) to show forgery; or (2) a non-delivery of the paper; or (3) a delivery without the intent to pass the property, or (4) a delivery without intent to guaranty in case of acceptor or maker (as the case may be) is unable to pay. Thus, as in this particular case, it was declared that if the defendant, after putting his name on the paper, had delivered it to an agent to collect the amount, this would not have made the defendant liable to such agent on the paper; and so it was also held that the defendant would not be liable on such delivery, though the plaintiff was not a mere agent, but had an interest in the debt for which the paper was given, if the defendant had not signed for the purpose of transferring title to the plaintiff as indorser. Such cases are analogous to delivery of goods to an agent as a mere go-between, in which no title passes to the agent, as there is no concurrence of minds in the passage of title, and, therefore, no sale.

A memorandum, made on a bill or note before completion, providing that payment shall be contingent, is incorporated in the paper on which it is entered. Byles on Bills, 100; citing Leeds *v.* Lancashire, 2 Camp. 205; Hartley *v.* Wilkinson, 4 M. & S. 505. But the operation of the paper is not affected by the memorandum when it is merely directory, "as if it point out the place of payment (Exton *v.* Russell, 4 M. & S. 505); or be merely an expression of an intended courtesy, as if it intimate a wish that the money lent should not be called in by the payee's executors till three years after his death; Stone *v.* Metcalf, 4 Camp. 217; 1 Starke, 53; or if it import that a collateral security has been given (Wise *v.* Charlton, 4 A. & E. 786; 6 N. & M. 364; Fancourt *v.* Thorne, 9 Q. B. 312); or be intended only to identify and ear-mark the instrument (Brill *v.* Crick, 1 M. & W. 232);" Byles on Bills, 101. An indorser is liable, according to the law of the place where the indorsement was made, such being also the place where the indorsement was payable. Whart. Conf. of L. §§ 454–6; Aymer *v.* Sheldon, 12 Wend. 439; Allen *v.* Bank, 22 Wend. 215.

[1] Leighton *v.* Bowen, 75 Me. 504; Barker *v.* Prentiss, 6 Mass. 430; Kingman *v.* Kelsie, 3 Cush. 339; Riley *v.* Gerrish, 9 Cush. 104; Rohan *v.* Hanson, 11 Cush. 44; Crosman *v.* Fuller, 17 Pick. 171; Creech *v.* Byron, 115 Mass. 324; Case *v.* Spaulding, 24 Conn. 578; Schineler *v.* Muhlheisen, 45 Conn. 154; Graves *v.* Johnson, 48 Conn. 160; Scott *v.* Ocean Bank, 23 N. Y. 239; Milton *v.* R. R., 4 Lansing, 76; Bookstaver *v.* Jayne, 3 Thomp. & C. (N. Y.) 397; Watkins *v.* Kirkpatrick, 26 N. J. L. 84; Petrie *v.* Clarke, 11 S. & R. 377; Walker *v.* Geisse, 4 Wh. 258; Depeau *v.* Waddington, 6 Wh. 220; *S. C.* 2 Am. Leading Cas. 155; Hoffman *v.* Miller, 1 Ibid. 676; Kirkpatrick *v.* Muirhead, 16 Penn. St. 123; National Bank *v.* Perry, 2 Weekly Notes, 484; Haile *v.* Pierce, 32 Md. 327; Peck *v.* Beckwith, 10 Ohio St. 497; Harris *v.* Pierce, 6 Ind. 162; Rawlings *v.* Fisher, 24 Ind. 52; Schmich *v.* Frank, 86 Ind. 250; Klepper *v.* Borchsenius, 13 Ill. App. 318; Collins *v.* Gilson, 29 Iowa, 61; Harrison *v.* McKim, 18 Iowa, 485; Preston *v.* Gould, 64 Iowa, 44; Catlin *v.* Birchard, 13 Mich. 110; Elliott *v.* Elliott, 79 Ky. 277; Foulks *v.* Rhodes, 12 Nev.

Relations of parties with notice may be varied by parol.

Hence, one of two makers of a promissory note may prove, as against parties with notice, that he was only a surety.[1] And as between the parties so liable, their relations may be shown by parol.[2] Consideration, also, as between the parties, may be disputed.[3]

225; Carhart *v.* Wynn, 22 Ga. 24; Dixon *v.* Edwards, 48 Ga. 142; Branch Bank *v.* Coleman, 20 Ala. 140; O'Leary *v.* Martin, 21 La. An. 389; Davidson *v.* Bodley, 27 La. An. 149; Smith *v.* Paris, 53 Mo. 274; Clarke *v.* Scott, 45 Col. 86; Bissenger *v.* Guiteman, 6 Heisk. 277.

But if the question of the existence of an indorsement is at issue, parol evidence is admissible. Supra, §§ 927–8, 1059. Hence parol evidence is admissible to prove that a party's name on a negotiable instrument is not an indorsement. Samarin *v.* Courrégé, 13 La. An. 25; Cole *v.* Smith, 29 La. An. 551.

How far admissions may be received for this purpose, see infra, § 1163.

[1] Hubbard *v.* Gurney, 64 N. Y. 457; overruling Campbell *v.* Tate, 7 Lans. 370, and Benjamin *v.* Arnold, 5 T. & C. 54; and relying on Archer *v.* Douglass, 5 Den. 509; Pintard *v.* Davis, 1 Zab. 632; Davis *v.* Barrington, 30 N. H. 517; Bank *v.* Hoge, 6 Ohio, 17; Schooley *v.* Fletcher, 45 Ind. 86; Porter *v.* Waltz, 108 Ind. 40; Guice *v.* Thornton, 76 Ala. 466. See supra, § 952; Houck *v.* Graham, 106 Ind. 195; see Mansfield *v.* Edwards, 136 Mass. 15; Stevens *v.* Oaks, 58 Mich. 343.

[2] Adams *v.* Flanagan, 36 Vt. 400; Blake *v.* Cole, 22 Pick. 97; Monsen *v.* Drakeley, 40 Conn. 552; Wells *v.* Miller, 66 N. Y. 255; Oldham *v.* Broom, 28 Ohio St. 41; Houck *v.* Graham, 106 Ind. 195.

[3] In Massachusetts, by the statute of 1874, c. 404, "all persons becoming parties to promissory notes payable on time, by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as indorsers." Before this statute, it was held that such parties were original promisors, and that parol evidence was not admissible to show that they were to be treated as indorsers only. Allen *v.* Brown, 124 Mass. 77. See Gibson *v.* Machine Co., Id. 546; Browning *v.* Merritt, 61 Ind. 220.

"When a promissory note, made payable to a particular person or order, is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place.

"1. If he put his name in blank on the back of the note at the time it was made and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note. Schneider *v.* Schiffman, 20 Mo. 571; Irish *v.* Cutler, 31 Me. 536.

"2. Reasonable doubt of the correctness of that rule cannot be entertained; but if his indorsement was subsequent to the making of the note, and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor, which can only be done where there is legal proof of consideration for the promise, unless it be shown that he was connected with the inception of the note.

"3. But if the note was intended for

§ 1060 *a*. It may be determined by parol whether successive indorsers stand to each other as successively liable, in order of

discount, and he put his name on the back of the note with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser, in the commercial sense, and as such would clearly be entitled to the privileges which belong to such an indorser.

"Considerable diversity of decision, it must be admitted, is found in the reported cases where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee and before it is delivered to take effect, the question being whether the party is to be deemed an original promisor, guarantor, or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction is admissible to aid in the interpretation of the language employed. Denton *v.* Peters, 5 Q. B. 475.

"Facts and circumstances attendant at the time of the contract was made are competent evidence for the purpose of placing the court in the same situation, and giving the court the same advantages for construing the contract which were possessed by the actors. Cavazos *v.* Trevino, 6 Wall. 773.

"Courts of justice may acquaint themselves with the facts and circumstances that are the subjects of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the thing described. Shore *v.* Wilson, 9 Cl. & Fin. 352; Clayton *v.* Grayson, 4 Nev. & M. 602; Addison, Contr. (6th ed.) 918; 2 Taylor, Evid. (6th ed.) 1035.

"Evidence to show that the indorsement of the defendant in this case was made before the instrument was indorsed by the payee or delivered to take effect was admitted without objection; but it is not necessary to rest the decision upon that suggestion, as it is clear that the evidence would have been admissible, even if seasonable objection had been made to its competency. Hopkins *v.* Leak, 12 Wend. (N. Y.) 105.

"Like a deed or other written contract, a promissory note takes effect from delivery; and, as the delivery is something that occurs subsequently to the execution of the instrument, it must necessarily be a question of fact when the delivery was made. Parol proof is, therefore, admissible to show when that took place, as it cannot appear in the terms of the note. 2 Taylor, Evid. (6th ed.) 1001; Hall *v.* Cazenove, 4 East, 477; Cooper *v.* Robinson, 10 Mee. & W. 694." Clifford, J., Good *v.* Martin, 95 U. S. 94, ff.

"Where the indorsement is in blank, if made before the payee, the liability must be either as an original promisor or guarantor; and parol proof is admissible to show whether the indorsement was made before the indorsement of the payee and before the instrument was delivered to take effect, or after the

And so of relations of successive indorsers.

priority, or whether they are jointly liable, each for the quota agreed upon, or, in default of agreement, for their respective proportions, share and share alike.[1]

payee had become the holder of the same; and, if before, then the party so indorsing the note may be charged as an original promisor, but if after the payee became the holder, then such a party can only be held as guarantor, unless the terms of the indorsement show that he intended to be liable only as a second indorser, in which event he is entitled to the privileges accorded to such an indorser by the commercial law." Clifford, J., Good *v.* Martin, 95 U. S. 97, 98; adopted in Hoffman *v.* Moore, 82 N. C. 313.

[1] In Macdonald *v.* Whitfield, 8 H. L. & Pr. C. App. 733 (supra, § 1060), it appeared that the directors of a "china-ware" company at St. John's, province of Quebec, mutually agreed to become sureties to the Merchants' Bank of Canada for certain debts of the company, and in pursuance of that agreement successively indorsed three promissory notes of the company. It was held by the Privy Council, in July, 1883 (present Lord Watson, Sir Barnes Peacock, Sir Robert P. Collier, and Sir Arthur Hobhouse), that the directors so indorsing were entitled and liable to equal contribution *inter se*, and were not liable to indemnify each other successively according to the priority of their indorsements. The opinion of the court was delivered by Lord Watson, who, after stating the facts, said: "Their lordships see no reason to doubt that the liabilities *inter se* of the successive indorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law-merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well-established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law-merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law-merchant, is not altered or affected by reference to such acts and circumstances, he may still obtain relief by showing that the party from whom he claims indemnity agreed to give it him; but in that case he sets up an independent and collateral guarantee, which he can only prove by means of a writing which will satisfy the statute of frauds."

It has been held, also, in Massachusetts that as between accommodation indorsers it is admissible to prove that they were, *inter se*, by agreement co-sureties. Clapp *v.* Rice, 13 Gray, 403; Sweet *v.* McAlister, 4 Allen, 355.

"There appears to be no good reason why such evidence would not be admissible as well in an action upon the

§ 1060 *b*. As between the parties, the consideration stated in negotiable paper may be disputed, the existence of any consideration denied, the failure of consideration proved; or another consideration than that stated may be set up.[1] Consideration can always be inquired into between immediate parties and their privies, but, unlike the law as to other contracts not under seal, the law as to the instruments mentioned raises in every case a presumption of the existence of a valid and sufficient consideration.[2] This presumption arises independently of the recited "value received."[3] As parties in this sense are joint makers of a note,[4] the maker and payee of a note; and the indorser and immediate indorsee of a bill or note.[5] Between such parties, when a *primâ facie* case of inadequate consideration is made out, the burden to show consideration is on the plaintiff;[6] and so

Consideration may be inquired into.

paper by one of the accommodation parties against another as indorser, as in an action for contribution, like Clapp *v.* Rice. The evidence would not vary the contract, but, admitting its efficacy, would show how the parties had agreed to bear the burden of it if need were." Bigelow, Bills and Notes, 169, citing Easterly *v.* Barber, 66 N. Y. 433; McNeilly *v.* Patchin, 23 Mo. 40, and other cases. And see Edelen *v.* White, 6 Barb. 408; Griffith *v.* Reed, 21 Wend. 502; Davis *v.* Morgan, 64 N. C. 570. That indorsers may be shown to be cosureties see, also, Paul *v.* Rider, 58 N. H. 119; Nurre *v.* Chittenden, 56 Ind. 462; Melms *v.* Wirdekoff, 14 Wis. 18. See supra, § 952. Cf. Phillips *v.* Preston, 5 How. U. S. 278.

In Pennsylvania, however, it is said that in a suit by a second indorser against a first indorser, it would contravene the statute of frauds to permit the defendant to show by parol that the plaintiff was surety of the maker. Haner *v.* Patterson, 84 Penn. St. 254; supra, § 952.

[1] Supra, §§ 1044, 1060; Story on Bills, § 188; Abbott *v.* Hendricks, 1 M. & G. 795; Barker *v.* Prentiss, 6 Mass. 791; Barnet *v.* Offerman, 7 Watts, 130; Jones *v.* Horner, 60 Penn. St. 214; Clarke *v.* Dedrick, 31 Md. 148; Jones *v.* Buffum, 50 Ill. 277; Foster *v.* Clifford, 49 Wis. 569; Ramsay *v.* Young, 69 Ala. 157; Matlock *v.* Livingston, 9 Sm. & M. 489; Cocke *v.* Blackburne, 57 Miss. 689.

That it is between the parties a defence that the consideration was an unperformed condition. See Ball *v.* Ingestie, 12 Q. B. 317; Goggerley *v.* Cuthbert, 2 B. & P. 170; and other cases cited supra, § 1059.

[2] Bigelow, Bills and Notes, 89, citing Dean *v.* Carruth, 108 Mass. 242.

[3] Hatch *v.* Frayes, 11 Ad. & El. 702; Townsend *v.* Derby, 3 Met. 363; Story on Bills, § 187; Greenl. on Ev. § 271.

[4] Robertson *v.* Deatherage, 82 Ill. 511; see more fully supra, § 1060.

[5] See Daniel on Neg. Inst. § 174; Easton *v.* Pratchett, 1 C., M. & R. 798; Holiday *v.* Atkinson, 5 B. & C. 501; Abbott *v.* Hendricks, 1 M. & Gr. 791; Clement *v.* Reppard, 15 Penn. St. 111. As to admissions in such cases see infra, § 1163.

[6] Conway *v.* Macfarlane, 97 Penn. St. 631. See Moore *v.* Hershey, 90 Penn. St. 196; Zook *v.* Simonson, 72 Ind. 88; Holmes *v.* Cook, 50 Wis. 172; Holendyke *v.* Newton, 50 Wis. 635.

in a suit between indorser and indorsee.[1] When, however, the issue of consideration is made, then it is to be decided by preponderance of proof.[2] Want of consideration, however, cannot be set up by the maker of a note against an indorsee; nor by a prior but not his immediate indorser against an indorsee; nor by the acceptor of a bill against the payee; unless the plaintiff's title be in some way disgraced, or he be shown to have notice of want of consideration, or to have taken the bill after maturity.[3] The notice which taints the remote holder of negotiable paper, not overdue when taken by him, with complicity in such a way as to require him to prove consideration, must be something more than failure to inquire as to floating rumors of the unreliable character of the antecedent party from whom payment is claimed.[4] Purchase by an indorsee must be for value before maturity.[5]

Real parties may be brought out by parol.

§ 1061. It is elsewhere observed that, on suing on a written contract, an undisclosed party may be shown by parol to be the real plaintiff, though not in such a way as to cut off the defendant from any defence he might otherwise have against the agent, who is the nominal plaintiff. It is also shown that a plaintiff, suing a nominal party to a contract, may, in order to charge an undisclosed principal, prove by parol the existence of such principal, but that such nominal party cannot introduce such proof in order to relieve himself from liability.[6] There is no reason why the same distinction should not apply to negotiable paper, as between parties with notice, so far, at least, as to make

[1] Sheedy *v.* Sweeter, 70 Mo. 679.

[2] Delano *v.* Bartleby, 6 Cush. 367; Noxon *v.* De Wolf, 10 Gray, 343. See Small *v.* Clewly, 62 Me. 155.

[3] Story on Bills, § 188; Byles on Bills, 127 ff; Hunter *v.* Wilson, 4 Exch. 489; Hoffman *v.* Bank, 12 Wall. 181.

"When the holder of a negotiable instrument, regular on its face, and payable to bearer, produces it in a suit to recover its contents, and the same has been received in evidence, there is a *primâ facie* presumption that he became the holder of it for value at its date, in the usual course of business." Woods, J., in Pana *v.* Bowler, 107 U. S. 541–2; citing Murray *v.* Lardner, 2 Wall. 110; Collins *v.* Gilbert, 94 U. S. 752; Brown *v.* Spofford, 95 U. S. 474. See, also, Story on Bills, § 178; 2 Greenl. on Ev. § 172.

[4] Goetz *v.* Bank, 111 U. S. 551.

[5] Kellogg *v.* Curtis, 69 Me. 212. In a suit against the makers of a note, proof by them that the note was executed for the accommodation of the payee and indorser, who fraudulently diverted the proceeds, was held to throw on the plaintiff the burden of showing that he was a *bonâ fide* holder for value. Nickerson *v.* Ruger, 76 N. J. 273.

[6] See supra, § 952.

the principal liable on a contract of indebtedness of which the paper, explained and applied by parol, may be evidence.[1] It is clear that an undisclosed principal may by parol admission and guarantee make himself liable on his agent's note,[2] though unless his name appear on the note itself he cannot be made directly liable on the note.[3] And where it is doubtful, on the face of the paper, whether principal or agent is liable, parol evidence may be received to solve the doubt.[4] It may also be proved by parol that a party sued on a note was known by the plaintiff to have signed merely in a representative capacity; and in such case, it being proved that such person acted solely as agent for another, he will not be held liable on the note.[5] *A fortiori*, an agent indorsing a note to his

[1] Jones *v.* Littledale, 6 A. & E. 486; Hoffman *v.* Bank, 12 Wall. 181; Chandler *v.* Coe, 54 N. H. 561; Williams *v.* Glenn, 72 N. C. 253. See Daniel on Neg. Inst. § 418; Bartlett *v.* Hawley, 120 Mass. 92; aff. Tuckerman Co. *v.* Fairbank, 98 Mass. 101; Holzworth *v.* Koch, 26 Ohio St. 33; Scanlan *v.* Keith, 102 Ill. 64.

"It is well settled by decisions in Massachusetts and elsewhere, that a man may make the name and signature of another virtually his own by allowing it to be used as such in the course of his business." Loomis, J., Pease *v.* Pease, 35 Conn. 147; citing Fuller *v.* Hooper, 3 Gray, 334; Bryant *v.* Eastman, 7 Cush. 111; Melledge *v.* Boston Iron Co., 5 Cush. 158; Commercial Bank *v.* French, 21 Pick. 486; Lindus *v.* Bradwell, 5 C. B. 583; Bank of Cape Fear *v.* Wright, 3 Jones Law, 376. To same effect see Edmunds *v.* Hooper, L. R. 1 Q. B. 97; Story on Notes, 7th ed. § 67, note.

[2] Lindus *v.* Bradwell, 5 C. B. 583; Brown *v.* Parker, 7 Allen, 337; cases cited supra, §§ 951–2.

[3] Chitty on Bills, 22; Fenn *v.* Harrison, 3 Durn. & E. 761; Williams *v.* Robbins, 16 Gray, 80; Pentz *v.* Stanton, 10 Wend. 271; DeWitt *v.* Walton, 9 N. Y. 571.

Otherwise as to non-negotiable instruments. Dykers *v.* Townsend, 24 N. Y. 57. See, however, *contra*, Story on Agency, § 155; and see articles in 14 Alb. L. J. 409; 15 Alb. L. J. 117.

[4] Byles on Bills, 27, note; Dow *v.* Moore, 47 N. H. 419; Johnson *v.* Smith, 21 Conn. 627; Bank of Geneva *v.* Patchin Bank, 19 N. Y. 312; Early *v.* Wilkinson, 9 Grat. 68; Musser *v.* Johnson, 42 Mo. 78; Campbell *v.* Nicholson, 12 Rob. (La.) 433; Laflin *v.* Sinsheimer, 48 Md. 411; Tyree *v.* Murphy, 67 Ala. 1; Water Power Co. *v.* Brown, 23 Kans. 676.

[5] Kidson *v.* Dilworth, 5 Price, 364; Dowman *v.* Jones, 7 Q. B. 103; Williams *v.* Robbins, 16 Gray, 77; Pease *v.* Pease, 35 Conn. 131; Mott *v.* Hicks, 1 Cowen, 513; Miles *v.* O'Hara, 1 S. & R. 32; Sharpe *v.* Bellis, 61 Penn. St. 69; Lewis *v.* Brehme, 33 Md. 412; Milligan *v.* Lyle, 24 La. An. 144; Barnstable Bk. *v.* Ballou, 119 Mass. 487. Supra, § 1058. See, however, Davis *v.* England, 141 Mass. 587, where it was held that a note in the form, "I promise to pay," signed "E., Pres. and Treas.," etc., was the note of E., and

principal cannot be held liable on his indorsement to his principal, when the indorsement was made by him, and was known by the plaintiff to have been so made, simply for the purpose of passing the note to the principal.[1] But an agent, signing without any indication of agency on the paper, cannot evade his liability to *bonâ fide* holders without notice by proof that he was only agent.[2] It may, however, be shown by parol, as against a plaintiff proved to be cognizant of the facts, that the defendant's name was attached to the note only as surety;[3] or that the relation of the plaintiff and the

not of the company, and that parol evidence was not admissible to prove that it was understood by the parties that the note was the note of the company, and not of E.

[1] Wharton on Agency, § 295; Castrique *v.* Buttigieg, 10 Moore, P. C. 94; Sharp *v.* Emmett, 5 Whart. 288; Milligan *v.* Lyle, 24 La. An. 144.

[2] Lefevre *v.* Lloyd, 5 Taunt. 749; Beckham *v.* Drake, 9 M. & W. 79; Sowerby *v.* Butcher, 2 C. & M. 368; Leadbitter *v.* Farrer, 3 M. & S. 34; Hancock *v.* Fairfield, 30 Me. 299; Stackpole *v.* Arnold, 11 Mass. 27; Bank of N. A. *v.* Hooper, 5 Gray, 567; Pentz *v.* Stanton, 10 Wend. 276; Bogan *v.* Calhoun, 19 La. An. 472; Lander *v.* Castro, 43 Cal. 497.

In 1 Am. Lead. Cas. 633, the law is thus stated:—

"Where there is a doubt or ambiguity on the face of the instrument, as to whether the person means to bind himself, or only to give an evidence of debt against an institution or body of which he is a representative, parol evidence is undoubtedly admissible; not, indeed, to show the intention of the parties to the contract, but to prove extrinsic circumstances by which the respective liability of the principal and agent may be determined; such as, to which the consideration passed and credit was given, and whether the agent had authority, and whether it was known to the party that he acted as agent. The extent of the principle as to the admissibility of parol evidence appears to be this: Where the names of both principal and agent appear on the instrument, and the contract, though in the name of the agent, discloses a reference to the business of the principal, so that the instrument, as it stands, is consistent of either view, of its being the engagement of the principal or of the agent, parol evidence is admissible, in a suit against the agent, . . . to discharge him, by proving that the consideration passed directly to the principal; as, that credit having been given to the principal alone, the consideration of the note signed by him was an antecedent liability on the part of the principal, and that the other party knew that he acted as agent, and thus destroying all consideration for a liability on his part."

See, also, Wharton on Agency, §§ 290, 495, 458, and an elaborate discussion in Albany Law Journal for 1875, p. 275. See, also, Sumwalt *v.* Ridgely, 20 Md. 107; Haile *v.* Peirce, 32 Md. 327; Lazarus *v.* Skinner, 2 Ala. 718; Smith *v.* Alexander, 31 Mo. 193; McClellan *v.* Reynolds, 49 Mo. 313.

[3] Supra, § 952; Greenough *v.* McClelland, 2 E. & E. 424; Mutual Loan Fund Assoc. *v.* Sudlow, 5 Com. B. (N. S.) 449; Pooley *v.* Harradine, 7 E. &

defendant is that of co-sureties;[1] or that the relation of a person signing his name on the back of a note was not intended by the parties to involve individual liability;[2] or that an indorsement, as against the holder, was solely for the holder's accommodation.[3] The consideration of negotiable paper, as between parties in immediate relationship to each other, being, as we have seen, always open to impeachment,[4] parol evidence is admissible to determine such relationship.[5]

Ambiguities in such paper may be explained.

§ 1062. In any view, ambiguities as to the parties and subject-matter of negotiable paper may be explained by parol, provided that in so doing the explanation is limited to such ambiguities, and in no case the sense of the instrument is overridden:[6] as, for instance, when a person signs a note as "cashier," or "treasurer," to prove the institution of which he is an officer;[7] where A. gives a note as "agent," to

B. 431; Taylor *v.* Burgess, 5 H. & N. 1; Lawrence *v.* Walmsley, 12 Com. B. (N. S.) 799; Bristow *v.* Brown, 13 Ir. Law R. (N. S.) 201; Bailey *v.* Edwards, 34 L. J. Q. B. 41; 4 B. & S. 761, *S. C.*; Bank *v.* Kent, 4 N. H. 221; Adams *v.* Flanagan, 36 Vt. 400; Hubbard *v.* Gurney, 64 N. Y. 457; Bank of St. Mary *v.* Mumford, 6 Ga. 44; Pollard *v.* Stanton, 5 Ala. 451; Emmons *v.* Overton, 18 B. Mon. 643; Ward *v.* Stout, 32 Ill. 399; Dunn *v.* Sparks, 7 Ind. 490.

[1] Sweet *v.* McAllister, 4 Allen, 353; Horne *v.* Bodwell, 5 Gray, 457; Bright *v.* Carpenter, 9 Ohio, 139; though see Johnson *v.* Crane, 16 N. H. 68; and see Oldham *v.* Broom, 28 Ohio St. 41. *Aliter*, when contravening the statute requiring contracts of suretyship to be in writing. Supra, §§ 952, 1059.

[2] Supra, § 1059; Maynard *v.* Fellows, 43 N. H. 255; Harris *v.* Brooks, 21 Pick. 195; Parks *v.* Brinkerhoff, 2 Hill (N. Y.), 663; Northumberland Bank *v.* Eyer, 58 Penn. St. 97; Dale *v.* Moffitt, 22 Ind. 113; Collins *v.* Gilson, 29 Iowa, 61; Day *v.* Billingsly, 3 Bush, 157; Jennings *v.* Thomas, 21 Miss. 617; Powell *v.* Thomas, 7 Mo. 440; Lewis *v.* Harvey, 18 Mo. 74.

[3] Patten *v.* Pearson, 55 Me. 39; Farnum *v.* Farnum, 13 Gray, 508; Driver *v.* Miller, 16 La. An. 131. See cases supra, § 1059.

[4] See supra, § 1044; Jones *v.* Horner, 60 Penn. St. 214; Clarke *v.* Dederick, 31 Md. 148; Jones *v.* Buffum, 50 Ill. 277.

[5] Munroe *v.* Bordier, 8 C. B. 862; Arbouin *v.* Anderson, 1 Q. B. 498; Hoffman *v.* Bank, 13 Wall. 181; Horn *v.* Fuller, 6 N. H. 511; Aldrich *v.* Stockwell, 9 Allen, 45; Brummel *v.* Enders, 18 Grat. 873.

[6] Wilson *v.* Tucker, 10 R. I. 578; Jamison *v.* Pomeroy, 9 Penn. St. 230; Haile *v.* Peirce, 32 Md. 327; Isler *v.* Kennedy, 64 N. C. 530; Lockwood *v.* Avery, 8 Ala. 502; Taylor *v.* Strickland, 37 Ala. 642. Thus, it is inadmissible to prove that the transferee of a note, who is not an indorser, is by custom to be treated as an indorser. Paine *v.* Smith, 33 Minn. 495.

[7] Baldwin *v.* Bank, 1 Wall. 234; Bank of Newburg *v.* Baldwin, 1 Cliff. 519; Farmers' Bank *v.* Day, 13 Vt. 36; Hovey *v.* Magill, 2 Conn. 680.

prove whom he really represented;[1] and when the note recites the consideration, to explain or vary the recital;[2] and so of ambiguity as to collateral stipulations;[3] and as to currency of payment.[4]

VII. SPECIAL RULES AS TO OTHER INSTRUMENTS.

Releases cannot be contradicted by parol.

§ 1063. Releases, especially when under seal, partake of the nature of deeds, and are not susceptible, unless fraud or mutual mistake be set up, of contradiction or variation by parol.[5] It has been held that the principle above stated applies to unliquidated as well as to liquidated claims.[6]

§ 1064. Receipts, being informal and non-dispositive writings, may be modified, explained, or impugned by parol.[7] That this

[1] Paige *v.* Stone, 10 Met. (Mass.) 160; Haile *v.* Peirce, 32 Md. 327; Baker *v.* Gregory, 28 Ala. 544; South. Life Co. *v.* Gray, 3 Fla. 262.

[2] Pitts *v.* Allen, 72 Ga. 69; Anderson *v.* Brown, 72 Ga. 713; Walker *v.* Clay, 21 Ala. 797; Garton *v.* Bank, 34 Mich. 271.

[3] Wilson *v.* Powers, 131 Mass. 539; Bradshaw *v.* Combs, 102 Ill. 428; Des Moines Co. *v.* Hinkley, 62 Iowa, 637.

[4] Supra, § 1058.

[5] Deland *v.* Amesbury, 7 Pick. 244; Leddy *v.* Barney, 139 Mass. 394; Wood *v.* Young, 5 Wend. 620; Stearns *v.* Tappin, 5 Duer, 294; Noble *v.* Kelly, 40 N. Y. 420; State *v.* Messick, 1 Houst. 347; Ill. Cent. R. R. *v.* Welch, 52 Ill. 183; Turnipseed *v.* McMath, 13 Ala. 44. That such an instrument, however, may be avoided by fraud, see Martin *v.* Righter, 10 N. J. Eq. 510.

[6] Noble *v.* Kelly, 40 N. Y. 420; citing Stearns *v.* Tappin, 5 Duer, 294.

[7] Skaife *v.* Jackson, 3 B. & C. 421; Graves *v.* Key, 3 B. & Ad. 313; Wallace *v.* Kelsall, 7 M. & W. 273; Bowes *v.* Foster, 2 H. & N. 779; Farrar *v.* Hutchinson, 9 Ad. & E. 641; Lee *v.* R. R., L. R. 6 Ch. Ap. 527; Edwards *v.* Hancher, L. R. 1 C. P. D. 111; Good, ex parte L. R. 5 C. D. 46; Rollins *v.* Dyer, 16 Me. 475; Richardson *v.* Reede, 43 Me. 161; Furbush *v.* Goodwin, 25 N. H. 425; Nye *v.* Kellum, 18 Vt. 594; Street *v.* Hall, 29 Vt. 165; Guyette *v.* Bolton, 46 Vt. 228; Corlies *v.* Howe, 11 Gray, 125; Pitt *v.* Ins. Co., 100 Mass. 500; Nelson *v.* Weeks, 111 Mass. 223; Calhoun *v.* Richardson, 30 Conn. 210; Coon *v.* Knap, 8 N. Y. 402; Sheldon *v.* Ins. Co., 26 N. Y. 460; Buswell *v.* Poineer, 37 N. Y. 312; Baker *v.* Ins. Co., 43 N. Y. 283; Foster *v.* Newborough, 58 N. Y. 481; Green *v.* Man. Co. 1 Thomp. & C. 5; Joslyn *v.* Capron, 64 Barb. 599; De Lavalette *v.* Wendt, 75 N. Y. 579; Bird *v.* Davis, 14 N. J. Eq. 467; Middlesex *v.* Thomas, 20 N. J. Eq. 39; State *v.* McDonald, 43 N. J. L. 59; Swain *v.* Frazier, 35 N. J. Eq. 326; Pleasants *v.* Pemberton, 2 Dall. 196; Penns. Ins. Co. *v.* Smith, 3 Whart. R. 520; Dutton *v.* Tilden, 13 Penn. St. 46; Gue *v.* Kline, 13 Penn. St. 60; Batdorf *v.* Albert, 59 Penn. St. 59; Russell *v.* Church, 65 Penn. St. 9; McGrann *v.* R. R., 111 Penn. St. 171; Cramer *v.* Shriner, 18 Md. 140; Walker *v.* Christian, 21 Grat. 291; Juley *v.* Barton, 79 Va. 387;

is the case in ordinary receipts for the payment of money is a necessary consequent of the informality of such instruments. But the rule is not limited to ordinary receipts. Thus, in an action by an attaching officer against a receiptor, the latter is not estopped, by a receipt reciting the value of the goods, and that they are free from incumbrance, and agreeing to give them up when the officer should appoint, from setting up the intervening bankruptcy and discharge of the defendants in attachment.[1] Even where a creditor, upon payment of a portion of an undisputed account, gives a receipt in full, he is not thereby precluded from recovering the balance of the account, though the receipt was given intelligently, and there was no fraud or error.[2] To all classes of receipts is the rule applicable. A receipt, for instance, given by a fire or life insurance agent for the premium of a policy, may be explained by parol;[3] and so may a receipt given by such an agent stating that the receipt was "to be

Receipts may be corrected by parol.

Deford *v.* Seinour, 1 Ind. 532; Pauley *v.* Weisart, 59 Ind. 241; Carr *v.* Minor, 42 Ill. 179; Leonard *v.* Dunton, 51 Ill. 482; Elston *v.* Kennicott, 52 Ill. 272; Ditch *v.* Vollhardt, 82 Ill. 134; Rowe *v.* Wright, 12 Mich. 289; Bell *v.* Utley, 17 Mich. 508; Hammond *v.* Harrison, 21 Mich. 274; Schultz *v.* R. R., 44 Wis. 638; Sears *v.* Wempner, 27 Minn. 351; Wilson *v.* Derr, 69 N. C. 137; Clarke *v.* Deveaux, 1 S. C. 172; Heath *v.* Steele, 9 S. C. 86; Trimmer *v.* Thompson, 10 S. C. 164; Dunagan *v.* Dunagan, 38 Ga. 554; Walters *v.* Odom, 53 Ga. 286; City Bank *v.* Kent, 57 Ga. 283; Hogan *v.* Reynolds, 8 Ala. 59; Oakley *v.* State, 40 Ala. 372; Motley *v.* Motley, 45 Ala. 555; Dunn *v.* Pipes, 20 La. An. 276; Draughan *v.* White, 21 La. An. 175; Borden *v.* Hays, 21 La. An. 581; Smith, in re, 22 La. An. 253; Williams *v.* State, 20 Miss. 58; Wallace *v.* Wilson, 30 Mo. 335; Grumley *v.* Webb, 44 Mo. 444; Carpenter *v.* Jamison, 75 Mo. 285; Byrne *v.* Schwing, 6 B. Mon. 199; Hawley *v.* Bader, 15 Cal. 44; Ellicott *v.* Barnes, 31 Kan. 170; Solomon R. R. *v.* Jones, 34 Kan. 443; Pool *v.* Chase, 46 Tex. 207. The fact that the signer is dead makes no difference. Ibid.; Brice *v.* Hamilton, 12 S. C. 32. As to recitals of receipt of purchase-money in deeds, see supra, § 1039.

On an assignment from A. to B. simply acknowledging the receipt of money by the former, evidence by A. that he made a sale of the property to C. and received the money therefor from him, that C. in turn sold to B., and that A., at C.'s request, then conveyed to B., is admissible. Tillotson *v.* Ramsey, 51 Vt. 309.

That preponderance of evidence is required to overcome a receipt, see Neal *v.* Handley, 116 Ill. 418.

[1] Lewis *v.* Webber, 116 Mass. 450.

[2] Ryan *v.* Ward, 48 N. Y. 20.

[3] Reyner *v.* Hall, 4 Taunt. 725; Ferebee *v.* Ins. Co., 68 N. C. 11. See Luckie *v.* Bushby, 13 C. B. 844; Farmers' Ins. Co. *v.* Bair, 82 Penn. St. 33; Cox *v.* Davidge, 51 Tex. 244.

binding until policy is received;"[1] and so a receipt for a note with the words, "which I agree to account for on demand."[2] Where, also, a receipt is embodied in a promissory note, the receipt is open to explanation as fully as if it were in a separate instrument.[3] The same liberty extends to receipts indorsed on deeds or notes;[4] to bankers' pass-books;[5] and to freight receipts.[6] A certificate of deposit issued by a bank is also merely evidence of debt, in the nature of a receipt, and parol evidence is admissible to explain it, as in the case of a receipt.[7]

Receipts for marine insurance are conclusive.

§ 1065. A receipt in a policy of marine insurance is an exception to the rule, and is held to be conclusive,[8] though it is otherwise as to the adjustment of a loss made without full knowledge of the circumstances.[9] Nor, though the usual acknowledgment in a policy of insurance of the

[1] Scnrry *v.* Ins. Co., 51 Ga. 624.

[2] Eaton *v.* Alger, 2 Abb. (N. Y.) App. 5.

[3] Smith et al. *v.* Holland, 61 N. Y. 635.

[4] Straton *v.* Rastall, 2 T. R. 366; Graves *v.* Key, 3 B. & Ald. 313. Supra, §§ 1042–4.

"A receipt is an admission, only, and the general rule is, that an admission, though evidence against the person who made it and those claiming under him, is not conclnsive evidence except as to the person who may have been induced by it to alter his condition."

Per cur. in Graves *v.* Key, 3 B. & Ald. 318. The same rule obtains in equity. Lee *v.* R. R., L. R. 6 Ch. 534. Hence a receipt given as part of a composition with oreditors, although absolutely discharging the debt, may be explained by the terms of the composition, by which the payment was to be made in promissory notes, and was not to be regarded as operative until the notes were paid. Edwards *v.* Hancker, L. R. 1 C. P. D. 111. And so a receipt purporting to be given for the price of goods sold may be explained by showing that the sale was colorable only, and made for the pnrpose of protecting the property from the creditors of the pretended seller, who may recover possession of the goods from the pretended buyer. Bowers *v.* Foster, 2 H. & N. 779.

One trustee, also, may show that the money on a joint receipt was received by his co-trustee. Westley *v.* Clarke, 1 Eden, 357; Brice *v.* Stokes, 1 Ves. 319.

[5] Com. Bk. *v.* Rhind, 3 Macq. Sc. Cas. 643.

[6] Thus, in Hewett *v.* R. R., 63 Iowa, 611, it was held that where a receipt for a car was dated a certain day, it may be shown that, by the custom prevailing, oars receipted for in the afternoon and evening of one day were not in fact delivered nntil the morning of the next day.

[7] Hotohkiss *v.* Mosher, 48 N. Y. 478.

[8] Arnould, Ins. 180, 181; Bigelow on Estoppel, 2d ed. 429; Mutnal Ben. Co. *v.* Ruse, 8 Ga. 536; Illinois Co. *v.* Wolf, 37 Ill. 354.

[9] Lucky *v.* Bnshby, 13 C. B. 844; Reyner *v.* Hall, 4 Tannt. 725; Shepherd *v.* Chewter, 1 Camp. 274; Adams *v.* Sanders, 4 C. & P. 25.

receipt of premium from the assured is conclusive of the fact as between the underwriters and the assured, is it so as between the underwriters and the broker.[1]

§ 1066. A party, however, may, as to innocent third parties, estop himself from disputing a receipt;[2] as where a warehouseman gives a receipt of goods, which the holder passes to a *bonâ fide* dealer.[3] "So, under circumstances which would create an estoppel by conduct, an acknowledgment of receipt of money or property will become binding even between the parties; as in the case of a receipt given by an attaching officer, with knowledge, for goods attached as the property of a third person, whereby the officer is prevented from levying upon other goods, and induced to leave those attached in the possession of the receiptor."[4] So a receipt by a county treasurer, acknowledging the redemption of land sold for taxes, is part of a record title which cannot be contradicted by parol.[5] And if a man by his receipt acknowledges that he has received money from an agent on account of his principal, and thereby accredits the agent with the principal to that amount, such receipt may be conclusive as to payment by the agent.[6] And, as a general

Receipts may be estoppels in favor of third parties, and be conclusive between the parties when incorporating contracts.

[1] Dalzell *v.* Mair, 1 Camp. 532; Anderson *v.* Thornton, 8 Ex. R. 428. See Farmers' Ins. Co. *v.* Bair, 82 Penn. St. 33.

[2] Bigelow on Estoppel, 2d ed. 429; Lake on Cont. 2d ed. 905; Kennedy *v.* Green, 3 M. & K. 699; Hunter *v.* Walters, L. R. 7 Ch. 75; Wyatt *v.* Hertford, 3 East, 147; Jenkins *v.* Power, 6 M. & S. 287; Stackpole *v.* Robbins, 47 Barb. 212; Graves *v.* Dudley, 20 N. Y. 76. See Scott *v.* Whittemore, 27 N. H. 309; Curtis *v.* Wakefield, 15 Pick. 437.

[3] McNeil *v.* Hill, Woolw. 96; citing Austin *v.* Craven, 4 Taunt. 644; Whitehouse *v.* Frost, 12 East, 614; White *v.* Wilkes, 5 Taunt. 176; Conard *v.* Ins., 1 Pet. 386; Gardiner *v.* Suydam, 7 N. Y. 357; Gibson *v.* Bank, 11 Ohio St. 311. See Knights *v.* Wiffen, L. R. 5 Q. B. 660; supra, § 1039; yet, even in such cases, mistake may be set up. Second Nat. Bk. *v.* Walbridge, 19 Ohio St. 419.

[4] Bigelow on Estoppel, 2d ed. 430; citing Dewey *v.* Field, 4 Met. 381; Dezell *v.* Odell, 3 Hill, 215; Dresbach *v.* Minnis, 45 Cal. 223; Bleven *v.* Freer, 10 Cal. 172; Gaff *v.* Harding, 66 Ill. 61. To the same point, see James *v.* Bligh, 11 Allen, 4; Wakefield *v.* Stedman, 12 Pick. 562; Van Ostrand *v.* Reed, 1 Wend. 424; Coon *v.* Knap, 8 N. Y. 402; and see Craig *v.* Lewis, 110 Mass. 377; Candee *v.* Burke, 4 Thomp. & C. 143; *S. C.* 1 Hun, 546; Stone *v.* Vance, 6 Ohio, 246; Dale *v.* Evans, 14 Ind. 288; Stapleton *v.* King, 33 Iowa, 28; Knoblauch *v.* Kronschnabel, 18 Minn. 300; Brown *v.* Brooks, 7 Jones L. 93; Wilson *v.* Duer, 69 N. C. 137; Grumley *v.* Webb, 48 Mo. 562; Rice *v.* Crow, 6 Heisk. 28.

[5] Halsey *v.* Blood, 29 Penn. St. 319.

[6] Hunter *v.* Walters, L. R. 11 Eq. 292.

rule, when a receipt embodies a contract, such contracts are as much guarded from parol variation as are other contracts.[1]

Bonds may be shown by parol to be payable on contingencies.

§ 1067. We have heretofore[2] seen that it is admissible to prove by parol that a written instrument is only an escrow, or that it was delivered with the understanding that it is not to go into effect except upon a contingency that has not happened. It has been also seen[3] that it is admissible to prove by parol, who, with the knowledge of the obligee, were principals on the bond, who sureties. On the same reasoning it is admissible to prove by parol that a bond, by an agreement contemporaneous with its execution, is to have its efficiency conditioned on the happening of a contingency.[4] But this is not allowable when the terms of the bond are thereby impugned.[5] Thus, where a warrant of attorney was given to confess judgment at once, it was held inadmissible to prove by parol an agreement that judgment should only be entered on a specific contingency.[6]

Subscriptions cannot be contradicted by parol.

§ 1068. A subscription to pay money to a business, or other enterprise, may in one sense be regarded as a naked promise to pay a particular amount, and if so, it is to be treated as an ordinary dispositive writing, not *primâ facie* open to parol correction, yet subject to any equities that may exist between the parties.[7] It may be shown, for instance, that the subscription was made on conditions which, so far as the other parties are concerned, have not been complied with.[8] When, however,

[1] Goodwin *v.* Goodwin, 59 N. H. 548; Fay *v.* Gray, 124 Mass. 500; Alcorn *v.* Morgan, 77 Ind. 184; Thompson *v.* Williams, 30 Kan. 114; Harper *v.* Dail, 92 N. C. 394.

[2] Supra, §§ 927, 930.

[3] Supra, § 952.

[4] Chester *v.* Bank, 16 N. B. 336; Morrison *v.* Morrison, 6 Watts & S. 516; Leppoo *v.* Bank, 32 Md. 136; Kerchner *v.* McRae, 80 N. C. 219. See, also, supra, § 255.

[5] Philadelphia R. R. *v.* Howard, 13 How. 307; Musselman *v.* Stoner, 31 Penn. St. 265; Chetwood *v.* Brittan, 5 N. J. Eq. 628; Towner *v.* Lucas, 13 Grat. 705; Wemple *v.* Knopf, 15 Minn. 440.

[6] Fulton *v.* Hood, 34 Penn. St. 365. See, also, Hendrickson *v.* Evans, 25 Penn. St. 441.

[7] Supra, §§ 920–3; Rutland, etc., R. R. *v.* Crocker, 29 Vt. 540; O'Hear *v.* De Goesbriand, 33 Vt. 593; Bull *v.* Talcott, 2 Root, 119; Hackney *v.* Ins. Co., 4 Barr, 185; Erie P. R. *v.* Brown, 25 Penn. St. 156; Plank Road *v.* Arndt, 31 Penn. St. 317; Coil *v.* Pittsburg College, 40 Penn. St. 445; Custar *v.* Titusville, 63 Penn. St. 385; Jones *v.* Turnpike Co., 7 Ind. 547; Sourse *v.* Marshall, 23 Ind. 194; Lawrence *v.* Smith, 57 Iowa, 701.

[8] New York Exc. Co. *v.* De Wolf, 31 N. Y. 273.

subscriptions are interdependent, one made on the faith of the other, then no such equities can be introduced; and each subscriber is estopped, so far as concerns other *bonâ fide* subscribers, from denying the binding effect of his subscription. Nor can a subscriber to a corporation so set up secret parol conditions to modify his subscription.[1]

[1] Gilman *v.* Veazie, 24 Me. 202; George *v.* Harris, 4 N. H. 533; White Mountain R. R. *v.* Eastman, 34 N. H. 124; Stewards of Meth. Ch. *v.* Town, 49 Vt. 29; Brigham *v.* Meed, 10 Allen, 245; Turnpike Co. *v.* Thorp, 13 Conn. 173; Mann *v.* Cook, 20 Conn. 178; Palmer *v.* Lawrence, 3 Sandf. S. C. 161; Crane *v.* Elizabeth Ass., 29 N. J. L. 302; Garrett *v.* R. R., 78 Penn. St. 465; Banet *v.* R. R., 13 Ill. 509; Corwith *v.* Culver, 69 Ill. 502; Palmer *v.* Albee, 50 Iowa, 429; Burhans *v.* Johnson, 15 Wis. 286; Smith *v.* Tallahassee, 30 Ala. 650. See Angell & Ames on Corp. § 146.

In Caley *v.* R. R., 80 Penn. St. 363, the question in the text is thus discussed by Sharswood, J.: "Where one subscribes to the stock of a public corporation prior to the procurement of its charter, such subscription is to be regarded as absolute and unqualified, and any condition attached thereto is void. Bedford Railroad Co. *v.* Bowser, 12 Wr. 29. The reason for this rule is obvious; the commissioners, who are appointed to receive such subscriptions, are not the accredited agents of the corporation, for it is not yet in being, but are rather the agents of the public, acting under limited and definite powers which every one is bound to know; and if he be misled by representations which such agents have no right to make, it is his own folly. Any other rule would lead to the procurement, from the commonwealth, of valuable charters, without any absolute capital for their support, and thus give rise to a system of speculation and fraud which would be intolerable. When, however, the company is once organized, a different order prevails. Such a company may receive conditional subscriptions for its stock, and when it does so do, it is bound to the performance of the conditions therein contained. Railroad Co. *v.* Stewart, 5 Wr. 54; Railroad Co. *v.* Hickman, 4 Ca. 318. Doubtless the act of incorporation might alter this rule, and put all stock subscriptions within the category of and subject them to the same conditions as those made before organization. But the Act of 1849, subject to the provisions of which the plaintiff company was erected, has in it nothing to indicate that the legislature intended to restrict the power which corporations ordinarily possess over their own stock. It follows that the plaintiff might dispose of its stock as of any other of its property in such manner as, in its judgment, might best subserve the purposes of its erection, and to this end might receive conditional subscriptions for such use.

"Again, after the organization of a company, chartered for some public purpose, as in this case for the building of a railroad, if one subscribe, without condition, to the stock of such company, he does so in view of the general powers conferred upon it by the legislature, and he is responsible, with his fellow-corporators, for the proper and lawful exercise of those powers; and he cannot, therefore, set up an unlawful act of the

§ 1069. Where, on the other hand, a subscription has been fraudulently obtained, this fraud may be set up as a defence to an action on the subscription, as to the party guilty of the fraud.[1] But it may be otherwise when the false representations which constitute the alleged fraud were false representations of *law*.[2]

Fraud may be a defence.

Parol evidence is admissible to show, in case of misdescription, for what object the subscription was intended.[3]

§ 1070. So far as bills of lading are receipts, they are open to explanation by parol evidence;[4] and hence, when a contract of car-

directors as an excuse for the non-payment of his subscription, for it is within his own power to prevent such abuse of authority.

"As was said in Graff *v.* The Railroad Co., 7 Casey, 489, the contract of subscription is not only with the company, but also with all the other shareholders; hence the subscriber may not set up even the fraud of the directors in order to defeat his contract. But whenever a power intervenes, over which he can have no control, to alter, in a material point, the character of his contract without his assent, actual or implied, such intervention works his release; as where, by an act of the general assembly, a turnpike company was authorized to alter the termini of its road, in that case it was held that a subscriber to its stock was released from his contract of subscription. Turnpike Co. *v.* Phillips, 2 Pa. R. 184; Plank Road Co. *v.* Arndt, 7 Ca. 317. The reason for this is, that such termini form part of the conditions which enter into the contract, and as the supreme power, over which the subscriber has no control, intervenes to alter such conditions, he is thereby released. A contrary doctrine would involve the unreasonable supposition that a contract might be imposed upon a party who had never assented thereto."

In Garrett *v.* R. R., 78 Penn. St. 465, it was held that where a subscriber to stock of a proposed railroad allowed his name to remain on the articles of association until final organization of the company, he cannot withdraw, although no part of his subscription had been paid up. Nor will he be permitted, in an action against him for the amount due on his subscription, to set up, as a defence, any alleged invalidity of the corporation, by evidence that it had failed to comply with essential conditions prescribed in its charter.

As to obligations of stockholders, see Muir *v.* Bank, infra, § 1249.

[1] Wharton on Agency, § 165; Kennedy *v.* Panama Co., L. R. 2 Q. B. 580; New York Co. *v.* De Wolf, 31 N. Y. 273; Jones *v.* Turnpike Co., 7 Ind. 547; Graff *v.* R. R., 31 Penn. St. (7 Cas.) 489.

[2] Rashell *v.* Ford, L. R. 2 Eq. 750; Lewis *v.* Jones, 4 B. & C. 506; Upton *v.* Tribilcock, 91 U. S. 5; Fish *v.* Cleland, 33 Ill. 243.

[3] Musselman *v.* R. R., 2 Weekly Notes of Cases, 105; Turnpike Co. *v.* Myers, 6 S. & R. 12.

[4] Bates *v.* Todd, 1 Mood. & R. 106; Berkeley *v.* Watling, 7 Ad. & E. 29; Mar. Ins. Co. *v.* Ruden, 6 Cranch, 338; Sutton *v.* Kettell, 1 Sprague, 309; The Lady Franklin, 8 Wall. 325; The Delaware, 14 Wall. 579; The Invincible, 1 Lowell, 225; The I. W. Brown,

riage is made by parol, its terms may be shown, although they contradict the terms of a bill of lading given.[1] Nor does the fact that the shippers gave an order to the warehousemen for a cargo, and then settled with them on the faith of the bill of lading, which for some cause was erroneous, take the case out of the general rule.[2] "No particular form or solemnity of execution is required for a contract of a common carrier to transport goods. It may be by parol, or it may be in writing, in either case it is equally binding."[3] Hence the shipper, who takes a bill of lading, may show that it does not express the terms of the transportation contract.[4] It is otherwise when the bill of lading involves a contract, in which case parol evidence, except in cases of fraud or mistake, cannot be received to vary the terms.[5] A bill

Bills of lading are open to explanation.

1 Biss. 76; O'Brien *v.* Gilchrist, 34 Me. 554; Richards *v.* Doe, 100 Mass. 524; Grace *v.* Adams, 100 Mass. 505; Graves *v.* Harwood, 9 Barb. 477; Putnam *v.* Furman, 71 N. Y. 590; Cafiero *v.* Welsh, 3 Leg. Gaz. 21; Balt. St. Co. *v.* Brown, 54 Penn. St. 77; Mitchell *v.* Express Co., 46 Iowa, 214; Atwell *v.* Miller, 11 Md. 348; Cincin. R. R. Co. *v.* Pontius, 19 Ohio St. 221. See Erb *v.* Keokuk R. R., 43 Mo. 53; Wayland *v.* Moseley, 5 Ala. 430; McTyer *v.* Steele, 26 Ala. 487; Hedricks *v.* Morning Star, 18 La. An. 353; Steamboat *v.* Webb, 9 Mo. 193. A bill of lading is but *primâ facie* evidence of the condition of goods which it states to be in good order. Witzler *v.* Collins, 70 Me. 290.

[1] Mobile R. R. *v.* Jurey, 111 U. S. 584. But see Hill *v.* R. R., 73 N. Y. 351, overruling *S. C.*, 8 Hun, 296.

[2] The I. W. Brown, 1 Biss. 76.

"As to the quantity of goods delivered to a carrier, the bill of lading furnishes *primâ facie* evidence only, and is always open to contradiction and explanation by parol evidence, like any receipt. Wolfe *v.* Myers, 3 Sandf. Sup. Ct. R. 7; Meyer *v.* Peck, 29 N. Y. 590. In the case of Meyer *v.* Peck, it was held that a stipulation in a bill of lading, that 'any damage or deficiency in quantity the consignee will deduct from balance of freight due the captain,' will not be understood as a guarantee that the captain had received the whole quantity of goods specified. That case is an authority in point of this. The language used in this bill of lading is: 'All damage caused by the boat or carrier, or deficiency of cargo from quantity, as herein specified, to be paid by the carrier and deducted from freight.' Here is an agreement that the carrier will be bound by the quantity specified, or that the bill of lading shall furnish the only evidence of the quantity. Such an agreement might, doubtless, be made by a carrier; but the language used would have to be quite clear and explicit to preclude the carrier from showing by parol a mistake in the quantity." Earl, C., Abbe *v.* Eaton, 51 N. Y. 413.

[3] Woods, J., Mobile R. R. *v.* Jurey, 111 U. S. 591, citing Am. Trans. Co. *v.* Moore, 5 Mich. 368; Shelton *v.* Ins. Co., 59 N. Y. 258; Roberts *v.* Riley, 15 La. An. 103.

[4] Ibid.

[5] "Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one

of lading in such case stands on the footing of all other contracts, and cannot be varied by parol unless on proof of fraud or gross

appears to be, that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated. Abbott on Shipping (7th Am. ed.), 323; O'Brien *v.* Gilchrist, 34 Me. 558; 1 Parsons on Shipping, 186; Maclachlan on Shipping, 338; Emerigon on Insur. 251. Regularly the goods ought to be on board before the bill of lading is signed, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel, and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on these goods, as between the shipper and the carrier, by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Rowley *v.* Bigelow, 12 Pick. 307; The Eddy, 5 Wallace, 495. Such an instrument is twofold in its character: that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Maclachlan on Shipping, 338, 339; Smith's Mercantile Law (6th ed.), 308. Beyond all doubt, a bill of lading in the usual form is a receipt for the quantity of goods shipped, and a promise to transport and deliver the same as therein stipulated. Bates *v.* Todd, 1 Moody & Robinson, 106; Berkeley *v.* Watling, 7 Adolphus & Ellis, 29; Wayland *v.* Mosley, 5 Alabama, 430; Brown *v.* Byrne, 3 Ellis & Blackburne, 714; Blaikie *v.* Stembridge, 6 C. B. (N. S.) 907. Receipts may be either a mere acknowledgment 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 to acknowledge payment or delivery, it, the receipt, is only *primâ facie* evidence of the fact, and not conclusive, and, therefore, the facts 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 evidence. 1 Greenleaf's Evidence (12th ed.), 305; Bradley *v.* Dunipace, 1 Hurlstone & Colt. 525. Text-writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree, that the instrument may, as between the carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state or condition was bad, or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites; but in all other respects it is to be treated like other written contracts. Hastings *v.* Pepper, 11 Pickering, 42; Clark *v.* Barnwell *et al.* 12 Howard, 272; Ellis *v.* Willard, 5 Selden, 529; May *v.* Babcock, 4 Ohio, 346; Adams *v.* Packet Co., 5 C. B. (N.

concurrent mistake.[1] Thus, it has been held on high authority[2] that a clean bill of lading imports that the goods are stowed under deck, and that parol evidence, that the vendor agreed that the goods should be stowed on deck could not be legally received, even in an action by the vendor against the purchaser for the price of the goods, which were lost in consequence of the stowage of the goods in that manner by the carrier. Even when it appeared that the shipper, or his agent who delivered the goods to the carrier, repeatedly saw them as they were stowed in that way and made no objection to their being so stowed, the Supreme Court of Maine held that the evidence of those facts was not admissible to vary the legal import of the contract of shipment; and that the bill of lading being what is called a clean bill of lading, it bound the owners of the vessel to carry the goods under deck, though the court admitted that where there is a well-known usage in reference to a particular trade to carry the goods as convenience may require, either upon or under the deck, the bill of lading may import no more than that the cargo shall be carried in the usual manner.[3] So in a Connecticut case, where testimony was offered by the carrier to prove a verbal agreement that the goods might be stowed on deck,[4] the court rejected the testimony, holding that the whole conversation, both before and at the time the writing was given, was merged in the written instrument. Evidence of usage in a particular trade, it is true, is admissible to show that certain goods in that trade may be stowed on deck.[5] "But evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading, or to substitute for the express terms of the instrument an implied agreement or usage

S.) 492; Sack *v.* Ford, 13 C. B. (N. S.) 100." Clifford, J., in The Delaware, 14 Wall. 600.

As to invoice, see Dows *v.* Bank, 91 U. S. 618. Infra, § 1141.

[1] Ibid.; Adams *v.* Packet Co., 5 C. B. (N. S.) 492; Bradley *v.* Dunipace, 1 Hurl. & C. 525; Clark *v.* Barnwell, 12 How. 272; Hastings *v.* Pepper, 11 Pick. 42; Long *v.* R. R., 50 N. Y. 76; Creery *v.* Holly, 14 Wend. 28; Little Rock R. R. *v.* Hall, 32 Ark. 659.

[2] Nelson, J., Creery *v.* Holly, 14 Wend. 28. See The Wellington, 1 Biss. 279.

[3] Clifford, J., in The Delaware, 14 Wall. 600; citing Sproat *v.* Donnell, 26 Me. 187. See, also, 2 Taylor on Evidence, §§ 1062, 1067; Hope *v.* State Bank, 4 Louisiana R. 212; 1 Arnould on Insurance, 70; Lapham *v.* Insurance Co., 24 Pick. 1.

[4] Barber *v.* Brace, 3 Conn. 14.

[5] 1 Smith's Leading Cases (6th American edition), 837, cited by Clifford, J., The Delaware, *ut supra*.

that the carrier shall not be bound to keep, transport, and deliver the goods in good order and condition."[1]

Insurance applications may be explained by parol.

§ 1071. Hereafter we will see[2] how far an applicant for insurance may explain the written statement of his agent, who is also agent of the insurer. We have now to observe that applications made by parties themselves, and statements of their losses, are in like manner open to explanation.[3]

[1] Clifford, J., The Delaware, *ut supra*, citing The Reeside, 2 Sumner, 570; I Duer on Ins. § 17. See, however, Vernard *v.* Hudson, 3 Sumner, 406; Sayward *v.* Stevens, 3 Gray, 101.

As to proposed statute making bills of lading conclusive under certain circumstances, see Congressional Record, Feb. 9, 1888, H. R.

[2] Infra, § 1172.

[3] Connecticut Ins. Co. *v.* Swenck, 94 U. S. 593. In this case the court say:—

"It has repeatedly been held that errors and omissions in the proofs of loss furnished to insurers in cases of fire insurance may be corrected or supplied at the trial. In McMasters *v.* The Insurance Co. of North Amer., 55 N. Y. 222, the plaintiff had stated in his proofs of loss that he had other insurance on the same property (a fact which, if true, avoided his policy), and he had verified his statement by his oath. Yet he was held not to be estopped by the statement, and he was permitted to prove at the trial that the statement was a mistake. Hubbard *v.* The Hartford Fire Ins. Co., 33 Iowa, 325, is to the same effect. So are the Ætna Fire Ins. Co. *v.* Allen, 48 Ill. 431; Comm. Fire Ins. Co. *v.* Huckenburger, 52 Ibid. 464, and numerous other cases that might be cited. But it is contended that evidence to show Nolan's affidavit was a mistake ought not to have been admitted without notice to the insurers before the trial that such evidence would be offered, and in support of this position Campbell *v.* The Charter Oak Fire & Marine Ins. Co., 10 Allen, 213, and Irving *v.* The Excelsior Ins. Co., 1 Bosw. 500, are cited. In the former of these cases it was held, that if an incorrect statement of a material matter has been made through mistake in a notice and proof of loss furnished to insurers, in compliance with a requirement in the conditions of insurance annexed to a policy, and no amended statement has been furnished to the insurers before the trial of an action upon the policy, the insured cannot be allowed to prove the mistake and show that the facts were not as therein stated. But that case is very different from the one we have before us. There a true statement of the material fact in the proofs of loss was called for by the policy, and it was made a condition precedent to the insurer's liability. The erroneous statement, therefore, was relied upon by the assured as the notice required by the conditions of the policy, and as a necessary basis of his suit. It must have been in substance averred in his declaration, and for these reasons the insurers were misled in regard to a matter which the assured had obligated himself to state truly as a condition precedent to his right to remuneration for his loss. But even in that case the court declined to say that the incorrect statement in the proofs of

loss could not be corrected. All that was decided was that the mistake and the correction could not be first made known to the insurers at the trial of the action to recover for the loss, and obviously for the reason that the correction then would be a surprise to them. Irving *v.* The Excelsior Fire Ins. Co. is substantially the same. Neither of the cases can be considered as deciding that an insured is estopped by an erroneous statement of a fact in the proofs of loss furnished by him, even though a true statement of that fact be a condition of the policy. He may correct it, though not first at the trial. But in the case we have in hand it was not a condition of the policy that a statement of the age of the deceased should accompany the proofs of death. The insurer's liability was independent of that. Nolan's affidavit, therefore, was superfluous. And it was but a statement of his conjecture. He stated that according to the best of his judgment the person whose life was insured was between sixty-six and seventy years of age at the time of his death. This can hardly be regarded as a contradiction of the statement made in the application. The insurers ought not to have been misled by it, and it does not appear that they were. They alleged no surprise when the evidence was offered to show that Nolan had no knowledge on the subject and that he was mistaken. We cannot, therefore, say there was error in receiving the evidence."

BOOK III.

EFFECTS OF PROOF.

CHAPTER XIII.

ADMISSIONS.

I. General Rules.

Admissions not to be considered as strictly evidence, § 1075.

Must relate to existing conditions, § 1076.

Non-contractual admissions do not conclude, and may be rebutted, § 1077.

Estoppels do not bind as to strangers, § 1078.

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Credibility of admission a question of fact, § 1080.

Admission may be by acts, § 1081.

Admission of a right distinguishable from admission of a fact, § 1082.

Contractual admission to be distinguished from non-contractual, § 1083.

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Otherwise as to non-contractual admissions, § 1088.

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Admissions, when made for the purpose of compromise, inadmissible, § 1090.

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May prove intent, § 1093 *a*.

Admissions not excluded because party could be examined, § 1094.

Admissions may prove execution of document, unless when there are attesting witnesses, § 1095.

May prove marriage, § 1096.

May prove domicil, § 1097.

But not record facts, § 1098.

Invalidated by duress, § 1099.

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And so by our own law, § 1101.

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Admissions by plea are rebuttable, § 1117.
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Affidavits and bill and answers in chancery may be put in evidence against party making them, § 1119.
Party's testimony in another case may be used against him, § 1120.
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And memoranda, § 1129.
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If party was unable or not called upon to answer, such evidence is valueless, § 1138.
So as to party acquiescing in testimony of witness or reception of documents, § 1139.
Otherwise as to silence on reception of accounts, § 1140.
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Silent admissions and conduct estop, § 1142.
Extension of estoppels of this class, § 1143.
Party permitting another to deal with his property may be estopped, § 1144.
And so as to any contractual representation of a fact, § 1145.
Party knowingly contracting on an erroneous assumption cannot afterwards repudiate, § 1146.
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Other party's action must be influenced, and the misleading conduct must impose a liability based on contract or negligence, § 1150.
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But silence, on being told of an unauthorized act, does not estop, § 1152.
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Admissions made, either without the intention of being acted on, or without being acted on, do not estop, nor can third parties use estoppel, § 1155.
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Self-disserving admissions of predecessor in title may be received against successor, § 1156.
Such declarations must not conflict with record title, must not be hearsay, and must be self-disserving, § 1157.
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Landlord's admissions receivable, against tenant, § 1159.
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Declarations of fraud cannot infect innocent vendee, § 1167.
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Agent employed to make contract binds his principal by his representations, § 1170.
And this though the representations were unauthorized, § 1171.
Applicant for insurance may contradict written statement made by agent, § 1172.
Admissions of agent receivable when part of the *res gestae*, § 1173.
So in torts, if connected with the act charged, § 1174.
When admissions are not by a general agent in the scope of his business, nor part of the *res gestae*, special authorization must be proved, § 1175.
So as to torts, § 1176.
General agent may make non-contractual admissions, § 1177.
Non-contractual admissions are open to correction, § 1179.
After business is closed, agent's power of representation ceases, § 1180.
Servant's admissions are subject to the same restrictions as to time, § 1181.
As to scope are more limited than those of other agents, § 1182.
Agency must be established *aliunde*, § 1183.
Attorney's admissions bind client, § 1184.

Attorney's admissions may be used by strangers, § 1185.
Implied admissions of counsel bind in particular case, § 1186.
Attorney's authority must be proved *aliunde*, § 1187.
So of admissions of attorney's clerk, § 1188.
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Party not estopped by unilateral reference, § 1191.
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Persons jointly interested may bind each other by admissions, § 1192.
Such declarations must relate to a joint business, § 1193.
Admissions of partners reciprocally admissible, § 1194.
As to acknowledgment to take debt out of statute, § 1195.
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So as to joint contractors and other associates, § 1197; supra, § 1131.
Persons interested, but not parties, may affect suit by admissions, § 1198.
But mere community of interest does not create such liability, § 1199.
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Admissions in fraud of associates may be rebutted, § 1202.
Self-serving statements of associates inadmissible, § 1203.
Co-defendant's admissions not to be received against the others, unless concert is proved, § 1204.
But where conspiracy is proved admissions of co-conspirators are receivable, § 1205.
But not after conspiracy closed, § 1206.
VIII. Admissions by Trustees, Officers, and Principals.
Admissions of nominal party cannot prejudice real party, § 1207.
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His agency may be proved *aliunde*, § 1215.
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May bind her trustees, § 1218.
May bind her representatives, § 1219.
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I. GENERAL RULES.

§ 1075. Whether an extra-judicial admission is evidence is a question much agitated by jurists both early and recent. In a strict and scientific sense, such an admission is not so much evidence, as a dispensation from evidence. It may, it is true, when offered as a *quasi* contract between

Admissions not strictly "evidence."

the parties (*e. g.*, when the plaintiff, in the business on which the suit is brought, admits something, and on this the defendant acts), amount to an estoppel.[1] But in other cases it is merely a waiver, by one party, of his right that the other party should be required to prove a particular fact in issue. In such cases, therefore, an admission is a fact to be proved by evidence, not evidence to prove a fact. In this sense the Roman law speaks when it declares that an admission is not *probatio*, but *levamen probationis*.[2] Admissions, therefore, in the present chapter, are treated rather as things to be proved, than as a mode of proving things.

An admission must relate to existing conditions.

§ 1076. An admission, to have the effect of conceding, either wholly or *primâ facie*, an adversary's case, must relate to a past or present state of facts. If I say, "I now owe you so much," this may be treated as an admission. If I say, "I will pay you so much in the future," this is not an admission, unless, with other evidence, it implies a present indebtedness. This distinctive feature of admissions is recognized in Roman jurisprudence as well as in our own. "Qua de causa recte dicemus, arcaria nomina nullam facere obligationem, sed obligationis factae *testimonium* praebere."[3] "Verbis: quod sua quisque voce protestatus est, id infirmaret, testimonioque proprio resisteret."[4] "Quum res non instrumentis gerantur, sed in haec rei gestae *testimonium* conferatur."[5] If an admission, when viewed in this sense, is to be effective, it must relate to the present, not to the future, and must be in the concrete.[6] From it is thereby excluded the assumption that the declarant intends to establish an obligatory relation with another.[7] As has been well stated,[8] the declarant draws simply from his own knowledge or recollection, and turns, therefore, only to the past; the contractant, on the other hand, establishes, in connection with his co-contractor, a new legal relation, and turns to the future. The *promise* is productive; the *admission* simply reproductive. This condition of retrospectiveness

[1] Supra, § 920..

[2] See Bald. in L. 3 Cod. iv. 30, qu. 10; Mascard. 1. qu. 7, nr. 11; Pacian, L. C. 11, nr. 10; Endemann, 135. See to this point, Edmund *v.* Groves, 2 M. & W. 642.

[3] Gaius, Inst. iii. § 131.

[4] C. 13; C. 4, 30.

[5] C. 12; C. 4, 19.

[6] Mabley *v.* Kittleburger, 37 Mich. 360.

[7] Gönner, Handb. des Proc. ii. 46; Hesse, juristisch. Probleme, 24.

[8] Hesse, *ut supra.*

applies also to estoppels. "An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made."[1]

§ 1077. *Extra-judicial* admissions are either contractual (being in such case dispositive),[2] constituting an estoppel when they form part of the statements by which one party is induced to contract with the other; or they are non-contractual and non-dispositive, when they consist of casual statements, not part of a contract with the other party, or not uttered in such a way as to induce another to alter his position in consequence. Supposing an admission is set up, not as the basis of a contract, but simply as the concession of a fact on which the opposite party relies to make out his case, then the admission, as we have already seen, is not a *probatio*, but a *levamen probationis;* it does not *prove* a fact, in the strict sense, when offered against the declarant, but it relieves the party relying on it from proving such fact, thereby throwing the burden of disproving on the declarant.[3] By the scholastic jurists such admissions were spoken of sometimes as half proofs; sometimes as presumptions. With us, evidence that they were made may be admissible, either as yielding presumptions against the party charged, or as relieving (under ordinary circumstances) the party offering them from the necessity of more formal proof.[4] At the same time it must be remembered that

Non-contractual admissions do not conclude, and may be rebutted.

[1] Field, J., Insurance Company *v.* Mowry, 96 U. S. 547.

[2] To documents, generally, the distinction, in this respect, is expressed by the terms *dispositive* and *non-dispositive*, since under documents fall wills, which cannot be spoken of as contractual. As all admissions, on the other hand, are either contractual or non-contractual, I here adopt the latter terms as, in this relation, more exact. It should be remembered that a document which may be void contractually, for want of due formalities, may be receivable as a non-contractual admission of some particular fact in the case. Crawford *v.* Jones, 54 Ala. 459; supra, § 698; infra, § 1124.

[3] Mascard. I. C. No. 26; Endemann, 137.

[4] Infra, § 1088; Hamilton *v.* Paine, 17 Me. 219; Pike *v.* Wiggin, 8 N. H. 356; Tenney *v.* Evans, 14 N. H. 343; Plummer *v.* Currier, 52 N. H. 287; Goodnow *v.* Parsons, 36 Vt. 46; Loomis *v.* Wadhams, 8 Gray, 557; Abbott *v.* Andrews, 130 Mass. 145; Linsley *v.* Bushnell, 15 Conn. 225; Doyle *v.* St. James's Church, 7 Wend. 178; Black *v.* Lamb, 12 N. J. Eq. 108; Silvis *v.* Ely, 3 Watts & S. 420; McGill *v.* Ash, 7 Penn. St. 397; Wolf *v.* Studebaker, 65 Penn. St. 459; Brandywine R. R. *v.* Ranck, 78 Penn. St. 454; Kutz's App., 100 Penn. St. 75; Hope *v.* Evans, 4 Sm. & M. 321; Fidler *v.* McKinley,

they are not conclusive proof of what they state; that they may be readily neutralized by proof that they were uttered in ignorance, or levity, or mistake;[1] and hence that they are, at the best, to be regarded as only cumulative proof, which affords but a precarious support, and on which no party should be content to rest his case.[2]

21 Ill. 308; Secor *v.* Pestana, 37 Ill. 525; Higgs *v.* Wilson, 3 Metc. (Ky.) 337; Gidney *v.* Moore, 86 N. C. 484; Tredwell *v.* Graham, 88 N. C. 208; State *v.* Pratt, 88 N. C. 630; Keller *v.* R. R., 27 Minn. 178; Harvey *v.* Anderson, 12 Ga. 69; Ector *v.* Welsh, 29 Ga. 443; Brown *v.* Stroud, 34 La. An. 374.

[1] McCraw *v.* Ins. Co., 78 N. C. 149; Steele *v.* Wood, 78 N. C. 365.

Of this an illustration given in the Roman books is as follows: A. writes to B., asking for a loan of money. B. answers saying that he has no money at his disposal, and has just been forced to borrow 10 pieces of gold from C. C., upon receiving this information, sues B. for ten pieces of gold, and puts the letter in evidence. The letter, it is held, is not sufficient to sustain C.'s suit. In such a case it might readily be assumed that B. might have been influenced, in the statement made as to C.'s loan, by a desire to get rid of A.'s importunities; nor is it necessary to suppose that the statement was a pure falsehood, for the loan may have been expected, or B. may have had reason to suppose, though erroneously, that it was actually received. In weighing a non-contractual admission, also, it is important to inquire whether the party making the statement expects at the time he makes it that it will work to his advantage. Men readily believe what they wish to be true; and even supposing that the declarant makes his declaration honestly, the fact that he makes it, when its utterance is apparently beneficial to himself, does not justify us in juridically assuming its verity. The same observation may be made as to confessions which may be instigated, as is the case with some of those of Byron and Rousseau, by a morbid desire of notoriety. In fine, to enable us to repose confidence in a party's admissions, they must be made at a time when the person making them believed them to be against his interest. In the Roman law, this is laid down as a test which determines the value to be attached to all admissions by a party. In our own law, while we cannot apply this test so as to determine the admissibility, it is of much value in determining credibility. And even as to admissibility, if we exclude all confessions which are induced by the hope of an advantage held out to the party confessing by a person in authority, the same rule should be good as to admissions in civil suits.

Of the extent to which persiflage may be misunderstood we have an illustration given in the comments of a learned German historian, Göeller, in the 82d chapter of the 3d book of his Thucydides, on Washington Irving's account in his Knickerbocker's New York of the feuds between the Long Pipes and the Short Pipes. This is taken by the German historian as a sober narrative of fact, and is appealed to to elucidate the remarks of Thucydides as to the trivial origin of factions. See 3 Irving's Life of Irving, 149.

[2] Snow *v.* Paine, 114 Mass. 520; Garrison *v.* Akin, 2 Barb. 25; Tracy *v.* McManus, 58 N. Y. 257; Quarles *v.* Littlepage, 2 Hen. & M. 401; Horner *v.* Speed, 2 Patt. & H. 616; Chicago R. R. *v.* But-

This is eminently the case when the party who made the admissions is deceased, in which case admissions alleged to have been made by him should be cautiously weighed;[1] or when there is any suspicion attachable to the admission as a class, as is the case with admissions of adultery;[2] or impotence;[3] or when they on their face appear to have been uttered in order to elude inquiry.[4] In fine, where the party seeking to prove admissions in no way altered his position in consequence of their utterance, the party making them can always prove their untruth,[5] though not, it is said, by introducing subsequent inconsistent declarations.[6]

§ 1078. It should also be remembered, that estoppels can never bind as to strangers, since as to strangers they are always non-contractual;[7] and that even recitals in deeds, which estop the parties, may be contradicted by strangers.[8]

Estoppels do not bind as to strangers.

ton, 68 Ill. 409; Clark *v.* Larkin, 9 Iowa, 391; Martin *v.* Algona, 40 Iowa, 390; Pillow *v.* Thomas, 57 Tenn. 121; Printup *v.* Mitchell, 17 Ga. 558; Crockett *v.* Morrison, 11 Mo. 3; Cafferratta *v.* Cafferratta, 23 Mo. 235; O'Brien *v.* Flynn, 8 La. An. 307. See, as qualifying the text, Mauro *v.* Platt, 62 Ind. 450. That the acknowledgment of a signature to a note does not conclude the party making it, see Hall *v.* Huse, 10 Mass. 39; Salem Bank *v.* Gloucester Bank, 17 Mass. 1. See supra, § 705.

[1] Supra, § 467; Pollock *v.* Ray, 85 Penn. St. 428; Dupre *v.* McCright, 6 La. An. 146; Wilder *v.* Franklin, 10 La. An. 279; Croizet's Succession, 12 La. An. 401.

[2] Supra, § 483; infra, § 1220; Lyon *v.* Lyon, 62 Barb. 138; Prince *v.* Prince, 25 N. J. Eq. 310; Haggard *v.* Haggard, 62 Iowa, 82; Evans *v.* Evans, 41 Cal. 103; Mathews *v.* Mathews, 41 Tex. 331.

As to admissions made by a person when intoxicated, see Gore *v.* Gibson, 13 M. & W. 623; Jefferds *v.* People, 5 Parker C. R. 522; State *v.* Bryan, 74 N. C. 351; McCraw *v.* Ins. Co., 78 N. C. 149; Pillow *v.* Thomas, 57 Tenn. 121. See supra, §§ 401–3.

As to talking in sleep, see Best's Evid. § 539; Whart. Cr. Law, 7th ed. § 684; People *v.* Robinson, 19 Cal. 40.

[3] Fulmer *v.* Fulmer (Phila. 1879).

[4] The student will find the distinctions in the text expanded with great subtlety and clearness in Hesse's Juristiche Probleme, Jena, 1872. Admissions, in this interesting treatise, are treated: (1.) As confessions; (2.) As statements of account; and (3.) As estoppels, the latter being viewed as constituting an Anerkennungsvertrag.

[5] Herne *v.* Rogers, 9 B. & C. 577; Newton *v.* Belcher, 1 Q. B. 921; Newton *v.* Liddiard, 12 Q. B. 927; Atty.-Gen. *v.* Stephens, 1 Kay & J. 748; Depue *v.* Place, 7 Penn. St. 428.

[6] Kean *v.* Ellmaker, 7 S. & R. 1; Galbraith *v.* Green, 13 S. & R. 85.

[7] See cases cited supra, § 923; infra, § 1083, notes to § 1155.

[8] R. *v.* Neville, Pea. R. 91; Carter *v.* Carter, 1 K. & J. 649; Mayor *v.* Blamire, 8 East, 487. See supra, § 1041; infra, § 1088.

§ 1079. To constitute an estoppel, also, it is usually necessary that the statement or conduct charged should have been intentional, with the object of inducing the other party to change his situation in consequence. A party will not be estopped by information given by him merely informally, as a matter of conversation, with no intention of establishing a contractual relation with the party to whom he speaks; it being the duty of the parties asking him for such information to notify him, if they would bind him, that they intended to act upon his answers.[1] At the same time a party, by negligence in asserting a claim when other parties are seeking *bonâ fide* to buy or improve a property on which such claim is chargeable, may be afterwards estopped from setting up such claim against such strangers.[2] And though it may be that when a fact is stated as mere hearsay, it is inadmissible, unless offered to prove estoppel;[3] yet it is otherwise when it is adopted and put forth by the speaker as a fact.[4] But if false, while it may estop, yet, if made non-contractually, as where an untrue statement involving a tort is made, it is entitled to no weight.[5]

Loose talk does not usually estop.

§ 1080. Truthfulness, however, as we have already observed, being essential to a non-contractual admission (as distinguished from an estoppel), the credibility of such an admission is a question of fact, resting on the presumption that no prudent man would declare an untruth to his own disadvantage.[6] "Quum legibus nostris dictum sit, quaecunque *quis pro se dixerit aut scripserit*, ea nihil ipsi prodesse, neque creditoribus praejudicare."[7] "Exemplo perniciosum est, ut ei scripturae credatur, qua unusquisque sibi adnotatione propria debitorem constituit. Unde neque fiscum neque alium quemlibet *ex suis*

Credibility of admissions a question of fact.

[1] Hackett *v.* Callender, 32 Vt. 99; Marvin *v.* Dutcher, 26 Minn. 391. See cases in Whart. Cr. Law, tit. "False Pretences," holding that false "puffs" are not false pretences.

[2] Storrs *v.* Baker, 6 Johns. Ch. 166. Infra, §§ 1136, 1145, 1150.

[3] Roe *v.* Ferrars, 2 B. & P. 548; Stephens *v.* Vroman, 16 N. Y. 381.

[4] Shaddock *v.* Clifton, 22 Wis. 115.

[5] See infra, § 1088.

[6] See as to effect of falsity, infra, § 1088.

[7] Nov. 28, c. 1; Hesse, 29.

That such admissions of a deceased person cannot be impeached by the statements of the party making the admissions to third parties as to the character of the witness repeating them, see Maryland *v.* Baldwin, 112 U. S. 490.

subnotationibus debiti *probationem* praebere posse oportet."[1] Hence "*contra* se dicere" is essential to the weight of an admission. Self-love and vanity, so it is justly argued, will hinder a prudent man from falsehoods that would involve him in disgrace.[2] Yet we must remember that this proposition applies mainly to matters of pecuniary interest. When we come to questions of pedigree, of *status*, and of marriage, different influences come in which render the tests just given of but little weight. In matters of pedigree, in particular, a statement which one man would shrink from as discreditable another would advance with pride. By some men an aristocratic connection might be claimed untruthfully; by others it might be untruthfully disclaimed. Sinister bars, indicating a royal illegitimate descent, are blazoned boastfully on some escutcheons; from others they have been obliterated with scorn. Nor can we forget that pecuniary interest may sometimes be overbalanced by other more powerful passions. The author of Junius, whoever he was, must have often untruthfully denied his responsibility for his handiwork, not because he might not have made money by such an avowal, but because it would have involved him in social ignominy. Sir Walter Scott, against what we might consider his interest, repeatedly disavowed Waverley, and went so far as to write a laudatory review, attributing that great novel to another author. For a man of gallantry, as Lord Denman reminds us, it is as disgraceful to swear to an intrigue as it would be unprofessional to avoid it.[3] On the other hand, the German poets of the Sturm and Drang period were in the habit, following Lord Byron, of intimating their complicity in merely imaginary crimes. Even among prudent men, a little obvious interest, against which a party makes an admission, may be greatly overbalanced by a superior secret interest, of which nobody knows but the declarant. The truthfulness, therefore, of an apparently self-disserving statement is a presumption of fact depending upon all the circumstances of the case. We must inquire whether the statement was really self-disserving; and even if it were so in a business sense, we must remember that it may be discredited by showing that it was made under mistake, or from a

[1] C. 7; C. 4, 19.

[2] Hesse, *ut supra*, 29; citing further I. 26, § 2; D. xvi. 3.

[3] Supra, § 483, note.

desire on the declarant's part to produce a sensation, or to avoid a disclosure of a fact with which the admission is inconsistent.[1]

Admission may be by acts.

§ 1081. Admission may be by acts as well as by words.[2] Silence itself may, as we shall soon more fully see,[3] under certain circumstances be proved as involving an admission; and *a fortiori* may such acts as are tantamount to an admission in words. Thus assuming the uniform or garb of a particular class of persons is a declaration that the party belongs to such class.[4] It is admissible, also, to show that after the plaintiff's claim became due, he paid a claim due from him to the defendant without any effort at or suggestion of set-off.[5] That a party pays interest on or instalments of a debt, may be also shown as an admission of indebtedness.[6] The assumption of an office, to take another illustration, is an admission of appointment to such office, and subjects the party to the liabilities attached to such office, though

[1] See supra, § 1077; Stowe *v.* Bishop, 58 Vt. 498; Saveland *v.* Green, 40 Wis. 431.

On the one side it may be argued that, as no prudent man would tell an untruth that would disgrace him, when he admits a fact that would disgrace him, this fact may be true. To this, however, the following replies are to be made: (1) All men are not prudent. Many men are so silly that they prefer notoriety with disgrace to obscure respectability; and hence will confess imaginary crimes in order to obtain notoriety. (2) Desire of revenge may be stronger than self-love. A man who will risk his life in order to assassinate an enemy may be ready to confess falsely a crime in which that enemy would be implicated. (3) Although a statement may appear to be against the pecuniary interest of the party making it, yet this may be only apparently the case, as he may have secret interests which the statement may greatly further. (4) A political or social point may be gained by the statement. Thus the courtiers who claimed to have received favors from Anne Hyde, Duchess of York, made this claim falsely, as they afterwards admitted, for the object of winning favor with Anne's husband, who, it was then said, wanted to repudiate her.

The authority of an admission is strengthened by the fact that it is offered against a party who does not testify. Robinson *v.* Stuart, 68 Me. 61. Infra, § 1094.

[2] Infra, § 1151; Russell *v.* Miller, 26 Mich. 1.

As to admissibility of proof, in a suit for negligence, that defendant, after the alleged negligent act, caused repairs to be made in the place where the injury occurred, see supra, § 40.

Otherwise as to dismissal of a servant after an alleged negligent act. Couch *v.* Coal Co., 46 Iowa, 17. Supra, § 1138.

[3] See infra, § 1136.

[4] See Whart. Crim. Law, § 1170.

[5] Strong *v.* Slicer, 35 Vt. 40.

[6] Washer *v.* White, 16 Ind. 136. Infra, § 1362.

he made no claim in words to the office.[1] Again, the payment of money by A. to B. is an admission by A. that B. is the proper payee, though not, it is said, by B. that A. is the person bound to pay.[2] When, also, the question is, whether the stationing a flagman at a crossing is requisite to public safety, the fact that a flagman has been assigned by the company to such station (he being absent at the time of the collision) may be treated as an admission by the company that a flagman should be so stationed.[3] Attempting to tamper with evidence may be regarded as an admission of a bad case;[4] and so may attempts at flight;[5] and so may non-pressure of the case.[6]

§ 1082. Admissions may also be distinguished as admissions of *right* and admissions of *fact*. I may be sued for a particular claim, and I may be proved to have admitted either the justice of the claim, or the truth of certain facts from which the justice of the claim may be inferred. Admissions of the first class, unless part of a contract, or unless involving some specific, self-disserving fact, are of little independent weight.[7] I may admit a claim against me for the sake of peace, or from a misunderstanding of the facts; and in such case I can withdraw the admission if it is not part of a contract.[8]

Admission of a *right* to be distinguished from admission of a *fact*.

[1] Bevan *v.* Williams, 3 T. R. 635; R. *v.* Borrett, 6 C. & P. 124; R. *v.* Giles, Leigh & C. 502; R. *v.* Story, R. & R. 81; R. *v.* Hunter, 10 Cox C. C. 642. See Whart. Cr. Law, § 2113. Infra, § 1319.

[2] James *v.* Biou, 2 Sim. & St. 606; Chapman *v.* Beard, 3 Anstr. 942.

[3] McGrath *v.* R. R., 63 N. Y. 522. But see supra, § 40.

[4] Infra, § 1265 ff.

[5] Infra, § 1269.

[6] Infra, § 1320 *a*.

In a contest, also, as to which of two parties is bound to make certain repairs, the fact that they had been made by one of the parties may be regarded as an admission that this was his duty. Readman *v.* Conway, 120 Mass. 374. But see supra, § 40.

[7] Infra, § 1089. See Com. *v.* Allen, 128 Mass. 46; Boston, etc., R. R. *v.* Ordway, 140 Mass. 510–2, per Holmes, J.; Colt *v.* Selden, 5 Watts, 525; Sandford *v.* Decamp, 8 Watts, 542; McLendon *v.* Shakleford, 32 Ga. 474; Balt. City R. R. *v.* McDonnell, 43 Md. 534; Funston *v.* R. R., 61 Iowa, 452; Burns *v.* Campbell, 71 Ala. 271. As will be seen the distinction is of peculiar importance when it relates to a party's admissions in respect to written instruments. Infra, § 1097.

In Alfred *v.* Kennedy, 74 Ala. 326, it was ruled that where the title-deeds of a plaintiff in ejectment were lost, his admissions that he had no title could not be put in evidence against him. Gutzoni *v.* Tyler, 64 Cal. 334.

And see Moore *v.* Hitchcock, 4 Wend. 262.

[8] Infra, § 1090.

A right, also, may be conceded on various grounds, and those conceding it may leave open on which of these grounds rests the concession. The convention, for instance, that offered the crown to William III. left it open whether the abdication of James, or the choice of the people, or the superior force of William, produced their action. Hence the offering the crown to William involved logically neither an admission that he was the legitimate sovereign, nor that he was a conqueror, nor that he was king by a revolutionary popular choice. On the other hand, either the abdication of James, or the *vis major* of William, might be admitted without admitting the right of William to the throne. Or, to take another illustration, I may acknowledge that B. has a claim against me, but unless my acknowledgment is pointed at a particular account, that particular account cannot be proved by my acknowledgment. On the other hand, I may admit the account, but this does not admit a debt, for the account may have been paid, or there may be a set-off. The admission of a right, therefore, does not logically involve the admission of a fact, nor does the admission of a fact logically involve the admission of a right. An admission of a right, to proceed to another point, unless involving necessarily a fact, is provable only against the party on a suit for the right; an admission of a fact may be proved in all suits in which it is relevant. An admission of a right, again, is to be strictly construed, as it is generally made vaguely, expressive of a mere sentiment, or tentatively, as part of a compromise; and unless proved to have been made solemnly as to a specific claim, does not bind. An admission of a fact, on the other hand, often becomes effective in proportion to the inadvertence of its expression. Each may be made contractually, and if so each may be an estoppel; but when made non-contractually, and non-forensically, the first is of little value unless logically including the second.[1]

[1] Yet the distinction between these two classes of admissions cannot be always definitely made. Many admissions partake of the qualities of both classes; in many cases an admission of one class involves an admission of another. My admission of the justice of a claim, for instance, may be of such a character that it presupposes an admission of the truth of certain facts; my admission of particular facts may be logically an admission of the justice of the claim. The apparent admission of a fact may be only the admission of a conclusion; the admission of a conclusion may be necessarily the admission of a fact. See supra, § 15. Yet, when we view the two kinds of ad-

§ 1083. We must, however, again emphasize, as bearing on both admissions of rights and admissions of facts, the radical distinction already[1] noticed, between admissions which are contractual and dispositive, and such as are non-contractual and non-dispositive; in other words, between admissions made intentionally, for the purpose of transferring a right, and admissions made casually, for the purpose of narrating an incident, or explaining an alleged right.[2] The contractual and dispositive admission[3] is equivalent to an offer which, when accepted by the other party, makes a contract. Such an admission, as we will presently see, when made as the basis of a contract, cannot be revoked. The non-contractual admission, on the other hand, not being acted on by the party to whom it is addressed, may at any time be recalled or qualified by the party making it.[4] Hence also it is, as we have seen, that while an admission may be an estoppel, when sued upon directly, as the basis of an action, it may be qualified or neutralized when offered by third parties simply as an evidential fact.[5]

Contractual admissions distinguishable from non-contractual.

§ 1084. The distrust of non-contractual (or casual, to use Mr. Bentham's term) admissions as a mode of proof is not confined to the Roman law. In England, courts of equity go so far in applying

missions in their essence, we find that the difference between them is material. The one is an exercise of the power that each man has of disposing of himself and his property. The other is an exercise only of the power of observation and memory, made admissible, in a court of justice, without the party himself being necessarily sworn, for the reason that, being made by him against his own interests, its truth is *primâ facie* assumed. See Bähr, die Anerkennung, p. 169; Endemann, p. 121; Steffy *v.* Carpenter, 37 Penn. St. 41; and supra, § 920. Compare Brackett *v.* Wait, 6 Vt. 411; Ramsbottom *v.* Phelps, 18 Conn. 278; Martin *v.* Peters, 4 Roberts, 434; Ray *v.* Bell, 24 Ill. 444; Husbrook *v.* Strawser, 14 Wis. 403; Zemp *v.* R. R., 9 Rich. 84; Stewart *v.* Conner, 13 Ala. 94; Beebe *v.* De Bann, 8 Ark. 510; Carter *v.* Bennett, 4 Fla. 283; Hays *v.* Cage, 2 Tex. 501.

[1] Supra, §§ 1077–8.

[2] See supra, § 920, where this distinction is discussed in reference to documents.

[3] See Wetzell, Civil Proc. i. p. 139; Weiske, Rechtslexicon, xi. 662.

[4] See supra, §§ 920, 1077–1080; infra, §§ 1151, 1155.

[5] Carpenter *v.* Buller, 8 M. & W. 209; South E. R. R. *v.* Warton, 6 H. & N. 520; Stronghill *v.* Buck, 14 Q. B. 780; Wiles *v.* Woodward, 5 Ex. 557; Richards *v.* Johnston, 4 H. & N. 660; Morgan *v.* Coachman, 14 C. B. 100; Francis *v.* Boston, 4 Pick. 365; Weed Machine Co. *v.* Emerson, 115 Mass. 554; Bigelow on Estoppel, 258. Supra, § 923; infra, § 1155.

the distinction that has been just expressed, as to decline to rest a decree on oral admissions or declarations *which are not put directly in issue by the pleadings*, and which, consequently, have not been open to explanation or disproof.[1] Even as to *written* admissions, it has been argued, the fact of their not being put in issue by the pleadings will naturally detract from their weight, as the party against whom they are offered in evidence will, in such case, have had no opportunity of explaining them.[2] In the United States, the conclusion above stated, so far as it involves an absolute rule of evidence, has not been accepted.[3] So far, however, as it goes to attach little weight to non-contractual, as distinguished from contractual admissions, it is sustained by the authorities cited in prior sections.

Contractual admissions may operate as estoppel.

§ 1085. The term "non-contractual," it must be repeated, applies exclusively to statements casually made, without the intention of establishing a business relation. When an admission is made by one party, in such a way that the other party relies on the admission as the consideration for something done or forborne by him, then this admission may conclude by way of estoppel the party making it.[4] In other words, he is bound, when his admission is accepted and acted on by the opposite party, in a contract which he can only avoid on proof of fraud, illegality, or mistake.[5] At the same time estoppel, to adopt the language of the books, must, in order to be effective, be mutual.[6] Hence where A. sets up acts or words of B. as an

[1] Austin *v.* Chambers, 6 Cl. & Fin. 1, 38, 39; Attwood *v.* Small, Ibid. 234; Copland *v.* Toulmin, 7 Ibid. 350, 373, 375.

[2] McMahon *v.* Burchell, 2 Phill. 127, 132, 133; 1 Coop. R. temp. Ld. Cottenham, 475, *S. C.*; Crosbie *v.* Thompson, 11 Ir. Eq. R. 404, per Brady, Ch.; Swift *v.* M'Tiernan, Ibid. 602, per Ibid.; Malcolm *v.* Scott, 3 Hare, 39, 63; and see Margareson *v.* Saxton, 1 Y. & C. Ex. R. 529; and Fitzgerald *v.* O'Flaherty, 2 Moll. 394, n.; Taylor's Ev. § 668.

[3] Story Equity Pl., § 265 *a*, note 1.

[4] See fully infra, §§ 1151–1155; Fishmongers' Co. *v.* Robertson, 6 M. & Gr. 193; Bowman *v.* Rostron, 2 A. & E. 295; Pickard *v.* Sears, 6 A. & E. 474; Howes *v.* Marchant, 1 Curtis C. C. 136; Scammon *v.* Scammon, 33 N. H. 52; Wakefield *v.* Crossman, 25 Vt. 298; Bower *v.* McCormick, 23 Grat. 310; Isler *v.* Harrison, 71 N. C. 64; Tompkins *v.* Philips, 12 Ga. 52; Lamar *v.* Turner, 48 Ga. 329; Rose *v.* West, 50 Ga. 474; Garrett *v.* Garrett, 27 Ala. 687; and see, also, cases cited supra, §§ 617, 923, 1079, 1083; and see Moriarty *v.* R. R., 5 Q. B. 320.

[5] See supra, §§ 927, 1019, 1030.

[6] 2 Smith's Lead. Cas. 442 (note by Hare & Wallace); Perrie *v.* Nuttall, 11 Ex. 569; De Mora *v.* Concha, 29 Ch. D. 268; Bigelow on Est. 47. Supra, § 1078.

estoppel, it is necessary, to enable them to operate as such, for A. to show that B. was aware, or ought to have been aware, at the time of such acts or words, that in some way his action in such respect was a concession of some sort of title in A.[1] And casual remarks drawn from B. by A., B. being ignorant of their bearing, or of A.'s claim in the premises, cannot be used as an estoppel against B.[2]

Estoppels may be substitutes for proof.

§ 1086. What has been said in regard to admissions, that they are not evidence on the one side, but dispensations of evidence, which would otherwise have to be offered on the other side, applies also to estoppels. "An estoppel," so speaks a high authority, "is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it, though he may show that the person relying on it is estopped from setting it up, since that is not to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it. Such being the general nature of an estoppel, it matters not what is the fact thereby admitted, nor what would be the ordinary and primary evidence of that fact, whether matter of record, or specialty, or writing unsealed, or mere parol; . . . . and this is no infringement on the rule of law requiring the best evidence, and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted; for the estoppel professes not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted; and so, too, has it been held, that an admission which is of the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose."[3]

Even a false statement may be an estoppel.

§ 1087. As has been already incidentally noticed, a party, by even false statements, by which he induces others to change in some way their position, may preclude himself afterwards from showing the falsehood of such statements. This position is accepted by the Roman law as well as

[1] Taylor's Ev. § 80.

[2] See Hackett *v.* Callender, 32 Vt. 99.

[3] 2 Sm. L. C. 693.

our own. Donellus, after telling us that *confiteri* may be to enter into a binding dispositive act, adds, "Confiteri est fateri id, quod a nobis quaesitum est: id autem est, quod nobis objicitur; quod intenditur ab aliquo, id lingua verum esse agnoscere. Potest autem quivis agnoscere et dicere verum esse, quod intenditur, etiam qui id falsum esse sciat, multoque citius is, qui putat rem ita se habere, ut dicit, quae secus habeat."[1] In this view, a party making such a statement, thereby inducing another to enter into a contract with him, is bound to such other by such statement, whether it be true or false.[2] A person, for instance, falsely claiming to be an agent, cannot dispute his statement when sued on it by a party acting on his pretension.[3] A party warranting cannot escape liability by claiming that his warranty was false.[4] Even an honest misstatement, by which the other contracting party is led to enter into a contract, binds the party by whom the misstatement is made.[5]

Otherwise as to non-contractual admissions.

§ 1088. On the other hand, as we have seen, a non-contractual admission is of no weight unless it is true. If made under a mistake or error of fact, it may be repudiated. "*Non videntur* qui errant, *consentire.*"[6] "*Non fatetur qui errat.*"[7] Nor are such admissions binding if based on a mistake of law.[8] It is scarcely necessary to repeat that an admission may be contractual as to the party with whom it is made, operating as an estoppel when sued on by such party, but non-contractual as to strangers, as to whom, when they sue on it, it may be rebutted.[9] How far the circumstance that a fact is stated in an ad-

[1] Donel. Com. L. 28, c. 1.

[2] Cave *v.* Mills, 7 H. & N. 913; and see Salem Bank *v.* Gloucester Bank, 17 Mass. 1; McCance *v.* R. R., 3 H. & C. 343. Infra, §§ 1146, 1151.

[3] Whart. on Agency, § 541.

[4] See Bigelow on Est., 288-9.

[5] Freeman *v.* Cooke, 2 Ex. 654; Doe *v.* Oliver, 2 Smith's L. C. 671; Van Toll *v.* R. R., 12 C. B. N. S. 75; Luchtmann *v.* Roberts, 109 Mass. 53; Leake's Cont. 8, 168; Benj. on Sales, 3d Am. ed. 555.

[6] Lofft Max. 553.

[7] L. 116, D. (L. 17) Ulpian. See, as to unreliability of admissions, supra, § 1077; and so of admissions of agent, infra, § 1179; and see, generally, Hunter *v.* Heath, 67 Me. 507; Pecker *v.* Hoit, 15 N. H. 143; Stephens *v.* Vroman, 18 Barb. 250; 16 N. Y. 381; Tracy *v.* McManus, 58 N. Y. 257; Matthews *v.* Dare, 20 Md. 248; Ray *v.* Bell, 24 Ill. 444; Young *v.* Foute, 43 Ill. 33; Rose *v.* West, 50 Ga. 474; Roberts *v.* Trawick, 22 Ala. 490; Wynn *v.* Garland, 16 Ark. 440. As to receipts see supra, § 1064.

[8] Moore *v.* Hitchcock, 4 Wend. 292; Rowen *v.* King, 25 Penn. St. 409; Solomon *v.* Solomon, 2 Ga. 18.

[9] Supra, §§ 923, 1078; Carter *v.* Carter, 1 K. & J. 649. That non-contractual admissions are only *primâ facie* and

mission as hearsay affects the admission has been already considered.[1]

§ 1089. To admit a non-contractual admission, offered in evidence merely to relieve the party offering it from proving a particular part of his case, the admission must be specific.[2] Thus the admission of a "debt" due the plaintiff will not be sufficient proof to support an account presented by plaintiff to defendant in connection with which the general admission was made;[3] though an admission as to a particular account may be evidence on which it may be sustained.[4] Nor will an admission of the genuineness of a signature avail against a party to whom the paper containing the signature was not shown.[5]

Such admission must be specific.

§ 1090. An implied admission of liability made as part of the negotiations for a compromise, expressly for the purposes of peace (whether or no such admission be made under the technical proviso "without prejudice"), will not be received in evidence against the party by whom it is made, when its object was merely to suggest a scheme of settlement. The policy of the law favors amicable settlements of litigation, and therefore protects negotiations *bonâ fide* made for the purpose of effecting such settlements.[6] Aside from the reason just mentioned, it may be well

General admissions made for purpose of compromise inadmissible, but otherwise as to admission of facts.

rebuttable evidence against the party making them, see supra, §§ 1077–8; and see Baker *v.* Dewey, 1 B. & C. 704; Stratton *v.* Rastall, 2 T. R. 366; Reeve *v.* Whitmore, 2 Dr. & S. 450.

[1] Supra, § 1079.

[2] Chambers Co. *v.* Clews, 21 Wall. 317; Ripley *v.* Paige, 12 Vt. 353; Clarendon *v.* Weston, 16 Vt. 332; Smith *v.* Jones, 15 Johns. R. 229; Smith *v.* Smith, 1 Greene (Iowa), 307; Watson *v.* Byers, 6 Ala. 393. Supra, § 1082.

[3] Green *v.* Davis, 4 B. & C. 235; Lane *v.* Hill, 18 Q. B. 252; U. S. *v.* Kuhn, 4 Cranch C. C. 401; Gibney *v.* Marchay, 34 N. Y. 301; Quarles *v.* Littlepage, 2 Hen. & M. 401; Douglass *v.* Davie, 2 McCord, 219.

[4] Peacock *v.* Harris, 10 East, 104; Vinal *v.* Burrill, 16 Pick. 401; Sugar *v.* Davis, 13 Ga. 462.

[5] Infra, § 1095.

[6] Hoghton *v.* Hoghton, 15 Beav. 321; Cory *v.* Bretton, 4 C. & P. 462; Healey *v.* Thatcher, 8 C. & P. 388; Paddock *v.* Forrester, 3 M. & Gr. 903; 3 Scott N. R. 734; Cassey *v.* R. R., L. R. 5 C. P. 146; Skinner *v.* R. R., L. R. 9 Ex. 298; McCorquodale *v.* Bell, L. R. 1 C. P. D. 471; Home Ins. Co. *v.* Baltimore, 93 U. S. 527; Rowell *v.* Montville, 4 Greenl. 270; Rideout *v.* Newton, 17 N. H. 71; Perkins *v.* Concord R. R., 44 N. H. 223; Gerrish *v.* Sweetser, 4 Pick. 374; Batchelder *v.* Batchelder, 2 Allen, 105; Saunders *v.* McCarthy, 8 Allen, 42; Harrington *v.* Lincoln, 4 Gray, 563; Gay *v.* Bates, 99 Mass. 263; Durgin *v.* Somers, 117 Mass. 55; Draper *v.* Hatfield, 124

argued that where the communication is made because the party is ready to offer a sacrifice for the sake of peace, this cannot be regarded as the admission of a right in the other side.[1] It has been also held that the admission of a party in a case stated for the

Mass. 53; Daniels *v.* Woonsocket, 11 R. I. 4; Williams *v.* Thorp, 8 Cow. 201; Payne *v.* R. R., 40 N. Y. Sup. Ct. 8; Wrege *v.* Westcott, 30 N. J. L. 212; Slocum *v.* Perkins, 3 S. & R. 295; Tryon *v.* Miller, 11 Whart. 11; Arthur *v.* James, 28 Penn. St. 236; Reynolds *v.* Manning, 15 Md. 510; Paulin *v.* Howser, 63 Ill. 312; Barker *v.* Bushnell, 75 Ill. 220; Kinsey *v.* Grimes, 7 Blackf. 290; Dailey *v.* Coons, 64 Ind. 545; Munshink *v.* R. R., 57 Iowa, 718; Camphan *v.* Dubois, 39 Mich. 274; State *v.* Dutton, 11 Wis. 371; Richards *v.* Noyes, 44 Wis. 609; Watson *v.* Williams, Harper, 447; Keaton *v.* Mayo, 71 Ga. 649; Wilson *v.* Hines, 1 Minor (Ala.), 255; Williams *v.* State, 52 Ala. 411; Jackson *v.* Clopton, 66 Ala. 29; Ferry *v.* Taylor, 33 Mo. 323.

In Paddock *v.* Forrester, 3 Maun. & G. 903, 919, it was held that where a letter expressed to be without prejudice is replied to, neither the letter nor the reply is admissible, even though the reply is not expressed to be without prejudice. Tindal, C. J., said: "It is of great importance that parties should be left unfettered by correspondence which has been entered into upon the understanding that it is to be without prejudice."

[1] Underwood *v.* Courtown, 2 Sch. & Lef. 67; Thomson *v.* Austen, 2 D. & R. 361; Robinson *v.* R. R., 7 Gray, 92. Supra, § 1082.

In Hoghton *v.* Hoghton, 15 Beav. 278, 321, before Sir John Romilly, certain letters were written after the dispute had arisen, with a view to a compromise, and "without prejudice." Their admission being objected to, it was said that, if rejected, the court would have before it only part of the correspondence. "Such communications, made with a view to an amicable arrangement, ought to be held very sacred; for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences."

In Jones *v.* Foxall, 15 Beav. 388, which was a suit for a breach of trust, Sir John Romilly said: "I have paid no attention to the correspondence and negotiations which occurred. . . . I find that the offers were in fact made *without prejudice* to the rights of the parties. I shall, as far as I am able, in all cases endeavor to repress a practice which, when I was first acquainted with the profession, was never ventured upon, but which, according to my experience in this place, has become common of late, viz., that of attempting to convert offers of compromise into admissions or acts prejudicial to the persons making them. If this were permitted, the effect would be that no attempt to compromise a dispute could ever be made. . . . In my opinion, such letters and offers are admissible for one purpose only, namely, to show that an attempt has been made to compromise the suit, which may sometimes be necessary; as, for instance, in order to account for a lapse of time; but never for the purpose of fixing the person making them with any admissions contained in such letters. And I shall do all I can to discourage this modern, and, as I think, most injurious practice."

opinion of the court cannot afterwards be used against him.[1] If, however, in a negotiation between litigants, a fact is conceded as true, such concession not being made "without prejudice," or hypothetically, or as a condition in a pending treaty,[2] the admission may be afterwards used, for what it is worth, against the party by whom it is made.[3] When such negotiations are admitted in part, however, all the relevant conditions, if called for, must be proved.[4] And when an offer is made in a letter written "without prejudice," and such offer is accepted,[5] or when an admission is made in such a letter subject to a condition, and such condition has been performed,[6] then the letter can be used in evidence against the writer, notwithstanding that it was written "without prejudice."[7] But when a letter is written as an offer of compromise, and is not accepted, no part is admissible.[8]

[1] Hart's Appeal, 8 Penn. St. 32.

[2] Lofts *v.* Hudson, 2 M. & R. 481; West *v.* Smith, 101 U. S. 263.

[3] Nicholson *v.* Smith, 3 Stark. R. 129; Wallace *v.* Small, M. & M. 446; Unthank *v.* Ins. Co., 4 Biss. 357; Home Ins. Co. *v.* Balt. Co., 93 U. S. 527; Cole *v.* Cole, 33 Me. 542; Hamblett *v.* Hamblett, 6 N. H. 333; Perkins *v.* Concord, 44 N. H. 223; Eastman *v.* Amoskeag, 44 N. H. 143; Plummer *v.* Currier, 52 N. H. 282; Doon *v.* Ravey, 49 Vt. 293; Marsh *v.* Gold, 2 Pick. 285; Gerrish *v.* Sweetser, 2 Pick. 374; Durgin *v.* Somers, 117 Mass. 55; Hartford Bridge Co. *v.* Granger, 4 Conn. 142; Fuller *v.* Hampton, 5 Conn. 416; Murray *v.* Coster, 4 Cow. 635; Marvin *v.* Richmond, 3 Denio, 58; Sailor *v.* Hertzogg, 2 Penn. St. 182; Holler *v.* Weiner, 15 Penn. St. 242; Arthur *v.* James, 28 Penn. St. 236; Cates *v.* Kellogg, 9 Ind. 506; Ashlock *v.* Linder, 50 Ill. 169; Campan *v.* Dubois, 39 Mich. 274; Church *v.* Steele, 1 A. K. Marsh. 328; Mayor *v.* Howard, 6 Ga. 213; Prussel *v.* Knowles, 5 Miss. 90; Garner *v.* Myrick, 30 Miss. 448; Delogny *v.* Rentoul, 2 Mart. La. 175. See Short Mountain Co. *v.* Hardy, 114 Mass. 197; Molyneaux *v.* Collier, 13 Ga. 406. Supra, § 1082. See White *v.* Steamship Co., 102 N. Y. 660.

In Clapp *v.* Foster, 34 Vt. 580, the court admitted evidence that the defendant offered to settle the plaintiff's claim if the latter would consent to a continuance. See, also, Grubbs *v.* Nye, 21 Miss. 443. In Cuming *v.* French, 2 Camp. 106, n., an offer to settle a note was held *primâ facie* proof of authenticity of signature.

In Thomas *v.* Morgan, 2 C., M. & R. 496; *S. C.* Tyr. 1085, which was an action for injury to cattle through defendant's mischievous dogs, an offer to settle was held admissible as some evidence of *scienter*, but to be entitled to but little weight, as the offer may have been prompted by mere charity.

[4] Scott *v.* Young, 4 Paige, 542.

[5] In re River Steamer Co., L. R. 6 Ch. 822; 19 W. R. 1130.

[6] Holdsworth *v.* Dimsdale, 19 W. R. 798; Collier *v.* Nokes, 2 C. & K. 1012.

[7] Powell's Evidence, 4th ed. 269.

[8] Home Ins. Co. *v.* Balt. Co., 93 U. S. 527.

Party's admission may prove contents of writing.

§ 1091. For a long time it was an open and much-agitated question in England whether the admission by a party of the contents of a written instrument could be received in derogation of the principle that such instruments cannot be proved by parol. After numerous conflicting dicta and rulings at nisi prius, the question came before the Court of Exchequer in 1840. It was then ruled, that "whatever a party says, or his acts amounting to admissions, are evidence against himself, *though such admissions may involve what must necessarily be contained in some deed or writing.*" . . . . "The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of, the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded, from the presumption of untruth arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true may be reasonably presumed to be so. The weight and value of such testimony is another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say that the evidence is admissible."[1]

Admission must go to facts.

§ 1092. It is true that much exception has been taken to this modification of the rule that a written instrument cannot be proved by parol, and it has been urged that the exception will eat away the rule. The exception, however, is sanctioned by the high authority of the present English practice; though it is said the witness when a party ought not to be compelled to testify as to the contents of such instruments.[2] The same general

[1] Slatterie *v.* Pooley, 6 M. & W. 664; Parke, B. See, as to same effect, Howard *v.* Smith, 3 Scott N. R. 574; Boulter *v.* Peplow, 9 C. B. 493; Pritchard *v.* Bagshawe, 11 C. B. 459; King *v.* Cole, 2 Exch. 628; Boileau *v.* Rutlin, 2 Exch. 665; Murray *v.* Gregory, 5 Exch. 468; R. *v.* Basingstoke, 14 Q. B. 611; Ansell *v.* Baker, 3 C. & K. 145.

It has been also held, where, on an action for contribution towards money paid on a written contract, there was evidence of the express authority of the defendant to enter into the contract, of the execution thereof, and that the defendant, when informed of the amount paid, did not dispute his liability, that the contract need not be put in evidence. Chappell *v.* Bray, 6 H. & N. 145.

[2] Darby *v.* Ously, 1 H. & N. 1; Powell's Evidence, 4th ed. 310. But see supra, § 480.

conclusion has been reached in the United States, so far, at least, as to hold that the contents of a document, not requiring the attestation of witnesses, may be proved by admissions.[1] But in any view, the statement relied on must be distinctly a statement of fact, and not merely an opinion or inference of law by the deponent.[2] It must be an admission of a *fact* as distinguished from the admission of a *right*.[3]

§ 1093. It has, however, been with much force objected,[4] that to permit such parol evidence to be equally admissible, in proof of the contents of the instrument, with the instrument itself, when duly proved, is to open a vast field for misapprehension, perjury, and fraud, which would be wholly closed if the salutary rule of law, requiring that what is in writing should be proved by the writing itself, were here, as in other cases, to prevail. We are also reminded that Lord Tenterden, and Maule, J., have pointedly condemned this relaxation of the old practice;[5] and that even Parke, B., to whom the relaxation is mainly due, has questioned whether such admissions may not be sometimes quite unsatisfactory to a jury;[6] while the same acute reasoner qualified his own conclusions by reverting to the elementary principles we have already noticed,[7] as to the treacherous character of this kind of proof.[8] For, to apply these prin-

Such admissions must be strictly guarded.

[1] See Smith *v.* Palmer, 5 Cush. 513; Loomis *v.* Wadhams, 8 Gray, 557; Crichton *v.* Smith, 34 Md. 42; Taylor *v.* Peck, 21 Grat. 11. For other rulings bearing on the same question see New York Ice Co. *v.* Parker, 8 Bosw. 688; Robinson *v.* Schuy. Nav. Co., 3 Grant, 186; Taylor *v.* Henderson, 38 Penn. St. 60; Gay *v.* Lloyd, 1 Greene (Iowa), 78; Bivins *v.* McElroy, 11 Ark. 23; Brooks *v.* Isbell, 22 Ark. 488; Ward *v.* Valentine, 7 La. An. 184. An outstanding equity in land, it has been held, may be proved by a party's admission. Lewis *v.* Harris, 31 Ala. 689; Warfield *v.* Lindell, 30 Mo. 272. In New Jersey, while the conclusion reached in Slatterie *v.* Pooley is not accepted, it is held that the admission of a party insured, under oath, forming part of the proof of loss required to be furnished to the company, undertaking to set forth the insurance existing on the premises, may be received to prove the existence of the policy. Cumberland Ins. Co. *v.* Giltinan, 48 N. J. L. 495.

[2] Morgan *v.* Couchman, 14 C. B. 101; Goodell *v.* Smith, 9 Cush. 492.

[3] See supra, § 1082; Bloxam *v.* Elsee, 1 C. & P. 558; R. & M. 187.

[4] Taylor's Ev. § 382.

[5] Bloxam *v.* Elsee, *ut supra;* Boulter *v.* Peplow, 9 Com. B. 501.

[6] Slatterie *v.* Pooley, 6 M. & W. 669.

[7] Supra, § 318.

[8] See Williams *v.* Williams, 1 Hagg. Cons. 304; Earle *v.* Picken, 5 C. & P. 542, n.; Smith *v.* Burnham, 3 Sumn. 438; Salem Bank *v.* Gloucester Bank, 17 Mass. 27.

ciples to the present issue, the witness not only may misunderstand what the party has said, but, by unintentionally altering a few of the expressions really used, may give to the statement an effect completely at variance with what was intended.[1] To the same effect is an opinion by a leading Irish judge. "The doctrine laid down in that case,"[2] says Chief Justice Pennefather, speaking of Slatterie *v.* Pooley, "is a most dangerous proposition; by it a man might be deprived of an estate of £10,000 per annum, derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard defendant say he had conveyed away his interest therein by deed, or had mortgaged, or had otherwise incumbered it; and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through his invitation to fraud and dishonesty."[3]

May prove intent.

§ 1093 *a*. An admission may prove intent.[4] This is eminently the case in questions of domicil.[5]

Admissions not excluded because party could be examined.

§ 1094. Subject generally to the limitation just expressed, the extra-judicial admission of a party will not be received to prove that for which a higher class of evidence is required, unless such higher class of evidence is not attainable.[6] This rule, however, will not preclude the putting in evidence the admissions of a party, made out of court, even though he be in court, open to examination, at the time they are offered.[7]

[1] Note to Earle *v.* Picken, 5 C. & P. 542.

[2] Lawless *v.* Queale, 8 Ir. Law, 385. See Henman *v.* Lester, 12 C. B. (N. S.) 781.

[3] See also Henman *v.* Lester, 31 L. J. C. P. 370, 371, per Byles, J.; 12 Com. B. (N. S.) 781, 782, *S. C.*

"The case which called forth these remarks," comments Mr. Taylor, "was an action for nse and occupation. At the trial, one of the plaintiff's witnesses, after proving the occupation of the premises by the defendant, acknowledged in cross-examination the existence of a written agreement; and the court held that this agreement must be produced, though the defendant had admitted that he was tenant at a particular rent."

[4] Supra, §§ 482, 508, 955. Infra, § 1097; Carver *v.* Huskey, 77 Mo. 509.

[5] Infra, § 1097.

[6] Barrett *v.* Wright, 13 Pick. 45, cited § 1094; Welland Co. *v.* Hathaway, 8 Wend. 480; Morris *v.* Wadsworth, 17 Wend. 103; Jameson *v.* Conway, 10 Ill. 227; Threadgill *v.* White, 11 Ired. L. 591. Infra, § 1098.

[7] Clark *v.* Hougham, 2 B. & C. 149; Woolway *v.* Rowe, 1 Ad. & El. 114; Robinson *v.* Stuart, 68 Me. 61; Holley

§ 1095. But whatever may be the law as to admission of the contents of writings, it was settled in England, before the 17 & 18 Vict. c. 125, that a party cannot, by admitting the extra-judicial *execution* of a deed, dispense with the duty laid on the other side of proving such deed by the attesting witnesses.[1] There can be no question, however, that a party may make a *primâ facie* case against himself by admitting the execution of a note or other instrument as to which the law does not prescribe more formal proof.[2] Admissions of this kind, when non-contractual,[3] may be rebutted by the maker on proof of mistake;[4] nor are they admissible, unless it be shown that at the time of making them the note was exhibited to the party making the admission.[5]

Admission cannot prove execution where attestation is required.

§ 1096. An admission at common law, as we have seen,[6] may prove marriage; and an admission of a party that he had been married according to the laws of a foreign country, if such admission be corroborated by proof of cohabitation, may make it unnecessary to prove that the marriage had been celebrated according to the laws of that country.[7]

May prove marriage.

§ 1097. The declarations of a person deceased as to his domicil are admissible, when his intention is in question.[8] The same mode

v. Young, 68 Me. 215; Phœnix Ins. Co. *v.* Clark, 58 N. H. 164; Brubacker *v.* Taylor, 76 Penn. St. 83; Mason *v.* Poulson, 43 Md. 162; Hall *v.* The Emily Banning, 33 Cal. 522. See, however, Reed *v.* R. R., 45 N. Y. 574. Infra, § 1120.

To this effect, in fact, may be cited most of the cases in which admissions have been received in evidence since the statutes removing the incompetency of parties.

[1] See cases cited supra, § 725.

Where a testator bequeathed certain stock to his daughters, to stand in the executor's name until the expiration of the charter, which was renewed, parol declarations of the testator as to the renewal of the charter were held inadmissible. Barrett *v.* Wright, 13 Pick. 45.

[2] Nichols *v.* Allen, 112 Mass. 23; Daniel *v.* Ray, 1 Hill (S. C.), 32.

[3] See supra, §§ 1076–8.

[4] Hall *v.* Huse, 10 Mass. 39; Salem Bank *v.* Gloucester Bank, 17 Mass. 1.

[5] Shaver *v.* Ehle, 16 Johns. R. 201; Palmer *v.* Manning, 4 Denio, 131; Glazier *v.* Streamer, 57 Ill. 91.

[6] Supra, §§ 86 *et seq.*

[7] R. *v.* Newton, 2 M. & Rob. 503, per Wightman and Cresswell, JJ.; 1 C. & Kir. 164; *S. C. nom.* R. *v.* Simmonsto. But see R. *v.* Flaherty, 2 C. & Kir. 782; and supra, §§ 83 *et seq.*, and infra, § 1297.

[8] Brodie *v.* Brodie, 2 Sw. & Tr. 259; Ennis *v.* Smith, 14 How. 400; Kennedy *v.* Ryall, 67 N. Y. 380.

of proof is admissible, even when parties are alive, for the purpose of determining intent.[1] But mere vague unexecuted expressions of intent cannot be so received.[2] And a wife's casual declarations cannot bind her husband.[3]

Declarations as to domicil admissible.

§ 1098. We have seen elsewhere that an admission, whether under oath on an examination or otherwise, is not admissible to prove record facts.[4] It is at the same time competent to show by admissions the consequences of facts stated by record. Thus a witness can be asked whether he has not been in prison.[5] So, in an action for wages, an admission by the plaintiff that his claim had been referred to an arbitrator, who had made an award against him, has been held admissible evidence on behalf of the defendant.[6]

But not record facts.

§ 1099. An admission, as well as a confession, made under duress, is inadmissible,[7] though the mere proof of undue influence leading to admissions does not in civil cases, as it may in criminal, exclude such admissions.[8] Unless, however, otherwise provided by statute, the fact that an answer was extorted from a witness, when under examination in a court of justice, does not preclude its reception in evidence against him in a civil issue;[9] and the same rule applies to an admission obtained through a bill in equity.[10] Even though a witness is pre-

Admissions under duress inadmissible.

[1] Thorndike *v.* Boston, 1 Met. (Mass.) 242; Kilburne *v.* Bennett, 3 Met. (Mass.) 199; Wright *v.* Boston, 126 Mass. 161; Weld *v.* Boston, Ibid. 166; Burgess *v.* Clark, 3 Ind. 250. See supra, §§ 482, 1093 *a*.

[2] Bangor *v.* Brewer, 47 Me. 97; Harvard College *v.* Gore, 5 Pick. 370. See Lord Summerville's case, 5 Ves. 750; Anderson *v.* Lanenville, 9 Moo. P. C. 325; Moke *v.* Fellman, 17 Tex. 367; Wharton, Confl. of Laws, § 62.

The date of a contract has been held to be admissible, as one among other incidents to make up a presumption of domicil at a particular place. Lougee *v.* Washburn, 16 N. H. 134; Cavendish *v.* Troy, 41 Vt. 99.

[3] Parsons *v.* Bangor, 61 Me. 457.

[4] Supra, §§ 63, 64, 541, 991, 1094.

[5] Supra, §§ 541, 991.

[6] Murray *v.* Gregory, 5 Exch. R. 468.

[7] Stockflesh *v.* De Tastet, 4 Camp. 11; Robson *v.* Alexander, 1 M. & P. 448; Tilley *v.* Damon, 11 Cush. 247; Foss *v.* Hildreth, 10 Allen, 76. Supra, § 931. As to proof of duress, see Snyder *v.* Braden, 58 Ind. 143.

[8] Newhall *v.* Jenkins, 2 Gray, 562.

[9] Supra, § 488; infra, § 1120; Grant *v.* Jackson, Pea. R. 203; Ashmore *v.* Hardy, 7 C. & P. 501. *Aliter* in criminal trials where the defendant is confronted by confessions of crime drawn from him as a witness in a prior judicial proceeding. Whart. Crim. Ev. § 664.

[10] Bates *v.* Townsley, 2 Ex. R. 157. Infra, §§ 1109, 1119, 1122.

vented from explaining his testimony at trial, such testimony can afterwards be used against him.[1]

Party's statements when self-serving inadmissible by Roman law.

§ 1100. The extra-judicial writings of a party, according to the Roman standards, cannot be received in his favor, *quia nullus idoneus testis in re sua intelligitur*.[2] Hence comes the maxim, *Scriptura pro scribente nihil probat*.[3] When offered *against* a party making them, such writings are evidence, not because they are writings, but because they are admissions made by a party against his interest. To the rule that such statements cannot be received to further the interests of the party producing them, the Roman practice notes the following exceptions: merchants' books of original entries, when verified by the party's oath;[4] and papers forming part of those produced by the opposite party. But, as a general rule, statements made by a party out of court, in his own favor, cannot be received on trial to prove his case.[5]

And so by our own law.

§ 1101. By our own courts the same conclusions have been reached. A party's self-serving declarations cannot be put in evidence in his own favor, whether he be living or dead at the trial. Nor is the result changed by the statutes enabling a party to be called as a witness in his own behalf. That which he could prove by his sworn statements he is not permitted to prove by statements which are unsworn. In any view, therefore, the extra-judicial self-serving declarations of a party are inadmissible for him, with the exceptions hereafter stated, as evidence to prove his case.[6] Thus, the declarations of a person in pos-

[1] Collett *v.* Keith, 4 Esp. 212. See Milward *v.* Forbes, 4 Esp. 171. Infra, § 1120.

[2] L. 10, D. xxii. 5.

[3] See more fully supra, §§ 170, 265; and see James *v.* Stookey, 2 Wash. C. C. 139; Proprietary *v.* Ralston, 1 Dall. 18; Framingham Co. *v.* Barnard, 2 Pick. 532; Robinson *v.* R. R., 7 Gray, 92; Bailey *v.* Wakeman, 2 Denio, 220; Beach *v.* Wheeler, 24 Penn. St. 212; Douglass *v.* Mitchell, 35 Penn. St. 440; Nourse *v.* Nourse, 116 Mass. 101.

[4] See supra, § 678.

[5] Supra, §§ 619, 736.

[6] Handy *v.* Call, 30 Me. 9; Buswell *v.* Davis, 10 N. H. 413; Judd *v.* Brentwood, 46 N. H. 430; Baird *v.* Fletcher, 50 Vt. 603; Jacobs *v.* Whitcomb, 10 Cush. 255; Nourse *v.* Nourse, 116 Mass. 101; Whitney *v.* Houghton, 125 Mass. 451; Fay *v.* Harlan, 128 Mass. 244; North Stonington *v.* Stonington, 31 Conn. 412; Downs *v.* R. R., 47 N. Y. 83; Duvall *v.* Darby, 38 Penn. St. 56; Graham *v.* Hollinger, 46 Penn. St. 55; Schenck *v.* Sithoff, 75 Ind. 485; Craig *v.* Miller, 103 Ill. 605; Murray *v.* Cone, 26 Iowa, 276; Hogsett *v.* Ellis, 17 Mich. 351; Young *v.* Perkins, 29 Minn. 173;

session of land, in support of his own title, are inadmissible,[1] and so are self-serving declarations of possessors of chattels,[2] and so is the declaration of an alleged *cestui que trust*, not made in the alleged trustee's presence, when the object is to establish the trust.[3] By the same rule a party sued on an alleged loan cannot put in evidence his declaration at the time of the loan to prove that his pecuniary condition was such as to make it improbable that he would borrow money.[4]

Except when part of the *res gestae* or explanatory of condition and title.

§ 1102. It may, however, happen that statements of a party are so interwoven with a contract as to form part of it, or are so wrought up in a transaction that they form a necessary incident of any narrative of such transaction. In such case the party's declarations are admissible, as we have already seen, as part of the *res gestae*.[5] Self-serving declarations, therefore, are admissible as part of a transaction, and they are so whenever they are its incidental emanations; whenever, in other words, they were uttered instinctively, the transaction speaking through them, not they speaking about the transaction. If, on the other hand, instead of being the immediate reflex of the transaction, they are uttered after there has been time for concoction, they are inadmissible.[6] This is so in torts as well as

White *v.* Green, 5 Jones (N. C.), L. 47; Gordon *v.* Clapp, 38 Ala. 357; Marx *v.* Bell, 48 Ala. 497; Berney *v.* State, 69 Ala. 220; Heard *v.* McKee, 26 Ga. 332; Bowie *v.* Maddox, 29 Ga. 285; Hall *v.* State, 48 Ga. 607; Williams *v.* English, 64 Ga. 546; Arthur *v.* Gordon, 67 Ga. 364; Tucker *v.* Hood, 2 Bush, 85; Lester *v.* Woolley, 57 Tenn. 358; Darrett *v.* Donnelly, 38 Mo. 492; Rice *v.* Cunningham, 29 Cal. 492.

[1] Peabody *v.* Hewett, 52 Me. 33; Morrill *v.* Titcomb, 8 Allen, 100; Jackson *v.* Cris, 11 Johns. R. 437; Hedrick *v.* Gobble, 63 N. C. 48; Salmons *v.* Davis, 29 Mo. 176; and cases cited infra, § 1168.

[2] Bradley *v.* Spofford, 23 N. H. 444; Swindell *v.* Warden, 7 Jones L. 575; Turner *v.* Belden, 9 Mo. 787.

[3] Com. *v.* Kreager, 78 Penn. St. 477.

[4] Douglass *v.* Mitchell, 35 Penn. St. 440.

[5] See supra, §§ 258, 264; Milne *v.* Leisler, 7 H. & N. 786; Green *v.* Bedell, 48 N. H. 546; Blake *v.* Damon, 103 Mass. 199; Beardslee *v.* Richardson, 11 Wend. 25; Ahern *v.* Goodspeed, 72 N. Y. 108; Tompkins *v.* Saltmarsh, 14 Serg. & R. 275; Louden *v.* Blythe, 16 Penn. St. 532; Potts *v.* Everhardt, 26 Penn. St. 493; Scott *v.* Shaler, 28 Grat. 89; Mitchell *v.* Colglazier, 106 Ind. 464; Purkiss *v.* Benson, 28 Mich. 538; Stephens *v.* McCloy, 36 Iowa, 659; Bass *v.* R. R., 42 Wis. 654; Allen *v.* Seyfried, 43 Wis. 414; Hart *v.* Freeman, 42 Ala. 567; Head *v.* State, 44 Miss. 731; Sherley *v.* Billings, 8 Bush, 147; Tevis *v.* Hicks, 41 Cal. 123; Colquitt *v.* State, 34 Tex. 550.

[6] Supra, § 262.

contracts.[1] Declarations, however, when received as part of the *res gestae*, are admitted, not to prove their own truth, but to exhibit the attitude of the parties, and to show the transaction in all its aspects. Thus, where the question was whether the defendant had acquired a right of way over a field belonging to the plaintiff, it was held, in Connecticut, admissible for the plaintiff to put in evidence his declarations while ploughing the field, that the party claiming the right of way had no such right, but only used the same by the owner's permission; the evidence being received not as proof of the assertion, but as showing that the act of ploughing was the assertion of a right inconsistent with the alleged right of way.[2] On the same reasoning may be admitted statements made by a party in possession as to his boundaries,[3] and as to the nature of his title.[4] And statements in taking possession of property may be in like manner admissible.[5] But such declarations are inadmissible when conflicting with record title.[6]

Another exception to the rule is to be found in the reception, under the limitations already noticed, of a party's declarations as to his physical or mental condition, when such are in controversy.[7] Such declarations, also, may be received to fix a date.[8]

And so when stating symptoms or fixing dates.

§ 1103. A party offering a written admission of his opponent, must offer the whole; a part cannot be picked out, but the whole context, so far as qualifying the sense, must be introduced.[9] The admission of part of an ac-

The whole context of a written admission must be

[1] See supra, § 263; Fellowes *v.* Williamson, M. & M. 306; Polston *v.* See, 54 Mo. 291.

[2] Sears *v.* Hayt, 37 Conn. 406. See Carrig *v.* Oaks, 110 Mass. 144; Hardy *v.* Moore, 62 Iowa, 65.

[3] Abel *v.* Van Gelder, 36 N. Y. 513; Sheafer *v.* Eastman, 56 Penn. St. 144.

[4] Hale *v.* Rich, 48 Vt. 217; Moore *v.* Hamilton, 44 N. Y. 666. See Newlin *v.* Lyon, 49 N. Y. 661; Pier *v.* Duff, 63 Penn. St. 59; and so of declarations of deceased persons cognizant of land, supra, §§ 191, 248; Susq. R. R. *v.* Quick, 68 Penn. St. 189.

[5] Supra, § 262.

[6] Infra, 1157.

[7] Supra, § 268–9.

[8] Com. *v.* Sullivan, 123 Mass. 221.

[9] Supra, §§ 617–620, 924; Bermon *v.* Woodbridge, 2 Dougl. 788; Ld. Bath *v.* Bathersea, 5 Mod. 10; Cobbett *v.* Grey, 4 Ex. R. 729; Percival *v.* Caney, 4 De Gex & Sm. 622; Pennell *v.* Meyer, 2 M. & Rob. 98; Mut. Ins. Co. *v.* Newton, 22 Wall. 32; Storer *v.* Gowen, 18 Me. 174; Webster *v.* Calden, 55 Me. 165; Whitwell *v.* Wyer, 11 Mass. 6; Lynde *v.* McGregor, 13 Allen, 172; Hopkins *v.* Smith, 11 Johns. R. 161; Gildersleeve *v.* Mahony, 5 Duer, 383; Clark *v.* Crego, 47 Barb. 599; Barnes *v.*

proved, and so of interdependent writings.

count, for instance, involves the admission of the whole.[1] This, however, does not require the admission of distinct irrelevant items in account books;[2] nor other writings in the same letter-book or compilation.[3] A letter can be put in evidence without offering that to which it was a reply,[4] though if what purports to be an entire correspondence be offered, it must be offered complete,[5] and if a letter is put in, this carries with it all memoranda on the letter;[6] nor can a writing go in evidence without carrying with it its indorsements.[7] A letter addressed to a party, found in his possession, cannot be put in evidence without showing he replied to it, or in some other way acquiesced in its contents.[8] But interdependent documents are to be read together.[9]

Allen, 1 Abb. (N. Y.) App. 111; Blair *v.* Hum, 2 Rawle, 104; Searles *v.* Thompson, 18 Minn. 316; Satterlee *v.* Bliss, 36 Cal. 489; People *v.* Murphy, 39 Cal. 52; Harrison *v.* Henderson, 12 Ga. 19; Jordan *v.* Pollock, 14 Ga. 145; Fitzpatrick *v.* Harris, 8 Ala. 32; Howard *v.* Newsom, 5 Mo. 523. See Harrison *v.* Henderson, 12 Ga. 19; Spanagel *v.* Dellinger, 38 Cal. 278.

[1] See supra, §§ 619, 620, 924; infra, § 1134.

[2] Catt *v.* Howard, 3 Stark. R. 6; Reeve *v.* Whitmore, 2 Dr. & S. 446; Abbott *v.* Pearson, 130 Mass. 141. And so of disconnected articles in a newspaper. Darby *v.* Ouseley, 1 H. & N. 1.

[3] Sturge *v.* Buchanan, 10 Ad. & E. 598.

[4] Barrymore *v.* Taylor, 1 Esp. 326; De Medina *v.* Owen, 3 C. & K. 72; North Berwick Co. *v.* Ins. Co. 52 Me. 336; Hayward Rubber Co. *v.* Dunklee, 30 Vt. 29; Cary *v.* Pollard, 14 Allen, 285; Stone *v.* Sanborn, 104 Mass. 319; Wiggin *v.* R. R., 120 Mass. 201; Brayley *v.* Jones, 33 Ind. 508; Lester *v.* Sutton, 7 Mich. 331. See Merritt *v.* Wright, 19 La. An. 91; Newton *v.* Price, 41 Ga. 186. Infra, § 1127. Compare article in Pittsburgh L. J., May 9, 1877.

[5] Supra, § 607; Roe *v.* Day, 7 C. & P. 705; Watson *v.* Moore, 1 C. & K. 625; Bryant *v.* Lord, 19 Minn. 396; Stockham *v.* Stockham, 32 Md. 196; Simmons *v.* Haas, 56 Md. 153; Moore *v.* Hawkes, 56 Ga. 557; Merritt *v.* Wright, 19 La. An. 91.

[6] Dagleish *v.* Dodd, 5 C. & P. 238. See supra, § 619.

[7] Supra, § 619; infra, § 1135.

[8] Com. *v.* Eastman, 1 Cush. 189. Infra, § 1154.

[9] Supra, § 618. Phoenix Steel Co. *v.* Daly, 44 L. J. Ch. 683; Payson *v.* Lamson, 134 Mass. 593; Gardt *v.* Brown, 113 Ill. 475; Maxted *v.* Seymour, 56 Mich. 129.

That evidence is admissible to show two writings are interdependent, see Myers *v.* Munson, 65 Iowa, 423.

But one who puts in evidence a petition in bankruptcy for the purpose of proving the fact of bankruptcy does not, by so doing, admit the truth of statements contained in the schedule. Pringle *v.* Leverich, 97 N. Y. 181. See infra, §§ 1107–8.

A letter written by one party to a transaction to the other party, after

§ 1104. In equity, however,[1] if a plaintiff read particular facts from an answer, the defendant cannot by the English practice, as part of the proof of the case, read other facts, unless qualifying and explaining the meaning of those read by the plaintiff.[2] But it is said that on a motion for a decree the defendant's answer will be treated as an affidavit, of which the whole must be read.[3]

Whole of answer in equity and sworn returns need not be read.

§ 1105. At common law, admissions contained in pleas, or answers in chancery, cannot be offered separately from the documents to which they are attached; the whole document must go in.[4] Even an answer in chancery cannot in common law practice be read, without the bill to which the answers are given, should this be required by the party against whom the answers are offered.[5]

Otherwise at common law.

§ 1106. Although the exhibits attached to the answers of a person, when sworn, cannot be read without the examinations,[6] yet a party obtaining knowledge of such documents by a suit in chancery may compel their admission in a suit at common law, without putting in evidence the chancery proceedings.[7] "It is surmised," said Lord Denman, "that an unfair advantage had been taken of the defendant in obtaining a knowledge of these letters through a suit in chancery, and then producing them without the answers, which may have greatly qualified and altered their effect. But I cannot think that a judge

Practice as to exhibits.

the transaction, giving his version of it, and not answered by the other party, is not competent in evidence against the latter as an admission. Learned *v.* Tillotson, 97 N. Y. 1; 49 Am. Rep. 508. See Beer *v.* Aultmay, 32 Minn. 90. Supra, § 618.

Where a contract refers to a plan, the plan, unless made the final arbiter, must yield to clauses in the contract with which it conflicts. Smith *v.* Flanders, 129 Mass. 322.

[1] See supra, § 1099; infra, § 1112.

[2] Davis *v.* Spurling, 1 Russ. & M. 68; Bartlett *v.* Gillard, 3 Russ. 156. See remarks of Swayne, J., Clements *v.* Moore, 6 Wall. 299–315.

[3] Stephens *v.* Heathcote, 1 Drew. & Sm. 138; Taylor's Evidence, § 660.

[4] Percival *v.* Caney, 4 De Gex & Sm. 623; Bermon *v.* Woodbridge, 2 Dougl. 788; Marianski *v.* Cairns, 1 Macq. Sc. Cas. 212; Baildon *v.* Walton, 1 Exch. C. 617; Bath *v.* Bathersea, 5 Mod. 10.

As to pleadings, see infra, § 1110. As to equity practice, infra, § 1112.

[5] Pennell *v.* Meyer, 2 M. & Rob. 98; 8 C. & P. 470. But see Ewer *v.* Ambrose, 4 B. & C. 25; Rowe *v.* Brenton, 8 B. & C. 737.

[6] See Holland *v.* Reeves, 7 C. & P. 36. Supra, § 618.

[7] Long *v.* Champion, 2 B. & Ad. 284; Stnrge *v.* Buchanan, 10 Ad. & E. 605. See Falconer *v.* Hanson, 1 Camp. 171.

at nisi prius has anything to do with these considerations: he is to inquire only whether due notice has been given; whether the documents have been proved to exist; whether copies are well proved."[1]

Whole of applicatory legal procedure usually goes in.

§ 1107. In actions against officers for misconduct in office, the introduction of particular writs, or other documents issued by them, to charge them, carries with it the introduction of any excusatory matter contained in such documents.[2] But it may be now considered settled that when a warrant is put in evidence, to charge a sheriff or other officer with misconduct in making a wrongful seizure, the sheriff is not relieved from producing justificatory evidence by the fact that such justification is recited in the warrant put in evidence against him.[3] In equity, where an answer contains an admission of the receipt of money, this admission is not to be regarded as drawing into it and identifying with it statements, in other parts of the answer, of independent payments or settlements of the money so admitted to be received.[4]

So of whole relevant portions of conversation.

§ 1108. Where part of a conversation is put in evidence by one party, the other is entitled to put in the whole so far as it is relevant. A., for instance, cannot put in evidence against B., remarks of B. containing admissions, without putting in evidence the substance of all that related to such remarks in the conversation.[5] "Nor can it make

[1] Sturge *v.* Buchanan, 10 A. & E. 605. See, further, Long *v.* Champion, 2 B. & Ad. 286; Hewitt *v.* Piggott, 5 C. & P. 75, 77; Jacob *v.* Lindsay, 1 East, 460; Falconer *v.* Hanson, 1 Camp. 171; 2 Ph. Ev. 341. In the latter cases it was held, that using a party's oral admission against him necessitates the introduction of papers referred to by him, without which his statement would be incomplete.

[2] Haylock *v.* Sparke, 1 E. & B. 471; Haynes *v.* Hayton, 6 L. J. K. B. (O. S.) 231; recognized in Bessey *v.* Windham, 6 Q. B. 172, cited in Taylor on Evidence, § 658. See supra, § 830.

[3] White *v.* Morris, 11 C. B. 1015; Glave *v.* Wentworth, 6 Q. B. 173, n.; Bowes *v.* Foster, 27 L. J. Ex. 463; Taylor on Evidence, § 659. See infra, § 1118; supra, §§ 824, 834.

[4] Robinson *v.* Scotney, 19 Ves. 584; Freeman *v.* Tatham, 5 Hare, 329.

[5] Queen Caroline's case, 2 B. & B. 297; Beckham *v.* Osborne, 6 M. & Gr. 771; Fletcher *v.* Froggatt, 2 C. & P. 566; Storer *v.* Gowen, 18 Me. 174; Ripley *v.* Paige, 12 Vt. 353; O'Brien *v.* Cheney, 5 Cush. 148; Dole *v.* Wooldredge, 142 Mass. 161; Bristol *v.* Warner, 19 Conn. 7; Hopkins *v.* Smith, 11 Johns. 161; Stuart *v.* Kissam, 2 Barb. 493; Oakland *v.* Ins. Co., 72 N. Y. 274; Platner *v.* Platner, 78 N. Y. 90; Fox *v.* Lambson, 3 Halst. 275; Thomson *v.* Austen, 2 S. & R. 361; Gill *v.* Kuhn, 6 S. & R. 333; Hamsher *v.* Kline, 57 Penn. St. 397; Wolf Creek Diamond

any difference whether the part is brought out by the direct examination of the party's own witness or the cross-examination of the witness of his adversary."[1] Even if the conversation should be deemed the declarations of a third person to the action, the principle of the rule will apply.[2] But collateral statements are not made admissible because part of the conversation; nor can they be introduced, by means of cross-examination, to make out an independent case for the party by whom they are made unless they are part of the context of the admission received.[3] Nor does the limitation exact the introduction of interviews subsequent to that in which the admissions proved were made.[4] If the substance be proved, it is not necessary to reproduce the words.[5] Nor is the evidence excluded by the fact that there were other portions of the conversation which the witness did not hear.[6] As we have seen, the relevant written context of a written admission must go in; and so of interdependent documents.[7]

So of testimony reproduced from a former trial.

§ 1109. When the testimony of a witness, as given in another cause, is offered, the whole relevant portion of the testimony, including cross-examination as well as examination, must be given;[8] and where the plaintiffs, who were assignees of a bankrupt, gave in evidence an examination of the defendant before the commissioners, as proof that he had taken certain property, the court held that they thereby

Coal Co. *v.* Schultz, 71 Penn. St. 185; Phares *v.* Barber, 61 Ill. 271; Chicago, etc. R. R. *v.* Eininger, 111 Ill. 79; Miller *v.* R. R., 52 Ind. 51; Overman *v.* Coble, 13 Ired. L. 1; Roberts *v.* Roberts, 85 N. C. 9; Bradford *v.* Bush, 10 Ala. 386; Martin *v.* State, 77 Ala. 1; Howard *v.* Newsom, 5 Mo. 523.

[1] Sharswood, J., Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Penn. St. 185.

[2] Citing 1 Phil. Ev. 445; Platner *v.* Platner, 78 N. Y. 90.

[3] Prince *v.* Samo, 7 A. & E. 627; Blight *v.* Ashley, Pet. C. C. 15; Barnum *v.* Barnum, 9 Conn. 242; Fox *v.* Lambson, 7 Halst. 275; Hatch *v.* Potter, 7 Ill. 725; Edwards *v.* Ford, 2 Bailey, 461; Ward *v.* Winston, 20 Ala. 167. Supra, § 1100.

[4] Adam *v.* Eames, 107 Mass. 275.

[5] Hale *v.* Silloway, 1 Allen, 21; Kittridge *v.* Russell, 114 Mass. 67; Mays *v.* Deaver, 1 Iowa, 216; Dennis *v.* Chapman, 19 Ala. 29; Kendall *v.* State, 65 Ala. 492. See fully § 514.

[6] Com. *v.* Pitzinger, 110 Mass. 101.

[7] Supra, § 1103.

[8] Goss *v.* Quinton, 3 M. & G. 825; Ridgway *v.* Darwin, 7 Ves. 404; Robinson *v.* Scotney, 19 Ves. 584; Smith *v.* Biggs, 5 Sim. 391; Tibbetts *v.* Flanders, 18 N. H. 284; Marsh *v.* Jones, 21 Vt. 378; Woods *v.* Keyes, 14 Allen, 236; Com. *v.* Richards, 18 Pick. 434; Gildersleeve *v.* Caraway, 10 Ala. 260. Supra, § 180.

made his cross-examination evidence in the cause; and as, in this cross-examination, the defendant had stated that he had purchased the property under a written agreement, a copy of which was entered as part of his answer, this statement was considered as *some evidence* on his behalf of the agreement and its contents; and that, too, though the absence of the document was not accounted for, nor had notice been given to the plaintiffs to produce it.[1] The whole testimony must be taken together. One portion without the other is incompetent. It is not, however, necessary that the testimony should be given verbatim. Its substance is enough;[2] it being sufficient to reproduce the main facts stated in such testimony.[3] But the witness must have a clear recollection of the whole testimony, examination and cross-examination.[4]

II. JUDICIAL ADMISSIONS.

Admissions by plea conclusive.

§ 1110. A *confessio*, to be *judicialis*, must be before a judge competent to take jurisdiction of the particular suit, and the suit must be brought regularly before him. The presence, actual or constructive, of the judge is as essential to the solemnity of the *confessio* as is that of the notary to the solemnity of the *instrumentum publicum*.[5] Nor is the admission a bar if an *ex parte* proceeding; it must be on an issue accepted by the other side in order to bind either.[6] The appearance in court, however (by person or attorney), of the other side, is such an acceptance. *Absente adversario*, the confession is operative only *quae solam voluntatem confitentis declarat*, or *in his quae dependent solum ex voluntate confitentis*.[7] But when formally made, a judicial confession is conclusive as to the issue, unless shown to have been made by mistake or to have been secured by fraud.[8] And it may be used against the party making it in all other cases in which it is relevant, though it may not in such cases conclude.[9]

[1] Goss *v.* Quinton, 3 M. & G. 825; Taylor's Ev. § 658.

[2] Supra, §§ 180, 514.

[3] Hepler *v.* Bank, 97 Penn. St. 120.

[4] Ibid.

[5] Tancred, p. 211; Mascard. concl. 347, nr. 53.

[6] See supra, § 1078.

[7] Mascard. concl. 348, nr. 1.

[8] Supra, §§ 837–8; infra, § 1116; Marsh *v.* Mitchell, 26 N. J. Eq. 497; Gridley *v.* Conner, 4 La. An. 416; Denton *v.* Erwin, 5 La. An. 18; Edson *v.* Freret, 11 La. An. 710.

[9] R. *v.* Fontaine Moreau, 11 Q. B. 1033; Bradley *v.* Bradley, 2 Fairf. 367;

When part of the record is put in evidence for this purpose, the whole may be put in.[1]

So of pleas in abatement.

§ 1111. It should be noticed, in respect to pleas in abatement, that where one defendant pleads generally the non-joinder of other parties as co-defendants, such plea is not divisible; but if it fails in part, it must fail altogether.[2] When a plea of abatement is decided against a defendant, such plea going to the merits, the judgment has been at common law held to be final if the action is for a definite sum.[3] It is otherwise when the judgment is interlocutory, in which case liability only to nominal damages is admitted.[4]

In pleading, that which is not disputed is admitted.

§ 1112. So far as concerns the particular suit in which the plea is entered, it may be generally declared that whenever a material averment well pleaded is passed over by the adverse party without denial, whether this be by pleading in confession and avoidance, or by demurring in law, or by suffering judgment to go by default, it is thereby, for the purpose of pleading, if not for the purpose of trial before the jury, conceded to be so far true that it need not be proved by the opposite side.[5] "It is a fundamental rule in pleading, that a

Perry *v.* Simpson Co., 40 Conn. 313; Adams *v.* Utley, 87 N. C. 356; Guy *v.* Manuel, 89 N. C. 83. Supra, § 838; infra, § 1116. See Brazill *v.* Isham, 2 Kern. 9.

"A party who formally and explicitly admits by his pleading that which establishes the plaintiff's right will not be suffered to deny its existence, or to prove any state of facts inconsistent with that admission. No application was made to the court to be relieved from the effect of this admission, or to weaken or modify its full import; and, while it thus stood, in the language of Woodruff, J., in Robbins *v.* Codman, 4 E. D. Smith, 325, 'after such an admission it was not necessary for the plaintiffs to prove it, nor would it be permitted to the defendant to deny it.'" Bacon, J., Paige *v.* Willett, 38 N. Y. 31.

In a civil suit for assault and battery, the plea of guilty to a criminal prosecution for the same act has been held admissible for plaintiff, but only as an admission of defendant. Rudolph *v.* Landwerten, 92 Ind. 34. See supra, § 776.

[1] State *v.* Hawkins, 81 Ind. 486.

[2] Hill *v.* White, 6 Bing. N. C. 26.

[3] Passmore *v.* Bousfield, 2 Stark. R. 298.

[4] Weleker *v.* Le Pelletier, 1 Camp. 481; Morris *v.* Lotan, 1 M. & Rob. 233. See per Pollock, C. B., in Crellin *v.* Calvert, 14 M. & W. 18, 19, and per Rolfe, B., in Ibid. 22; and see Crellin *v.* Calvert, 14 M. & W. 11.

[5] Taylor's Ev. § 748; citing Steph. Pl. 248; Jones *v.* Brown, 1 Bing. N. C. 484; Le Gaillon *v.* L'Aigle, 1 B. & P. 368; Prowse *v.* Shipping Co., 13 Moo. P. C. 484. See, also, Coffin *v.* Knott, 2 Greene (Iowa), 582.

material fact asserted on one side and not denied on the other is admitted."[1] But such admissions do not bind collaterally.[2]

The distinctive effects of demurrers have been already discussed.[3]

Judgment conceded by administrator admits assets.

§ 1113. As we have already had occasion to see, when a suit is brought on a former judgment, the record of such judgment cannot, unless on proof of fraud or mistake, or non-identity, be disputed in the second suit.[4] Nor is this rule limited to cases where the suit is simply for the revival of a judgment, or for its transfer to another jurisdiction. Thus, if an executor or administrator confess judgment, or suffer it to go against him by default, he thereby admits assets in

[1] McAllister, J., Simmons *v.* Jenkins, 76 Ill. 482; citing Dana *v.* Bryant, 1 Gilm. 104; Pearl *v.* Wellman, 3 Ibid. 311; Briggs *v.* Dorr, 19 Johns. 95; Jack *v.* Martin, 12 Wend. 316; Raymond *v.* Wheeler, 9 Cow. 295.

[2] See infra, § 1116 *a*.

[3] See supra, § 840.

The English equity practice in this respect is thus recapitulated by Mr. Taylor (Ev. § 759):—

"First, every bill which is ordered to be taken *pro confesso* may be read as evidence of the facts therein contained, in the same manner as if such facts had been admitted to be true by the defendant's answer. See 11 G. 4 and 1 W. 4, c. 36, § 14; Cons. Ord. Ch. 1860, Ord. xxii. Next, where a cause is heard upon a bill and answer, the answer is admitted to be true on all points. See Churton *v.* Frewen, 35 L. J. Ch. 692; and no other evidence is admitted, unless it be matter of record to which the answer refers, and which is provable by the record. Cons. Ord. Ch. 1860, Ord. xix. r. 2. Then, it is generally true that, where a defendant, in his answer to a bill, admits the existence and contents of a document, the plaintiff may use such admission for the purposes of the suit, without producing the document as evidence at the hearing. M'Gowan *v.* Smith, 26 L. J. Ch. 8, per Kindersley, V. C.; Lett *v.* Morris, 4 Sim. 607. Still, a demurrer is regarded by courts of equity as simply raising the question of law, without any admission of the truth of the allegations contained in the bill—so that if the demurrer be overruled, an answer may still be put in (as to when a party may plead and demur to the same pleading at the same time at common law, see 15 & 16 Vict. c. 76, § 80); and a plea is merely a statement of circumstances sufficient to show that, *supposing* the facts charged to be true, the defendant is not bound to answer. It follows, from this state of the law, that in any future action between the same parties, neither the demurrer nor plea can be received in evidence, as amounting to an admission of the facts charged in the bill. Tomkins *v.* Ashby, M. & M. 32, per Abbott, C. J."

That affidavits and answers may be put in evidence against the party making them, see infra, §§ 1116, 1119,

The Roman law is given supra, § 461.

See, as to Massachusetts practice, Elliott *v.* Hayden, 104 Mass. 180. As to how far introducing depositions or answer in chancery necessitates admission of bill, see supra, § 828.

[4] See supra, §§ 758 *et seq.*

his hands, and hence he cannot be permitted to dispute the fact, in an action on such judgment, based on a *devastavit*.[1] *Some* proof must indeed be given that the assets have been wasted, in order to charge the executor or administrator personally in such case; but slight evidence has been held enough for this purpose.[2]

Paying money into court is an admission *pro tanto*.

§ 1114. It was at one time intimated that paying money into court admits everything which the plaintiff would have to prove in order to recover the money.[3] The better opinion, however, now is, that payment into court upon the *indebitatus* counts admits only a hypothetical or alternative liability to the extent of the money paid in, on the declaration; and it would appear that, practically, the contract must be proved.[4] But if in a statement of claim, the claim is based upon a special contract, payment into court is an admission of such contract,[5] to the extent to which it is obligatory upon the plaintiff to prove it,[6] and an admission of the specific breach in respect of which the payment is made.[7] Beyond this sum, however, damages are not admitted; nor is there an admission of any sum to which the action does not apply. Thus, while payment into court in an action upon a bill or a promissory note admits the instrument, and also, *primâ facie*, admits the precise sum to be due upon it,[8] yet, if the instrument be payable by instalments, such payment admits only that the sum paid was due upon the bill or note, and does not preclude the defendant from pleading the statute of limitations as to any further sum.[9] A defendant also, by so paying, is not precluded from taking any other objection, in order to limit the operation of the contract declared on, and to prevent the plaintiff from recovering more than the amount that was really paid in.[10] A like qualified admission was recognized in a case where the declaration,

[1] Skelton *v.* Hawling, 1 Wils. 258; Re Trustee Relief Act, Higgins's Trusts, 2 Giff. 562. See supra, §§ 783, 837.

As to inventories as admissions, see infra, § 1121.

[2] Leonard *v.* Simpson, 2 Bing. N. C. 176, 180, per Tindal, C. J.; 2 Scott, 335, *S. C.* See, also, Cooper *v.* Taylor, 6 M. & Gr. 989.

[3] Per cur. Dyer *v.* Ashton, 1 B. & C. 3.

[4] Kingham *v.* Robins, 5 M. & W. 94.

[5] Archer *v.* English, 1 M. & G. 876; Powell's Ev. 267.

[6] Cooper *v.* Blick, 2 Q. B. 915.

[7] Rucker *v.* Palsgrave, 1 Camp. 550.

[8] Tattenhall *v.* Parkinson, 2 M. & W. 752.

[9] Reid *v.* Dickons, 5 B. & Ad. 599.

[10] Cox *v.* Parry, 1 T. R. 464.

after stating that the defendant and another were indebted to the plaintiff in a certain sum, to wit, £250, but that the debt was barred by the statute of limitations, averred that the defendant afterwards, and within six years from the commencement of the suit, signed a written promise to pay his proportion of the debt, which proportion amounted to a certain sum, to wit, a moiety of the debt, and then assigned non-payment as a breach. In this case it was held that the defendant, by paying 10*s.* into court, admitted the contract and breach, but disputed the amount due.[1]

§ 1115. In actions of tort the law has been thus comprehensively stated:[2]—

In torts only when declaration is specific.

If "the declaration is general and unspecific, the payment of money into court, although it admits *a* cause of action, does not admit *the* cause of action sued for; and the plaintiff must give evidence of the cause of action sued for before he can recover larger damages than the amount paid into court. On the other hand, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant unless the defendant admitted the particular claim made by the declaration, we think that the payment of money into court admits the cause of action sued for, and so stated in the declaration." The conclusion above given was not reached, however, without some faltering. The Court of Queen's Bench, to use the summary of a learned English commentator,[3] "ruled one way,[4] the Court of Common Pleas ruled another;[5] and the barons of the Exchequer, in their anxiety to be right, ruled both ways."[6] But the judgment of

[1] Lechmere *v.* Fletcher, 1 C. & M. 623.

That paying money into court admits only the special contract set out in the declaration only to that extent to which the plaintiff is bound to prove it, see Cooper *v.* Blick, 2 Q. B. 915; where the plaintiff, having declared upon a contract by the defendants to employ him, to wit, in the capacity of editor of a newspaper at a certain salary, to wit, at the rate of £400 per annum, the defendants paid money into court. It was held that on this state of the pleading they admitted the capacity in which the plaintiff had engaged to serve them, but not the amount of salary which they had agreed to pay him. The test, so held the court, was, what must the plaintiff have proved, had *non assumpsit* been pleaded, and it was decided that the former averment was material and the latter immaterial.

[2] Jervis, C. J., in Perren *v.* Monmouthshire R. Co., 11 C. B. 863.

[3] Powell's Evidence, 4th ed. 267.

[4] Leyland *v.* Tancred, 16 Q. B. 664.

[5] Screger *v.* Carden, 11 C. B. 851.

[6] Story *v.* Finnis, 6 Ex. R. 123; Knight *v.* Egerton, 7 Ex. R. 407.

Jervis, C. J., as above given, may be regarded as a final settlement of this vexed question.[1]

§ 1116. We have already noticed that the pleadings of a party in one case may, under certain circumstances, be used against the same party in another case.[2] It may here be incidentally observed, that an answer under oath is to be regarded as admissible against the party making it, in all independent suits in which it is relevant. As is said by a learned expositor,[3] "A person's answer in chancery is evidence against him, by way of admission, in favor of a person who was no party to the chancery suit; for the statement, being upon oath, cannot be considered conventional merely."[4] The same rule applies to all statements under oath in suits either at law or equity.[5] One defendant, however, cannot, as we will see, be affected by his co-defendant's answer.[6]

Pleadings in other cases may be admissions.

§ 1116 *a*. Collaterally, it should be remembered, pleas are not to be regarded as admitting that which they do not contest. A plea of confession and avoidance, it is true, is to be regarded as admitting, for the purposes of the particular issue, the existence of the claim which it seeks to avoid, by the introduction of an avoiding defence; but even such a plea may, on due cause shown, be withdrawn, and one traversing the plaintiff's cause of action substituted. So far as concerns collateral actions, a plea setting up an avoiding defence cannot, when confining itself to the avoidance, be

But collaterally pleas do not always admit that which they do not contest.

[1] Taylor's Ev. § 765.

[2] Supra, § 838.

[3] Phillipps on Evidence, vol. i., Van Colt's ed. 1849, p. 366.

[4] Infra, § 1119. See, to same effect, Cook *v.* Barr, 44 N. Y. 158. See, also, cases cited supra, §§ 838, 1099.

[5] Taylor on Ev. § 1753; De Whelpdale *v.* Milburn, 5 Price, 485; Church *v.* Shelton, 2 Curtis C. C. 271; Pope *v.* Allin, 115 U. S. 363; Eaton *v.* Telegraph Co., 68 Me. 63; Elliott *v.* Hayden, 104 Mass. 180; Cooke *v.* Barr, 44 N. Y. 156. See Williams *v.* Cheney, 3 Gray, 215; State *v.* Littlefield, 3 R. I. 124.

[6] Infra, § 1199.

"It is contended by the appellant's counsel in his brief that the answer of Jacob Reese to the bill of complaint is competent evidence against the other defendants, and that the admissions therein made are sufficient proof of the agreement of sale and its part performance. But the principle is very well settled that the answer of one defendant cannot be used as evidence against his co-defendant. Stewart *v.* Stone, 3 G. & J. 514; Hayward *v.* Carroll, 4 H. & J. 520; Calwell *v.* Boyer, 8 G. & J. 149." Grason, J., Reese *v.* Reese, 41 Md. 558–59.

treated as admitting the plaintiff's claim. The defendant, for instance, pleads a release; and this, it may be said, admits the claim released. But this conclusion does not necessarily result. A man may obtain a release from a claim which he does not owe; and collaterally, that he obtained such a release is no proof, by itself, of the existence of the claim. "Non utique existimatur confiteri de intentione adversarii, quocum agitur quia exceptione utitur."[1] As a matter of principle mere formal pleading, not sustained by affidavit, should not be regarded collaterally as entitled to any weight;[2] and in Massachusetts such pleading is not to be regarded as evidence on trial.[3]

Admissions by plea are rebuttable.

§ 1117. The qualities of an estoppel, which are imputable to a party's pleas so far as concerns the particular case in which they are pleaded, are not imputable to such pleas when offered in evidence collaterally, even in cases where they are admissible.[4] Thus, where a plea to an action on a bond set out a corrupt agreement between the parties irrespective of the bond, and then went on to aver that the bond was given to secure, among other moneys, the sum mentioned in the *said* agreement; and the replication, tacitly admitting the corrupt agreement, traversed the fact of the bond having been given in consideration thereof, but the plaintiff failed on this issue; it was held, that the admission was available for the purpose of that suit only; and, consequently, the plaintiff was at liberty to dispute the corrupt nature of the agreement in a subsequent action on a deed, which was signed by the defendant at the same time with the bond by way of collateral security.[5]

§ 1118. What has been said of pleading equally applies to process. A party by issuing process admits the facts which such process assumes.[6] Thus, where a magistrate was sued in trespass

[1] L. 9, D. de exceptionib. xli. 9. See Crump *v.* Gerock, 40 Miss. 765; Kimball *v.* Bellows, 13 N. H. 58; and see fully, supra, § 839.

[2] Infra, §§ 1184 *et seq.*

[3] See Lyons *v.* Ward, 124 Mass. 365; Blackington *v.* Johnson, 126 Mass. 21.

[4] See supra, §§ 760, 837–8; Leggett *v.* R. R., L. R. 1 Q. B. D. 599.

[5] Carter *v.* James, 13 M. & W. 137. See Rigge *v.* Burbidge, 15 M. & W. 598; 2 Dowl. & L. 1, *S. C.*; and Hutt *v.* Morrell, 3 Eq. R. 241, per Pollock, C. B.; Taylor's Ev. § 747.

[6] See supra, §§ 828 *et seq.* In Bessey *v.* Windham, 6 Q. B. 166, in order to fix a sheriff in an action of trespass, the plaintiff put in the warrant under which the seizure was made; and as this recited the writ of *fi. fa.*, the

for assault and false imprisonment, the warrant of commitment put in evidence by the plaintiff was held to be admissible on behalf of the defendant, as proof of the information recited in it.[1] It has been even held, in a case where an under sheriff's letter was produced by the plaintiff to affect the defendant, that the letter was *primâ facie* evidence also of certain facts stated therein, which tended to excuse the sheriff.[2] So far as concerns the returns of officers, "It is well settled that the return of an officer, as to all matters which are properly the subject of his return, is conclusive so far as it affects parties and privies to the process returned."[3] So the position taken by a party in a former trial may, when involving admissions by him on the merits, be produced against him at the discretion of the court on second trial.[4]

So of process and position taken on trial.

The effect of judgments as admissions has been already noticed.[5]

Court of Queen's Bench held that it was some evidence of the writ, and, consequently, that it tended to protect the sheriff, as showing that the seizure was made by the authority of the law. This ruling, however, has been somewhat qualified by a subsequent decision of the Court of Common Pleas. White *v.* Morris, 11 Com. B. 1015. See, also, Bowes *v.* Foster, 27 L. J. Ex. 263, per Watson, B.; Taylor's Ev. § 659. See supra, § 1107.

[1] Haylock *v.* Sparke, 1 E. & B. 471. See McCafferty *v.* Heritage, 5 Del. 220; Callan *v.* McDaniel, 72 Ala. 96; Boots *v.* Canine, 98 Ind. 408.

[2] Haynes *v.* Hayton, 6 L. J. K. B. (O. S.) 231; recognized in Bessey *v.* Windham, 6 Q. B. 172; and see supra, §§ 833 *a*, 837.

[3] Ames, J., Baker *v.* Baker, 125 Mass. 9, citing Campbell *v.* Webster, 15 Gray, 28; Hannum *v.* Tourtellott, 10 Allen, 494. Supra, § 833. See Sykes *v.* Keating, 118 Mass. 517, cited supra, § 980.

[4] Infra, § 1138. Holley *v.* Young, 68 Me. 515; Woodcock *v.* Calais, Ibid. 244. See Ludlow *v.* Pearl, 55 Mich. 312; Duffy *v.* Hickey, 63 Wis. 312. So as to proceedings before arbitrators. Calvert *v.* Fribus, 48 Md. 44.

[5] Supra, § 819.

Where, in a collision case, the witnesses for one of two colliding vessels testified that the bow light of their vessel was burning, and on the day after the hearing of the cause, the owners of the vessel caused the court to be informed, by their counsel, in open court, that, although the light was burning, it was covered with a tarpaulin at the time of the collision, it was held that the last statement, though forming no part of the evidence given at the trial, must be regarded as an admission given in the cause of the fact so stated. The Harry, 9 Ben. 524.

A paper used without objection as a specimen of the plaintiff's handwriting, cannot afterward be objected to, on the ground that, at the time it was so used, it was not shown to be the handwriting of the plaintiff. Sanderson *v.* Osgood, 52 Vt. 309.

As to motion to set aside order by

§ 1119. That an admission in pleading may be effectually used against the party making it has been already seen. It may be here repeated that an admission, made in an affidavit, though not necessarily an estoppel, is from its deliberativeness and solemnity entitled to an authority much greater than an ordinary conversational admission.[1] But an answer in chancery, though sworn to, is not conclusive against the party making it;[2] though it is *primâ facie* proof,[3] even though irregularly taken;[4] nor is such an

Affidavits, depositions and answers and bills in chancery may be put in evidence against the party making them.

consent, or proof of want of consent, see Holt *v.* Jesse, 3 Ch. D. 177.

B. claimed to hold land under A., and on a previous charge of malicious trespass on the land before the petty sessions, had called A. as a witness, who, however, disproved the tenure. It was held that the deposition of A. was admissible in evidence against B., although A. was alive. Cole *v.* Hadley, 3 P. & D. 458; 11 A. & E. 807.

That a party may estop himself by positions taken on trial, see supra, § 822; and see Behr *v.* Ins. Co., 2 Flip. 692; Chatfield *v.* Simonson, 92 N. Y. 209; Sherwood *v.* Yeomans, 98 Penn. St. 453; Supervisors *v.* Magoon, 109 Ill. 142; Perkins *v.* Jones, 62 Iowa, 345; Sweezey *v.* Stetson, 67 Iowa, 481; Martin *v.* Boyce, 49 Mich. 122; Kaehler *v.* Dobberpuhl, 60 Wis. 256; Statesville Bk. *v.* Pinkers, 83 N. C. 377; Brooks *v.* Brooks, 90 N. C. 142; Temple *v.* Williams, 91 N. C. 82; Wafford *v.* Wyly, 72 Ga. 863; Gray *v.* State, 63 Ala. 66; Mobile, etc., R. R. *v.* Yeates, 67 Ala. 164; Fluker's Succession, 32 La. An. 292; Beck *v.* Fleitas, 37 La. An. 492; Clark *v.* Child, 166 Cal. 87.

An admission that an absent witness would testify in a particular way, is not an admission of the truth of such testimony. Allen *v.* Carpenter, 7 Cal. 87.

[1] R. *v.* Clarke, 8 T. R. 220; Thornes *v.* White, Tyr. & Gr. 110; Doe *v.* Steel, 3 Camp. 115; Chicago, etc. R. R. *v.* Ohle, 117 U. S. 123; Rowe *v.* Hulett, 50 Vt. 637; Forrest *v.* Forrest, 6 Duer, 102; Peckham *v.* Harper, 41 Ohio St. 100; Bowen *v.* De Lattre, 6 Whart. R. 430; Fulton *v.* Gracey, 15 Grat. 314; Snydacker *v.* Brosse, 51 Ill. 357; Ill. Cent. R. R. *v.* Cobb, 64 Ill. 143; Williams *v.* Reynolds, 86 Ill. 263; Trustees *v.* Bledsoe, 5 Ind. 133; Davenport *v.* Cummings, 15 Iowa, 219; Mushat *v.* Moore, 4 Dev. & B. L. 124. It makes no matter that the affidavit was to the best of deponent's knowledge and belief. Chicago R. R. *v.* Ohle, 117 U. S. 123, citing Pope *v.* Allen, 115 U. S. 363. See, as to effect of answers under oath, Elliott *v.* Hayden, 104 Mass. 180; Knowlton *v.* Moseley, 105 Mass. 136; Root *v.* Shields, 1 Woolw. 340; Cook *v.* Barr, 44 N. Y. 158; Wylder *v.* Crane, 53 Ill. 490; Lawrence *v.* Lawrence, 21 N. J. Eq. 317. An *ex parte* affidavit, made without opportunity for cross-examination, is not admissible for the affiant, in evidence. Smith *v.* Feltz, 42 Ark. 355.

[2] Doe *v.* Steel, 3 Camp. 115; Cameron *v.* Lightfoot, 2 W. Bl. 1190; Studdy *v.* Sanders, 2 D. & R. 347; De Whelpdale *v.* Millburn, 5 Price, 481.

[3] Bates v. Townley, 2 Ex. R. 157. The answers of a party as trustee in another suit may be read in evidence against him, although containing some matters foreign to the issue. Eaton *v.* New England Tel. Co., 68 Me. 63.

[4] Daub *v.* Englebach, 109 Ill. 267.

answer evidence against a co-defendant, unless concert or privity between the affiant and the co-defendant as to the matter of the affidavit is first shown.[1] Depositions, also, may be received in evidence as admissions of the party making them, or of those whom he represents;[2] even though irregularly taken.[3] A bill in chancery, it is said, is not admissible at all against the plaintiff in proof of the admissions it contains, since the facts stated therein are regarded as nothing more than the mere suggestions of counsel.[4] The question how far equity pleadings are to be introduced as a whole has been already discussed.[5]

Admissions of a party when examined as witness.

§ 1120. The admissions of a party, when examined as a witness in another case, may be used against him in a subsequent issue,[6] nor is such evidence excluded by the fact that the party against whom his former evidence is produced is present at the trial.[7] If he does not offer himself as a witness, this enhances the value of the admission.[8] When a party is examined in his own behalf, his admission can be used against him in subsequent stages of the same suit, or in other suits.[9] It is no objection to the admission of such evidence that the witness had not the opportunity of fully explaining himself;[10] nor that the questions were irrelevant;[11] nor that the witness answered under compulsion;[12] nor that the evidence was by a party since deceased, provided the adverse party had an opportunity to cross-examine

[1] Jones *v.* Turbeville, 2 Ves. Jr. 11; Leeds *v.* Ins. Co., 2 Wheat. 380; Osborne *v.* Bank, 9 Wheat. 105; Morris *v.* Nixon, 1 How. U. S. 118; Field *v.* Holland, 6 Cranch, 8; Clark *v.* Van Riemsdyk, 9 Cranch, 153; McElroy *v.* Ludlum, 32 N. J. Eq. 828.

[2] Phœnix Ins. Co. *v.* Clark, 5 N. H. 164.

[3] Edwards *v.* Norton, 55 Tex. 405. See State *v.* Bank, 80 Mo. 626.

[4] Boileau *v.* Rutlin, 2 Ex. R. 665; Doe *v.* Sybourn, 7 T. R. 3, per Ld. Kenyon.

[5] Supra, §§ 1104–9.

[6] Supra, §§ 488, 537; Stockflesh *v.* De Tastet, 4 Camp. 11; Robson *v.* Alexander, 1 M. & P. 448; Ashmore *v.* Hardy, 7 C. & P. 501; Carr *v.* Griffin, 44 N. H. 510; Tooker *v.* Gormer, 2 Hilt. (N. Y.) 71. See Beeckman *v.* Montgomery, 14 N. J. Eq. 106; State *v.* Jefferson, 77 Mo. 136; Mitchell *v.* Napier, 22 Tex. 120.

[7] Lorenzana *v.* Camarillo, 45 Cal. 125. Supra, § 1094.

[8] Robinson *v.* Stuart, 68 Me. 61.

[9] McAndrews *v.* Santee, 57 Barb. 193; Woods *v.* Gevecke, 28 Iowa, 561. See supra, §§ 488, 1099. As to affidavits by party, see § 1120.

[10] Collett *v.* Keith, 4 Esp. 212. See supra, § 1099.

[11] Smith *v.* Beadnell, 1 Camp. 30; Stockflesh *v.* De Tastet, 4 Camp. 11.

[12] Supra, § 1099.

him.[1] But by statute in some jurisdictions evidence thus obtained in penal suits cannot be used against the party giving it.[2]

Inventory an admission by executor.

§ 1121. The inventory filed by an executor or administrator, when sworn to by such officer or his agent, is *primâ facie* proof of the facts it states; and the executor or administrator, who has pleaded *plene administravit*, will be forced to show, either the non-existence of such assets, or that they have not reached his hands, or that they have been duly administered.[3] Formerly in England, when inventories were without signature or verification, they were not treated as *primâ facie* evidence of assets, though they might, in connection with other circumstances, have afforded some proof of the value of the estate.[4] It was, however, held that verification of a probate stamp, though admissible as slight evidence of assets to the amount covered thereby, was not sufficient by itself to throw upon the executors the burden of proving the non-receipt of such assets.[5] It was otherwise when there was evidence of long assent to the payment of the duty, or of other suspicious circumstances.[6]

III. DOCUMENTARY ADMISSIONS.

Written admissions entitled to peculiar weight.

§ 1122. A written admission by a party, it need scarcely be said, if published by him, is strong evidence against him or those claiming under him. *Scriptura contra scribentem probat.*[7] To this rule, the Roman law presents the following qualification. When in a written stipulation,

[1] Breeden *v.* Feurt, 70 Mo. 624.

[2] So by Rev. U. S. Stat. § 860, which has been held not to apply to books seized by revenue officer. U. S. *v.* Myers, 1 Hugh, 533. See supra, §§ 1099, 1109.

[3] Giles *v.* Dyson, 1 Stark. R. 32; explained in Stearn *v.* Mills, 4 B. & Ad. 660, 662; Parsons *v.* Hancock, M. & M. 330, per Parke, J.; Hickey *v.* Hayter, 1 Esp. 313; 6 T. R. 384, *S. C.*; Young *v.* Cawdrey, 8 Taunt. 734. See Hutton *v.* Rossiter, 7 De Gex, M. & G. 9.

See this question discussed in its common law relations, in Williams on Ex. (7th ed.) 1968. See, also, Smith's Probate Law, 119; Richards *v.* Sweetland, 7 Cush. 324.

[4] Stearns *v.* Mills, 4 B. & Ad. 657.

[5] Mann *v.* Lang, 3 A. & E. 699; Stearn *v.* Mills, 4 B. & Ad. 663, 664. These cases overrule Foster *v.* Blakelock, 5 B. & C. 328.

[6] Mann *v.* Lang, 3 A. & E. 702, per Ld. Denman; Curtis *v.* Hunt. 1 C. & P. 180, per Ld. Tenterden; Rowan *v.* Jebb, 10 Irish Law R. 217; Lazenby *v.* Rawson, 4 De Gex, M. & G. 556, 563, 564, per Ld. Cranworth; Taylor's Evidence, § 786.

[7] See Cook *v.* Barr, 44 N. Y. 156.

cautio, the *causa* is expressed (*cautio discreta*), the burden is on the promisor, should he defend on the ground that the *cautio* was *indebite* or *sine causa*, to make out his case. When, however, the *causa* is not expressed in the writing (*cautio indiscreta*), the plaintiff has the burden on him of proving the consideration. We find this expressly stated in an extract from Paulus,[1] who declares that a creditor who takes a mere informal memorandum of indebtedness must prove the consideration: it being his duty, if he would relieve himself from this burden, to have the consideration specified in the instrument.

Written admissions may have evidential force though not delivered.

§ 1123. If A. has among his papers a written acknowledgment of indebtedness to B., which acknowledgment has never been delivered to B., can such acknowledgment be used against A., or A.'s representatives? Certainly A.'s books, containing his accounts, can be so used, for such books are prepared for the purpose of determining business relations with other parties;[2] but can a memorandum of indebtedness, which has never been delivered to the alleged creditor, be evidence against the alleged debtor? On this point there has been much discussion among foreign jurists. The French Code makes such a paper evidence.[3] On the other hand, it is argued with much strength in Germany, that a unilateral paper of this kind can have no contractual force; that the party holding it is at liberty at any time to destroy or qualify it; and that its non-delivery is to be regarded as a presumption of its non-validity.[4] Yet it must be remembered that such papers may be taken, especially after a party's death, as admissions by him of specific facts.[5] And a letter, admitting a fact, is evidence, irrespective of the question of delivery.[6] So papers found on a party, if he be shown to be in any way implicated in them, can be used in evidence against him to charge him with complicity in an illegal act.[7] But by our own law, as we shall hereafter more fully see, there must be something more than a mere

[1] L. 25, § 4, D. xxii. 3. See, also, L. 13, c. iv. 30.

[2] See supra, § 678.

[3] Code Civil, art. 1332.

[4] See Weiske's Rechtslexicon, 660.

[5] See Toner *v.* Taggart, 5 Binn. 490.

[6] See Medway *v.* U. S., 6 Ct. of Cl. 421. Recitals in a deed tendered, but not executed, have been held admissions by the parties on whose behalf the deed was prepared, but capable of being rebutted. Bulley *v.* Bulley, 9 L. R. Ch. 739.

[7] See R. *v.* Cooper, L. R. 1 Q. B. D. 19, cited infra, § 1154.

note, found among a party's papers, to charge him with indebtedness.[1] An account, however, need not be delivered in order to be efficacious as an admission, provided it appear that it was intended by the party making it to be an accurate statement.[2]

Invalid instrument may be valid as an admission.

§ 1124. Nor does the fact that the writing is void as an obligation make it any the less an admission of a debt.[3] Thus, a note, void from being executed on a Sunday, may be put in evidence as admitting indebtedness.[4] So where a power of attorney, executed by an agent, is void for want of a seal, it may be used as an admission.[5] By the same reasoning, an unsigned answer by a party before a register in bankruptcy, taken down by his attorney, may be used in evidence to contradict his testimony in a collateral proceeding.[6] An unstamped instrument, also, void as an obligation, may be received evidentially as an admission.[7] It has been also held, to take an illustration of another class, that a document, executed by an agent, but invalid for want of authority in the agent to execute, may be used against the agent as an admission.[8] Hence, a paper rejected as a contract may nevertheless by admissions contained therein be proof of a debt.[9]

Notes and other acknowledgments are

§ 1125. It is scarcely necessary to say that a negotiable instrument is a *primâ facie* admission to the amount expressed on the paper.[10] The same is true of

[1] See fully infra, § 1154.

[2] Bruce *v.* Garden, 17 W. R. 990.

[3] See Hutchins *v.* Scott, 2 M. & W. 809; Falmouth *v.* Roberts, 9 M. & W. 471; Agricult. College *v.* Fitzgerald, 16 Q. B. 432; Rumsey *v.* Sargent, 21 N. H. 397; Fort *v.* Gooding, 9 Barb. 371; Hickey *v.* Hinsdale, 12 Mich. 99; Crawford *v.* Jones, 54 Ala. 459; State *v.* Fowler, 72 Ala. 77; Fowne *v.* Milner, 31 Kan. 207; supra, § 698. See Thomas *v.* Arthur, 7 Bush, 245. So an infant's admissions can be used against him when of age. O'Neill *v.* Read, 7 Ir. L. R. 434.

[4] Lea *v.* Hopkins, 7 Penn. St. 492; Ayres *v.* Bane, 39 Iowa, 518; Riley *v.* Butler, 36 Ind. 51.

[5] Morrell *v.* Cawley, 17 Abb. (Pr.) 76. See Beach *v.* Sutton, 5 Vt. 209; Ross *v.* Gould, 5 Greenl. 204; Womack *v.* Womack, 8 Tex. 397.

As to non-producible writings being proved by parol, see supra, § 130.

[6] Knowlton *v.* Moseley, 105 Mass. 136.

[7] 3 Pars. on Cont. 295; Matheson *v.* Ross, 2 H. of L. 286; Atkins *v.* Plympton, 44 Vt. 21; Moore *v.* Moore, 47 N. Y. 468; Reis *v.* Hellman, 25 Ohio St. 180; *S. C.* 1 Cincin. 30. See supra, §§ 697–8.

[8] Huffman *v.* Cartwright, 44 Tex. 296.

[9] Bishop *v.* Fletcher, 48 Mich. 555.

[10] 1 Pars. on Notes, 176; Redfield & Big. Cases, 186; Grant *v.* Vaughan, 3 Burr. 1516; Bowers *v.* Hurd, 10 Mass.

certificates of indebtedness.[1] And orders for payment of money, in the hands of the drawee, are *primâ facie* evidence that the drawer has received the amount.[2]

admissible as admissions of indebtedness.

§ 1126. Self-disserving indorsements on instruments are, on the principles above stated, *primâ facie* evidence against the party making or permitting such indorsements, though, like receipts, they are open to parol explanation.[3] If self-serving, they are inadmissible;[4] though, as is elsewhere shown, it has been much discussed whether an indorsement of part payments, which is only superficially self-disserving, may be produced in evidence, by the party making it or his representatives, when the effect is to take the debt out of the statute, and therefore greatly to serve him.[5] When self-disserving, and when on the instrument sued on, they need not be proved by the party sued.[6] But, to be thus received, they must be in some way imputable to the party claiming under the instrument.[7]

Indorsements of payment on paper are admissions.

§ 1127. A letter, when it forms part of a contract, or is part of the material from which a contract may be constructed, may not only be received against the writer as an admission, but may bind him by way of estoppel. If contractual, to fall back on the distinction already put,[8] letters may estop; if non-contractual, they afford only *primâ facie* proof.[9] Ordinarily, however, it is evidentially, rather than dispositively, that letters are used in evidence against the writer; they are employed, in other words, not to bind him to a disposition of

Letters receivable as admissions.

427; Fisher *v.* Fisher, 98 Mass. 303; Mowry *v.* Bishop, 5 Paige, 98; Bunting *v.* Allen, 18 N. J. L. 299.

[1] Ala. R. R. *v.* Sanford, 36 Ala. 703.

[2] Child *v.* Moore, 6 N. H. 33; Rawson *v.* Adams, 17 Johns. R. 130; Curle *v.* Beers, 3 J. J. Marsh. 170. Infra, §§ 1362–3.

[3] See supra, §§ 228 *et seq.*, 619, 924; Harper *v.* West, 1 Cranch C. C. 192; Clarke *v.* Ray, 1 Har. & J. 318; Gilpatrick *v.* Foster, 12 Ill. 355; Carey *v.* Phil. Co., 33 Cal. 694.

[4] Sorrell *v.* Craig, 15 Ala. 789.

[5] Supra, § 228, and see §§ 229–230; infra, § 1135.

[6] Lloyd *v.* McClure, 2 Greene (Iowa), 139. See supra, §§ 619, 924.

[7] Jacobs *v.* Putnam, 4 Pick. 108; Turrell *v.* Morgan, 7 Minn. 368.

[8] See supra, §§ 1078–85.

[9] Dodge *v.* Van Lear, 5 Cranch C. C. 278; Pettibone *v.* Derringer, 4 Wash. C. C. 215; Connecticut *v.* Bradish, 14 Mass. 296; New England Ins. Co. *v.* De Wolf, 8 Pick. 56; Beers *v.* Jackman, 103 Mass. 192; Union Canal *v.* Loyd, 4 Watts & S. 394; Snyder *v.* Reno, 38 Iowa, 329. See Knight *v.* Cooley, 34 Iowa, 218.

property, but to show his admission of a fact, which admission, by force of the distinction above given, is but *primâ facie* proof, open to correction and explanation by the writer himself.[1] A letter to a third person is as admissible for this purpose as is a letter to the other party in the suit;[2] but in such case the admission, to be operative, must be specific.[3] It is not necessary to the admissibility of a letter that it should be signed; if traceable to the writer, and if involving a self-disserving admission of any kind, this is enough.[4] Nor is it an objection that the letters are insulated; a letter containing a particular admission may come in by itself;[5] nor is it necessary in such case that the whole correspondence should be put in.[6] Nor is it fatal to the admissibility of a written admission that it was in answer to a letter meant as a trap.[7]

Letters are admissible as admissions, though made after the commencement of litigation.[8]

Letters of third parties are ordinarily inadmissible, being hearsay.[9] Hence a letter addressed to a party cannot be admitted as

[1] Supra, §§ 923, 1085; Marshall *v.* R. R., 16 How. (U. S.) 314; Mulhall *v.* Keenan, 18 Wall. 342; Goddard *v.* Putnam, 22 Me. 363; Jacobs *v.* Shorey, 48 N. H. 100; Short Mountain Co. *v.* Hardy, 114 Mass. 197; Newcomb *v.* Cramer, 9 Barb. 402; Bank *v.* Culver, 2 Hill (N. Y.) 531; Stacy *v.* Graham, 3 Duer, 444; Wollenweber *v.* Ketterlinus, 17 Penn. St. 389; Douglass *v.* Mitchell, 35 Penn. St. 440; Downer *v.* Morrison, 2 Grat. 250; Coats *v.* Gregory, 10 Ind. 345; Shaw *v.* Davis, 7 Mich. 318; Beecher *v.* Pettee, 40 Mich. 181; Harrison *v.* Henderson, 12 Ga. 19; Buchanan *v.* Collins, 42 Ala. 419; Prussel *v.* Knowles, 5 Miss. 90; Swann *v.* West, 41 Miss. 104; South. Ex. Co. *v.* Thornton, 41 Miss. 216; Porter *v.* Ferguson, 4 Fla. 102. See Holtz *v.* Dick, 42 Ohio St. 23.

As to how far letters can be received without whole correspondence, see supra, § 1103; supra, § 618.

[2] Longfellow *v.* Williams, Pea. Add. Ca. 225; Rose *v.* Cunynghame, 11 Ves. 550; Gibson *v.* Holland, L. R. 1 C. P. 1; Wilkins *v.* Burton, 5 Vt. 76; Robertson *v.* Ephraim, 18 Tex. 118.

[3] Betts *v.* Loan Co., 21 Wis. 80; supra, §§ 1076–9.

[4] Bartlett *v.* Mayo, 33 Me. 518.

[5] North Berwick Co. *v.* Ins. Co., 52 Me. 336; Newton *v.* Price, 41 Ga. 186, and other cases cited supra, § 1103.

A letter containing an admission by a party is evidence against him, although the letter was in reply to another which the party is not called upon to produce. Wiggin *v.* R. R., 120 Mass. 201. See supra, § 1103.

[6] Supra, §§ 618 *et seq.*, 1103.

[7] U. S. *v.* Champagne, 1 Ben. 241.

[8] Holler *v.* Weiner, 15 Penn. St. 242; Prussel *v.* Knowles, 5 Miss. 90.

[9] Williams *v.* Manning, 41 How. (N. Y.) Pr. 454; Wolstenholme *v.* Wolstenholme, 3 Lans. 457; Rosenstock *v.* Tormey, 32 Md. 169; Underwood *v.* Linton, 44 Ind. 72; Livingston *v.* R. R., 35 Iowa, 555.

proof against him, unless it be proved that he received it and acted on it.[1] Whether a letter written, but not sent, can be put in evidence against a party, has been already discussed.[2]

§ 1128. Telegrams, under the same restrictions as those which have been noticed as appertaining to letters, may be treated as constituting admissions on the part of the person by whom they are sent.[3] If tending to make up a contract, they bind him contractually. If merely evidential, they may be treated as non-contractual admissions, which, so far as concerns the party from whom they emanate, are subject to the usual incidents of such admissions.[4] It is scarcely necessary to say, that, to charge a party with a telegram, the original draft in the handwriting of the party or his agent must be produced.[5] A telegram,

Telegram may be an admission.

[1] Smiths *v.* Shoemaker, 17 Wall. 630. See fully infra, § 1154. And see Maguire *v.* Corwine, 3 MacArthur, 81.

[2] Supra, § 1123.

[3] See supra, § 617.

[4] Com. *v.* Jeffries, 7 Allen, 548; Beach *v.* R. R., 37 N. Y. 457; Taylor *v.* The Robert Campbell, 20 Mo. 254; Wells *v.* R. R., 30 Wis. 605.

See, to effect of non-contractual admissions, supra, §§ 1075–8.

In Minnesota Linseed Oil Co. *v.* Collier White Lead Co., 4 Dill. 431, decided in 1876, by the United States Circuit Court for the District of Minnesota, the plaintiff, whose place of business was at Minneapolis, on the 31st of July, which was Saturday, deposited in the telegraph office at that place a telegram directed to defendant at St. Louis, offering to sell a quantity of linseed oil at fifty-eight cents per gallon. The dispatch was sent the same day, but was not delivered to defendant until between eight and nine o'clock Monday morning following. On Tuesday morning, a few minutes before ten o'clock, defendant deposited a telegram accepting plaintiff's offer in the telegraph office of St. Louis. A telegram was sent by plaintiff to defendant on the same day revoking the offer. The price of the kind of oil which was the subject of negotiation was subject to sudden and great fluctuations, and had in fact, after the offer was made, risen considerably. The court held that the same rule applied to contracts by telegraph as to those by mail, and that a contract is completed when the acceptance of a proposition is deposited for transmission in the telegraph office, whether the message is received by the person sending it or not. But it also held that an immediate answer should have been returned; and that an acceptance of the proposition, telegraphed after a delay of twenty-four hours from the time of its receipt, was not an acceptance within a reasonable time, and did not operate to complete the contract. See, to same general effect, Coupland *v.* Arrowsmith, 18 Law Times (N. S.) 75; Henkel *v.* Pape, L. R. 6 Exch. 7; Verdin *v.* Robertson, 10 Ct. Sess. Cas. (3d series), 35; Durkee *v.* R. R., 29 Vt. 127; Trevor *v.* Wood, 36 N. Y. 306; Beach *v.* R. R., 37 N. Y. 457; Alb. L. J., Jan. 20, 1877.

[5] Durkee *v.* R. R., 29 Vt. 127; Benford *v.* Zanner, 40 Penn. St. 9; Matteson *v.* Noyes, 25 Ill. 591; Williams *v.*

also, may be an adequate memorandum under the statute of frauds.[1] To prove a dispatch to have been received at a telegraph office, it must in some way be identified with the office.[2] The mere fact, however, of a telegram being dispatched to a party at a given place, and of an answer purporting to have been sent by him as at the same place, is no proof that he was at such place at the particular time. The operator at the place where the party was addressed must be called as a witness to prove the party's presence, or his own original, as an admission in his own writing, must be produced.[3] A telegram, it is generally held, is not a privileged communication; and the operator may be compelled to disclose its contents.[4] As will be hereafter seen, the presumption of delivery of telegrams is of the same general character as the presumption of delivery of letters.[5]

Memoranda, when self-disserving, may be received.

§ 1129. It is not necessary, as has been noticed, in order to charge a party with a written admission, that it should have been signed by him. Any memorandum, the authorship of which can be traced to him, may be put in evidence against him. Thus, the counter foil or stump of a check may be an admission when the check itself is lost.[6] Loose notes, or other casual writings, may be thus employed.[7] The effect of entries of receipt of interest on a note is elsewhere discussed.[8]

Receipts are admissions, but open to explanation.

§ 1130. As is elsewhere abundantly shown, a written receipt is *primâ facie* evidence of payment, liable to be explained by parol.[9] A receipt, however, as we have also seen, may be, when advanced as a basis for the action of third parties, an estoppel as to such third parties.[10] In other words, a receipt, when unilateral, is open to explanation by the party making it, but when bilateral, concludes.[11]

Brickell, 37 Miss. 682. See other cases cited supra, §§ 76, 617. As to non-producibility of original, see supra, § 76.

[1] Durkee *v.* R. R., 29 Vt. 127. See other cases supra, §§ 76, 617; and see Williamson *v.* Freer, L. R. 9 C. P. 393.

[2] Richie *v.* Bass, 15 La. An. 668.

[3] Howley *v.* Whipple, 48 N. H. 487.

[4] Supra, § 595.

[5] Infra, § 1329.

[6] R. *v.* Wilkinson, 10 Cox C. C. 537.

[7] Bartlett *v.* Mayo, 33 Me. 518; Hosford *v.* Foote, 3 Vt. 391; Stannard *v.* Smith, 40 Vt. 513; Wadsworth *v.* Ruggles, 6 Pick. 63; Leeds *v.* Dunn, 10 N. Y. 469; Cook *v.* Anderson, 20 Ind. 15; Snyder *v.* Reno, 38 Iowa, 329; Gaines *v.* Gaines, 39 Ga. 68. See Scammon *v.* Scammon, 28 N. H. 419.

[8] Infra, § 1135; supra, § 1126.

[9] See supra, § 1064.

[10] Supra, §§ 1065–7.

[11] See supra, § 1078.

§ 1131. From what has been said, it follows that bank books are admissible as showing a *primâ facie* case against the bank by whom the entries are made;[1] and against a party dealing with the bank, so far as he has made the person making the entries his agent.[2] The books are evidence, also, between the bank and its stockholders.[3] Entries made by strangers, however, without the knowledge of the litigants, cannot be received as against either of the litigants.[4] Ordinarily the bank books are not evidence, in suits to which the bank is not a party, without proving such books by the clerk who made the entry, if within process, or proving his handwriting, if he is outside of process.[5] As a general rule, as has been seen,[6] the books of municipal or private corporations are admissible against members of the corporation.[7] With regard to club and society books, it has been correctly held that entries in such books, when kept by the proper officer and accessible to all the members, are admissible against such members.[8]

Corporations and club books may be used as admissions.

§ 1132. Partnership books, on the same principle, are admissible in suits by one partner against the other.[9] As a condition of such admissibility, however, it must appear that the partner sued had access to the books, or in some way

Partnership books so admissible.

[1] Supra, § 662. See Whart. on Agency, §§ 671 *et seq.*, and cases there cited; Olney *v.* Chadsey, 7 R. I. 224; Manhattan Bank *v.* Lydig, 4 Johns. R. 377; State Bank *v.* Johnson, 1 Hill (S. C.), 404; Forniquet *v.* R. R., 6 How. (Miss.) 116.

[2] Williamson *v.* Williamson, L. R. 7 Eq. 542; Union Bank *v.* Knapp, 3 Pick. 96; Brown *v.* Bank, 119 Mass. 69; Allen *v.* Coit, 6 Hill (N. Y.), 318. See supra, § 662. Thus, a customer's bank book may be put in evidence against him to show what he had on deposit. Lichman *v.* Rothbarth, 111 Ill. 186, citing Furness *v.* Cope, 5 Bing. 114.

[3] Merchants' Bank *v.* Rawls, 21 Ga. 334.

[4] Barnes *v.* Simmons, 27 Ill. 512.

[5] Philadelphia Bk. *v.* Officer, 12 S. & R. 49; Ridgway *v.* Bk. 12 S. & R. 256; Courtney *v.* Com., 5 Rand. (Va.) 666. See, however, Crawford *v.* Bank, 8 Ala. 79; and see supra, § 662.

[6] Supra, § 661.

[7] See supra, § 661; Board of Educ. *v.* Moore, 17 Minn. 412. As to municipal and public corporations, see Righter, in re, 92 N. Y. 111; St. Louis Gas Light Co. *v.* St. Louis, 86 Mo. 495. As to such books generally, see supra, §§ 287 ff, 642.

[8] Raggett *v.* Musgrave, 2 C. & P. 556; Alderson *v.* Clay, 1 Stark. R. 405; Ashpitel *v.* Sercombe, 5 Ex. R. 147; Allen *v.* Coit, 6 Hill, N. Y. 318.

[9] Symonds *v.* Gas Co., 11 Beav. 283; Lodge *v.* Pritchard, 3 De Gex, M. & G. 706; Boardman *v.* Jackson, 2 Ball & B. 382; Tucker *v.* Peaslee, 36 N. H. 167; Topliff *v.* Jackson, 12 Gray, 565; Caldwell *v.* Leiber, 7 Paige, 483; White *v.* Tucker, 9 Iowa, 100; Perry *v.* Banks, 14 Ga. 699.

authorized the entries charging him to be made, and that the books were fairly kept.[1] Such books are also evidence against the partnership when sued by a stranger;[2] but not evidence against a stranger when sued by the partnership,[3] unless such books fall under the category of books of original entry.[4] After dissolution, entries cease to charge the partnership as such.[5] A partner's entries in the firm's books are not, unless made with the assent express or implied of his copartners, evidence for him to prove that he was a member of the firm.[6]

So of accounts stated, book entries, and tax returns.

§ 1133. Wherever it is the duty of one party to state and forward an account for the information of another, the entries of the accountant may be used as *primâ facie* evidence against him.[7] Such accounts, however, until final settlement, are open to correction by the parties, even after settlement on proof of mistake.[8] But the fact that an account was stated after the commencement of the suit does not exclude it.[9] Even an account, made out but not sent in, may be treated as an admission.[10]

In a suit to recover personal property, the sworn tax list in which defendant made no claim for the property is admissible against him for what it is worth.[11]

[1] Adams *v.* Funk, 53 Ill. 219; Turnipseed *v.* Goodwin, 9 Ala. 372. See Moon *v.* Story, 8 Dana, 226.

[2] Infra, § 1194.

[3] Brannin *v.* Foree, 12 B. Mon. 506.

[4] Supra, § 678.

[5] Boyd *v.* Foot, 5 Bosw. (N. Y.) 110. Infra, § 1201.

[6] Robins *v.* Ward, 111 Mass. 244.

[7] Morland *v.* Isaac, 20 Beav. 392; Ryan *v.* Rand, 26 N. H. 12; Currier *v.* R. R., 31 N. H. 209; Chase *v.* Smith, 5 Vt. 556; McKim *v.* Blake, 139 Mass. 593; Nichols *v.* Alsop, 6 Conn. 477; Peck *v.* Minot, 4 Robt. (N. Y.) 323; Carroll *v.* Ridgaway, 8 Md. 328; King *v.* Maddux, 7 Har. & J. 467; Mertens *v.* Nottebohms, 4 Grat. 163; Hallack *v.* State, 11 Ohio, 400; Goodin *v.* Armstrong, 19 Ohio, 44; Kirby *v.* Watt, 19 Ill. 393; State *v.* Woodward, 20 Iowa, 541; Byrne *v.* Schwing, 6 B. Mon. 199; Gradwohl *v.* Harris, 29 Cal. 150; Gaines *v.* Gaines, 39 Ga. 68; Turner *v.* Lewis, 6 La. An. 774; Murdoch *v.* Finney, 21 Mo. 138; Britton *v.* State, 77 Ala. 202.

[8] "The account rendered on the 16th of April, 1864, was, at the most, but *primâ facie* evidence that there were no other transactions which should properly form a part of it. Lockwood *v.* Thorne, 18 N. Y. 285. An account rendered is not conclusive against either party to it, but may be impeached or corrected within a reasonable time after its rendition or its receipt. Should the balance claimed be actually paid, the account would still be open to correction in the same manner. Ibid." Hunt, Com., Champion *v.* Joslyn, 44 N. Y. 656.

[9] Hyde *v.* Stone, 7 Wend. 354; Stowe *v.* Sewall, 3 St. & P. 67.

[10] Bruce *v.* Garden, 17 W. R. 990. Supra, §§ 1021, 1028, 1123.

[11] Lefever *v.* Johnson, 79 Ind. 554.

A tax collector's "stub book" is admissible against him.[1]

A principal's book entries are admissible against his surety.[2]

The omission by an insolvent of a claim, in the schedule of debts returned by him, is at least *primâ facie* evidence, as against the insolvent, that no such debt is due.[3]

An account filed by a party, stating a debt to a third party, makes a *primâ facie* case for such third party.[4]

An account may be evidence in favor of the party making it as against a party who had access to the books, and has full opportunity from time to time of testing their accuracy.[5]

The effect of silence in the reception of an account is discussed in another section.[6]

§ 1134. As has been already incidentally noticed,[7] the party receiving an account cannot ordinarily put the debit side in evidence, without putting in the whole account;[8] and where an account is made up of several stages, embracing distinct settlements, the last settlement *primâ facie* includes and extinguishes the first.[9] When mixed up with independent unwritten statements, the written and the unwritten explanations are to be taken together.[10] Not only is the whole of a written admission to go in evidence, when called for, but such is the case with all contemporaneous documents which are part of the same transaction.[11]

Whole account must go in, and so of contemporaneous documentary evidence.

§ 1135. An interesting question here arises as to the effect of an indorsement of payment of interest on a bond or note. Unquestionably such an indorsement is evidence against its maker whenever he undertakes to claim the debt of

Indorsements of interest admissible

[1] Britton *v.* State, 77 Ala. 202.

[2] McKim *v.* Blake, 139 Mass. 593. Infra, § 1212.

[3] Hart *v.* Newcomb, 3 Camp. 13; though see Nichols *v.* Downes, 1 M. & Rob. 13, where Lord Tenterden held the insolvent estopped by the admission; and see Tilghman *v.* Fisher, 9 Watts, 441.

[4] Burrows *v.* Stevens, 39 Vt. 378. Supra, §§ 1131–2.

[5] Symonds *v.* Gas Co., 11 Beav. 283; Boardman *v.* Jackson, 2 Ball & B. 382; Lodge *v.* Prichard, 3 De Gex, M. & G. 906.

[6] See infra, § 1140.

[7] Supra, §§ 620, 1103.

[8] Supra, §§ 620, 1103; Bell *v.* Davis, 3 Cranch C. C. 4; Morris *v.* Hurst, 1 Wash. C. C. 433; Walden *v.* Sherburne, 15 Johns. 409; Jones *v.* Jones, 4 Hen. & M. 447; Young *v.* Bank, 5 Ala. 179. See, however, Chesapeake Bank *v.* Swain, 29 Md. 483.

[9] Dorsey *v.* Kollock, 1 N. J. L. 35.

[10] Cramer *v.* Shriner, 18 Md. 140. See Matthews *v.* Coalter, 9 Mo. 686.

[11] Supra, § 1103.

against party making them, but not to bar statute of limitations.

which the indorsement indicates the payment of interest. The indorsement when made was self-disserving; it was an admission against his interests; it is, therefore, in accordance with the rule here stated, admissible to defeat his claim for interest. But if the entries were made while the statute of limitations was impending, and if their effect be to revive a debt which would otherwise become extinct, then, from being self-disserving, they would become in the highest degree self-serving. A debt of $10,000 would in this way be recalled into life by an entry of payment of a quarter's interest. Hence it has been properly held that an entry made after the creditor's remedy is impaired by the lapse of time is not a declaration against interest, and is consequently inadmissible to defeat the running of the statute.[1] In England this question had been partially settled by Lord Tenterden's Act, which provides that no indorsement or memorandum of interest on any writing, made by the creditor, shall be such a payment as to take the case out of the operation of the statute of limitations. Similar enactments exist in several of the United States. At common law, however, the question is still, in many jurisdictions, open to agitation; and it becomes, in such cases, important to determine whether an entry of payment on a note or other writing must be shown, by evidence outside of the paper (when the object is to suspend the operation of the statute), to have been made before the right of action was barred by the statute. The ordinary presumption, as is well known, is that a document, unless the contrary be shown, is executed on the date it bears on its face;[2] and this presumption has been directly applied, by high authorities, to entries of the class here immediately under discussion.[3] But this has not been without a vigorous protest,[4] it being argued that such a presumption, if accepted, is peculiarly invidious as to the debtor; for the reason that, as he cannot before trial have access to the writing in the creditor's hands, he will be

[1] Briggs *v.* Wilson, 5 De Gex, M. & G. 12; Glynn *v.* Bank, 2 Ves. Sen. 38; Sorrell *v.* Craig, 15 Ala. 789. See Turner *v.* Crisp, 2 Str. 827.

[2] See supra, §§ 977, 979; infra, § 1313.

[3] Smith *v.* Battens, 1 M. & Rob. 341. See Anderson *v.* Weston, 6 Bing. N. C. 302; Briggs *v.* Wilson, 5 De Gex, M. & G. 20; Clough *v.* McDaniel, 58 N. H. 201; Roseboom *v.* Billington, 17 Johns. 182; Shafer *v.* Shafer, 41 Penn. St. 51; Clark *v.* Burn, 86 Penn. St. 502; White *v.* Beaman, 85 N. C. 3. Supra, § 228.

[4] Taylor's Ev. § 629. See Bailey *v.* Danforth, 53 Vt. 504; Davidson *v.* Delano, 11 Allen, 525 (by statute).

in the dark as to the date of the entry, and hence unable to contradict it. But this reasoning does not hold good in those states in which a party may obtain, before trial, an inspection of papers relied on by his opponent.[1]

IV. ADMISSIONS: BY SILENCE OR CONDUCT.

Statements by one party to the other received in silence may be proved.

§ 1136. If A., when in B.'s presence and hearing, makes statements which B. listens to in silence, interposing no objection, A.'s statements may be put in evidence against B. whenever B.'s silence is of such a nature as to lead to the inference of assent.[2] "A declaration in the presence of a party to a cause becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth. Such an acquiescence, indeed, is worth very little where the party hearing it has no means of personally knowing the truth or falsehood of the statement."[3] "Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to understand what reply the party to be affected by the statement should make to the same. If he is silent when he ought to have denied, the presumption of acquiescence arises."[4] And again, extending the doctrine to accusations of crime: "A statement is made either to a man, or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply; the natural inference is, that the imputation is well founded or he would have repelled it."[5]

[1] Mr. Taylor cites, as sustaining his views, Lord Ellenborough's *dicta* in Rose *v.* Bryant, 2 Camp. 321.

[2] Hayslep *v.* Gymer, 1 Ad. & E. 162; Morgan *v.* Evans, 3 Cl. & F. 205; Gaskill *v.* Skene, 14 Q. B. 664; Wiggins *v.* Burkham, 10 Wall. 129; Rea *v.* Missouri, 17 Wall. 532; Johnson *v.* Day, 78 Me. 224; Bailey *v.* Woods, 17 N. H. 365; Corser *v.* Paul, 41 N. H. 24; Com. *v.* Call, 21 Pick. 515; Jewett *v.* Banning, 23 Barb. 13; McClenkan *v.* McMillan, 6 Penn. St. 366; Knight *v.* House, 29 Md. 194; Hagenbaugh *v.* Crabtree, 33 Ill. 225; Pierce *v.* Goldsberry, 35 Ind. 317; Green *v.* Harris, 3 Ired. L. 210; Wells *v.* Drayton, 1 Mill (S. C.), 111; Block *v.* Hicks, 27 Ga. 522; Drumright *v.* State, 29 Ga. 430; Alston *v.* Grantham, 26 Ga. 374; Moye *v.* State, 66 Ga. 740; Bradford *v.* Haggerthy, 11 Ala. 698; Benziger *v.* Miller, 50 Ala. 207; Davis *v.* Bowmar, 55 Miss. 671; People *v.* McCrea, 32 Cal. 98. See 1 Cow. & Hill N. 191.

[3] Per Parke, J., Hayslep *v.* Gymer, 1 A. & E. 163; cf. Neile *v.* Jakle, 2 C. & K. 709.

[4] Hunt, J., Gibney *v.* Marchay, 34 N. Y. 305; Gebhart *v.* Burkett, 57 Ind. 378.

[5] Best on Presumptions, § 241; affirmed in State *v.* Cleaves, 59 Me. 300–1, and reaffirmed in State *v.* Reed, 62

§ 1137. When the statement is put in the form of an interrogation, the inference gains additional strength.[1] Even where there is no personal appeal, the same doctrine applies, though with diminished force. Thus, A.'s silence, when declarations are made in his presence by another person, A. taking no part in the conversation, may be evidence against A., though of slight value.[2] So the silence of a person, whose name is on negotiable paper, on receiving notice of protest, may go to the jury for what it is worth.[3] And the dropping by A. of certain claims against B., at an arbitration at which A. is called upon and undertakes to present all his claims against B., may be used in evidence against A.[4] Circumstances, also, may exist, in which a silent recognition of letters and telegrams by a sendee, may authorize their reception in evidence against him.[5]

Weight depends upon circumstances.

§ 1138. But it is otherwise when B.'s silence is of a character not to justify such an inference.[6] Thus, neither a person when asleep,[7] nor when intoxicated,[8] nor a deaf person,[9] can be in this way prejudiced by statements made in his presence; nor is a foreigner, unless it appear that he understood the language spoken.[10] There are cases, also, in which a party may, with propriety, refuse, on his own personal affairs being introduced in a mixed if not a hostile company, to make any explanation which might imply the right of others thus to impertinently call him to account; and it

If party was unable or not called on to answer, such evidence is valueless.

Me. 142. See, also, First Nat. Bank *v.* Reed, 36 Mich. 263; State *v.* Pratt, 20 Iowa, 267; State *v.* Swink, 2 Dev. & Bat. 9; Keith *v.* State, 27 Ga. 483.

[1] Andrews *v.* Frye, 104 Mass. 234; Mitchell *v.* Napier, 22 Tex. 120.

[2] Turner *v.* Yates, 16 How. 14; Boston R. R. *v.* Dana, 1 Gray, 83; Smith *v.* Hill, 22 Barb. 656; Andres *v.* Lee, 1 Dev. & B. Eq. 318. See, however, Child *v.* Grace, 2 C. & P. 193; Moore *v.* Smith, 14 S. & R. 388.

[3] See Fargo *v.* Milburn, 100 N. Y. 94; Greenfield Bank *v.* Crafts, 2 Allen, 269.

[4] Moore *v.* Dunn, 42 N. H. 471. See supra, §§ 785–87.

[5] Oregon St. Co. *v.* Otis, 100 N. Y. 446.

[6] Corser *v.* Paul, 41 N. H. 24; Brainard *v.* Buck, 25 Vt. 573; Com. *v.* Kenney, 12 Met. (Mass.) 235; Com. *v.* Harvey, 1 Gray, 487; Larry *v.* Sherburne, 2 Allen, 35; Donnelly *v.* State, 2 Dutch. 601; Kuney *v.* Dutcher, 56 Mich. 308; Francis *v.* Edwards, 77 N. C. 271. See Mattox *v.* Bays, 5 Dana (Ky.), 461; Slattery *v.* People, 76 Ill. 217; Wilkins *v.* Stidger, 22 Cal. 231; Boyd *v.* Bolton, Irish Rep. 8 Eq. 113.

[7] Lanergan *v.* People, 39 N. Y. 39.

[8] State *v.* Perkins, 3 Hawks, 377.

[9] Tufts *v.* Charlestown, 4 Gray, 537. See Com. *v.* Gahaven, 9 Allen, 271; State *v.* Perkins, 3 Hawks, 377; Barry *v.* State, 10 Ga. 511.

[10] Wright *v.* Maseras, 56 Barb. 521.

would be absurd to treat silence under such circumstances as involving an admission.[1] Nor even under our present practice does a defendant's silence, when charges are judicially made against him, authorize such charges to be proved against him on future trials.[2] Hence a party who is arrested on *ex parte* affidavits cannot, by failing to take steps to vacate the arrest, be held to admit the truth of the matters charged against him in the affidavits.[3] It has also been held that statements made by a clergyman to his congregation in a sermon cannot be put in evidence against the congregation, although they listened in silence to the statements;[4] nor, generally, is such silence an assent unless the statements were such as properly to call for a response;[5] nor unless the truth or falsehood of the statements were within the range of the party's knowledge.[6]

[1] Mattocks *v.* Lyman, 16 Vt. 113; Hackett *v.* Callender, 32 Vt. 97.

[2] Child *v.* Grace, 2 C. & P. 193; R. *v.* Turner, 1 Moody C. C. 347; R. *v.* Appleby, 3 Starkie, N. P. C. 33. See, however, Lord Denman's remarks in Simpson *v.* Robinson, 12 Q. B. 512; and see R. *v.* Coyle, 7 Cox, 74; U. S. *v.* Brown, 4 Cranch C. C. 508; Com. *v.* Kenney, 12 Met. (Mass.) 235; Com. *v.* Walker, 13 Allen, 570; Bob *v.* State, 32 Ala. 560; Noonan *v.* State, 9 Miss. 562; Broyles *v.* State, 47 Ind. 251; Johnson *v.* Holliday, 79 Ind. 157.

In Cowell *v.* Patterson, Sup. Ct. Iowa, 1878, it was held that the waiver of a preliminary examination by one charged with the commission of a crime will not estop him from showing, on a writ of *habeas corpus*, that the evidence against him is insufficient to warrant his detention.

[3] Talcott *v.* Harris, 93 N. Y. 567. See Weaver *v.* State, 77 Ala. 26.

[4] Johnson *v.* Trinity Church, 11 Allen, 123.

[5] Corser *v.* Paul, 41 N. H. 24; Vail *v.* Strong, 10 Vt. 457; Mattocks *v.* Lyman, 16 Vt. 113; Hersey *v.* Barton, 23 Vt. 685; Brainard *v.* Buck, 25 Vt. 573; Com. *v.* Harvey, 1 Gray, 487; McGregor *v.* Wait, 10 Gray, 72; Whitney *v.* Houghton, 127 Mass. 527; Jewett *v.* Banning, 21 N. Y. 27; Moore *v.* Smith, 14 S. & R. 388; Barry *v.* Davis, 33 Mich. 515; Rolfe *v.* Rolfe, 10 Ga. 143; Abercrombie *v.* Allen, 29 Ala. 281; Wilkins *v.* Stidger, 22 Cal. 231; Boyd *v.* Bolton, 8 Ir. Rep. Eq. 113.

Thus, where a servant goes to a house to get possession of his master's chattel, evidence that the owner of the house, immediately after the entrance of the servant, said to a third person, in the hearing of the servant but not in his presence, that the servant had entered against his will, and had pushed him aside, and that the servant, who was on his way up-stairs to get the chattel, said nothing in reply, is incompetent, as an admission of the truth of the charge, in an action against A. for such assault. Drury *v.* Henry, 126 Mass. 519.

A party cannot fix another with liability on the contract by sending a proposal to him, with the announcement that unless refused it will be regarded as accepted. Felthouse *v.* Bindley, 11 C. B. (N. S.) 859.

[6] Hayslep *v.* Gymer, 1 A. & E. 163; Com. *v.* Kenney, 12 Met. 235; Edwards *v.* Williams, 3 Miss. 846.

A party, also, engaged in a business negotiation, is not bound to correct impressions, however erroneous, in the minds of other parties, unless he is specifically appealed to; and mere silence as to a matter concerning which he is not bound to speak is not equivalent to a representation.[1]

Discharge of a servant by a master, subsequent to an alleged negligent act by a servant, cannot be regarded as an admission by the master that the act was negligent.[2] And the better opinion is that evidence of repairs to a structure through negligence in the construction of which it is alleged a party was previously injured, cannot be held to be an admission of such negligence.[3]

A party is not necessarily bound by his silence during the remarks of a stranger intruding during a negotiation, though these remarks may have influenced the other side.[4]

So as to party hearing in silence the testimony of a witness whom he has the right to disclaim; and as to admission of documents.

§ 1139. An interesting question arises, under the law enabling parties to testify, as to the effect on a party of the testimony of witnesses called by him whom he has the right to contradict. At common law there can be no doubt that such testimony cannot be afterwards used against the party by whom it may be adduced.[5] Even at present, under the recent statutes, such evidence, according to the better opinion, cannot be employed in other suits against the party introducing it.[6] It is otherwise, so it has been held in Maine, in respect to the statements of witnesses made at a prior hearing of the same case, which

[1] Keates *v.* Cadogan, 10 C. B. 591; Smith *v.* Hughes, L. R. 6 Q. B. 597; Laidlaw *v.* Organ, 10 Wheat. 178; Whart. on Cont. §§ 217, 249, 251.

[2] Couch *v.* Coal Co., 46 Iowa, 17. See Campbell *v.* R. R., 45 Iowa, 76; supra, § 1081.

[3] Supra, §§ 40, 1081.

[4] Williams *v.* Beasley, 3 J. J. Marsh. 577.

[5] Melen *v.* Andrews, M. & M. 336; R. *v.* Appleby, 3 Stark. R. 33; R. *v.* Turner, 1 Moo. C. C. 347; Child *v.* Grace, 2 C. & P. 193; Com. *v.* Kenney, 12 Met. 237.

[6] See Ayres *v.* Wattson, 57 Penn. St. 360.

"It would be perilous, indeed, to any party to produce and examine a witness in court, if all that he might say could afterwards be used in evidence against him as an admission. He admits, indeed, by producing him, that he is a credible witness, but only *pro hac vice*, so far as that case is concerned. He does not admit that everything he says is true, either in that or any other proceeding. A party in the same suit may give evidence which contradicts his own witness, or shows that he was mistaken, though he cannot directly impeach his veracity." McDermott *v.* Hoffman, 70 Penn. St. 52.

statements the party is at liberty to contradict, he being entitled to be sworn as a witness in the case.[1] And in England, in a case[2] in which a question was raised relative to the admissibility of certain depositions, which the defendant had used in a chancery suit, wherein the same facts were in issue, Crompton, J., said: "A document knowingly used as true, by a party in a court of justice, is evidence against him as an admission even for a stranger to the prior proceedings, at all events, when it appears to have been used for the very purpose of proving the very fact, for the proving of which it is offered in evidence in the subsequent suit." And it has been held that where a book, purporting to be that of a deputy surveyor, had been three times, without objection, received in evidence in the same cause, it could be admitted on a subsequent trial without further proof.[3] A statement, also, made on a preliminary motion in court in the presence of a party by his attorney, as to what the party would testify to, has been held to be admissible to contradict the party when testifying in another case.[4] But silence during an adversary's testimony cannot, in any view, be imputed to a party as an admission.[5] And a party who neglects to contradict the testimony of an adverse witness is not precluded from disputing such testimony at a subsequent trial.[6]

§ 1140. When accounts are presented, the party to whom they are handed is not expected to speak; and his silence under such circumstances is not ordinarily to be treated as an admission of the debt.[7] Yet, with business men, the undue retention of an account without exceptions, when the practice is to return accounts in a reasonable time, if objected to, with the objections, may give rise, as against the party retaining, to a presumption of fact, whose strength depends upon the circumstances of the concrete case.[8] In fine, whenever accounts

Silence on reception of accounts no admission.

[1] Blanchard *v.* Hodgkins, 62 Me. 120.

[2] Richards *v.* Morgan, 4 B. & S. 641.

[3] Unger *v.* Wiggins, 1 Rawle, 331. See supra, § 1118.

[4] Lord *v.* Bigelow, 124 Mass. 185. See supra, § 1118.

[5] Broyles *v.* State, 47 Ind. 251.

[6] McCormick *v.* R. R., 99 N. Y. 65.

[7] Gibney *v.* Marchay, 34 N. Y. 301; Champion *v.* Joslyn, 44 N. Y. 653; Darlington *v.* Taylor, 3 Grant (Penn.), 195; Mellon *v.* Campbell, 11 Penn. St. 415; Quarles *v.* Littlepage, 2 Hen. & M. 401; Robertson *v.* Wright, 17 Grat. 534; Bright *v.* Coffman, 15 Ind. 371; Gartner *v.* Boller, 54 Mich. 333; Churchill *v.* Fulliam, 8 Iowa, 45; Glenn *v.* Salter, 50 Ga. 170. See Stiles *v.* Brown, 1 Gill (Md.), 350.

[8] Freeland *v.* Heron, 7 Cranch, 147; Wiggins *v.* Burkham, 10 Wall. 129; Oil Co. *v.* Van Etten, 107 U. S. 325;

are exhibited to a party who is interested in them (*e. g.*, an agent's accounts to his principal, or a partner to a copartner), and are not excepted to in a reasonable time, this is an implication of assent.[1] It has also been held that a banker's pass-book, when not excepted

Hopkirk *v.* Page, 2 Brock. 20; Hayes *v.* Kelley, 116 Mass. 300; Manhattan Co. *v.* Lydig, 4 Johns. R. 377; Hutchinson *v.* Bank, 48 Barb. 302; Phillips *v.* Tapper, 2 Penn. St. 323; Tams *v.* Bullitt, 35 Penn. St. 308; Tams *v.* Lewis, 42 Penn. St. 402; Darlington *v.* Taylor, 3 Grant (Penn.), 195; Randel *v.* Ely, 3 Brewst. 270; Robertson *v.* Wright, 17 Grat. 534; Miller *v.* Bruns, 41 Ill. 293; Sheppard *v.* Bank, 15 Mo. 143; Evans *v.* Evans, 2 Coldw. 143; Webb *v.* Chambers, 3 Ired. L. 374; Lever *v.* Lever, 2 Hill (S. C.) Ch. 158; McCulloch *v.* Judd, 20 Ala. 703; Freeman *v.* Howell, 4 La. An. 196. See Boody *v.* McKenney, 23 Me. 517.

"The principle which lies at the foundation of evidence of this kind is, that the silence of the party to whom the account is sent warrants the inference of an admission of its correctness. This inference is more or less strong according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it; as that the party was absent from home, suffering from illness, or expected shortly to see the other party, and intended and preferred to make his objections in person. Other circumstances of a like character may be readily imagined. Lockwood *v.* Thorne, 18 N. Y. 289. As regards merchants residing in different countries, Judge Story says: 'Several opportunities of writing must have occurred.' We see no objection to the rule as he lays it down, in respect to parties in the same country. When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission, or mistake, and in these respects he is in no wise concluded by the admission implied from his silence after it was rendered. Perkins *v.* Hart, 11 Wheaton, 256. The proposition, that what is reasonable time in such cases is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear it is always a question exclusively for the court. The point was so ruled by this court in Toland *v.* Sprague, 12 Peters, 336. See, also, Lockwood *v.* Thorne, 1 Kernan, 175. Where the proofs are conflicting, the question is a mixed one of law and of fact. In such cases the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties." Swayne, J., Wiggins *v.* Burkham, 10 Wall. 131.

A distinction has been taken in Ireland between such accounts as are *sent by post*, and those *delivered by hand;* and it has been held that the former, though kept by the party to whom they were sent without observation, are not admissible against him as evidence that he had acquiesced in their contents. Price *v.* Ramsay, 2 Jebb & Sy. 338, cited in Taylor's Evidence, § 735.

[1] Sherman *v.* Sherman, 2 Vern. 276; Tickel *v.* Short, 2 Ves. Sr. 239; Rich *v.* Eldredge, 42 N. H. 153; Meyer *v.* Reichardt, 112 Mass. 108; Oram *v.* Bishop, 7 Halst. (N. J.) 163; Darlington *v.* Taylor, 3 Grant (Penn.), 195; Phillips *v.* Tapper, 2 Penn. St. 323; Lever *v.* Lever, 2 Hill (S. C.) Ch. 158; Rayne *v.* Taylor, 12 La. An. 765.

to, is evidence of acquiescence by the customer of the principles on which the accounts are made up.[1] The raising an objection to a particular item may be *primâ facie* regarded as an assent to the items to which no objection is made.[2] When deposits are proved, the burden is on the bank to show counter-payments.[3]

So of invoices.

§ 1141. What has been said as to accounts applies to invoices. An invoice makes a *primâ facie* case against a business man who receives and retains it without dissent.[4]

Silent admissions and conduct may estop.

§ 1142. Admissions by silence, as well as admissions by speech, may have a contractual force, and may bind the party to whom they are imputable as effectually as if they were spoken. When they are so interwoven with acts as to put the actor in a specific attitude towards other persons, by which such other persons are induced to do or omit to do a particular thing, then he may be estopped from subsequently denying that he occupied such position, and is compelled to make good any losses which such other parties may have sustained by his course in this relation. In such cases, however, it must appear that the party complaining changed his situation in consequence of the conduct of the other party, and that the conduct of such other party was calculated to have this effect.[5] Aside from this position, conduct is always admissible when from it an admis-

[1] Williamson *v.* Williamson, L. R. 7 Eq. 542.

It should be remembered that an account sent by a creditor to a debtor has been held in equity evidence of a contract; Morland *v.* Isaac, 20 Beav. 392; and even where the account, although made out, was not sent in, a contract was implied. Bruce *v.* Garden, 17 W. R. 990.

[2] Chisman *v.* Count, 1 Man. & Gr. 307.

[3] De Land *v.* Bank, 111 Ill. 323.

[4] Field *v.* Moulson, 2 Wash. C. C. 155. Though see Wolf *v.* Ins. Co., 20 La. An. 383; and see Dows *v.* Bank, 91 U. S. 618.

[5] See supra, § 1085; Pickard *v.* Sears, 6 A. & E. 474; Atty.-Gen. *v.* Stephens, 1 Kay & J. 748; Harrison *v.* Wright, 13 M. & W. 820; Miles *v.* Furber, L. R. 8 Q. B. 77; Dairy Ass., 11 Bkrt. Reg. 253; Carroll *v.* R. R., 111 Mass. 1; Connihan *v.* Thompson, 111 Mass. 270; Rice *v.* Barrett, 116 Mass. 312; Hexter *v.* Knox, 39 N. Y. Sup. Ct. 109; Griswold *v.* Haven, 25 N. Y. 595; Bodine *v.* Killeen, 53 N. Y. 93; Chapman *v.* Rase, 56 N. Y. 137; Dillett *v.* Kemble, 25 N. J. Eq. 66; Beaupland *v.* McKeen, 28 Penn. St. 124; Philips *v.* Blair, 38 Iowa, 649; Summerville *v.* R. R., 62 Mo. 391; St. Louis *v.* Shields, 62 Mo. 247; Grace *v.* McKissack, 49 Ala. 163; Weedon *v.* Landreaux, 26 La. An. 729; Snow *v.* Walker, 42 Tex. 154. As to admissions by conduct, see Snell *v.* Brey, 56 Wis. 156.

sion of liability can be inferred.[1] Thus, where the question was whether a landlord or his tenant was to keep in repair a platform in front of a shop, evidence that, after an injury caused by a defect in the platform, the landlord repaired it, is competent as an admission that it was his duty to keep the platform in repair.[2] So where A. accepts from B. goods sent to him without protest and sells them at a fair price to C., he cannot afterwards maintain against B. that they were not merchantable.[3] The doctrine, however, does not apply to silence as to a statement of a fact not yet in existence, nor to a matter of future intention.[4]

Extension of estoppels of this class.

§ 1143. In their first conception, estoppels of this class were parts of solemn acts, in which the community was called upon to witness the attitude of the parties to a contract. "They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery of seisin, entry acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed."[5] Modern business, however, in discarding in most cases publicity in the negotiation of contracts, has so enlarged the sphere of estoppels of this class that they extend to all cases where one party by his conduct wilfully or negligently induces another party to do or omit to do a particular thing.[6] But there must be privity between the party

[1] Supra, § 921 ff, where the cases are given.

[2] Readman *v.* Conway, 126 Mass. 374. See, as to admissions of this class, supra, §§ 40, 1081.

[3] Winchester Co. *v.* Funge, 109 U. S. 651.

[4] Bank of Louisiana *v.* Bank of New Orleans, 43 L. J. Ch. 269; Langdon *v.* Doud, 10 Allen, 433; *S. C.* 6 Allen, 423; White *v.* Ashton, 51 N. Y. 580. Supra, § 1076.

[5] Parke, B., Lyon *v.* Reed, 13 M. & W. 309.

As sustaining the text, see further, Wallace *v.* Loomis, 97 U. S. 146; Walker *v.* Flint, 3 McCrary, 507; Carey *v.* Dinsmore, 58 N. H. 357; Smith *v.* Monroe, 85 N. Y. 354; Fleischmann *v.* Stern, 90 N. Y. 110; Cohen *v.* Teller, 96 Penn. St. 123; Frick *v.* Trustees, 99 Ill. 167; Wilson *v.* Sherffbillich, 30 Minn. 548; Slocumb *v.* R. R., 57 Iowa, 675; Airey *v.* Savings Inst., 33 La. An. 1346; Roley *v.* Williams, 73 Mo. 315.

[6] Graves *v.* Key, 3 B. & Ad. 318; Stow *v.* U. S., 5 Ct. of Claims, 362; Barron *v.* Cobleigh, 11 N. H. 559; Stevens *v.* Dennett, 51 N. H. 324; Dewey *v.* Field, 4 Met. 381; Zuchtman *v.* Roberts, 109 Mass. 53; Stephens *v.* Baird, 9 Cow. 274; Dezell *v.* Odell, 3 Hill, 215; Atlantic Co. *v.* Leavitt, 54 N. Y.

charging the estoppel and the party charged. In other words, the act or negligence relied on must establish a causal relation between the party charged with the party claiming to be estopped.[1]

Party permitting another to deal with his property may be estopped.

§ 1144. Hence if A., having a claim to property, wilfully or negligently permits B. to deal with such property as if he were absolute owner, A. will not be permitted to assert his claim to such property against innocent third parties dealing with B. as absolute owner.[2] On the same principle, where A. by act or word renounces to B.

35; Barnard *v.* Campbell, 55 N. Y. 456; Comstock *v.* Smith, 26 Mich. 306; People *v.* Brown, 67 Ill. 435; Peters *v.* Jones, 35 Iowa, 512; Crawford *v.* Ginn, 35 Iowa, 543; Drake *v.* Wise, 36 Iowa, 476; Smith *v.* Penny, 44 Cal. 161; Dresbach *v.* Minnis, 45 Cal. 223; May *v.* R. R., 48 Ga. 109; Thomas *v.* Pullis, 56 Mo. 211. See Bigelow on Estoppel, 437 *et seq.*

"When one," says Lord Denman, "by his words or conduct (and this includes silence) 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 previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Per Lord Denman, Pickard *v.* Sears, 6 A. & E. 474; cf. Attorney-General *v.* Stephens, 1 K. & J. 724. By the term "wilfully," in the above rule, it has been laid down (per Parke, B., Freeman *v.* Cooke, 2 Exch. 663) that "we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he does act upon it as true, the party making the representation would be equally precluded from contesting its truth and conduct by negligence or omission; where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth may often have the same effect." Hence negligence, in doing an act calculated to mislead a prudent business man, may estop. Mannfact. Bank *v.* Hazard, 30 N. Y. 226; Horn *v.* Cole, 51 N. H. 287; Preston *v.* Mann, 15 Conn. 118; Pierce *v.* Andrews, 6 Cush. 4; McKelvey *v.* Trnby, 4 Watts & S. 231; Kirk *v.* Hartman, 63 Penn. St. 97; Rice *v.* Bunce, 49 Mo. 231; and see Bigelow on Estoppel (2d ed.), 490–1; 4 Southern Law Rev. 647.

[1] Kinney *v.* Whiton, 44 Conn. 262; Mayenborg *v.* Haynes, 50 N. Y. 675. Infra, § 1150.

[2] Kerr on Fraud, 298; 1 Story Eq. Jur. § 384; Railroad Co. *v.* Dubois, 12 Wall. 47; Dewey *v.* Field, 4 Met. 381; Neven *v.* Belknap, 2 Johns. 573; Hope *v.* Lawrence, 50 Barb. 258; Carpenter *v.* Carpenter, 10 C. E. Green, 194; Burke's Est., 1 Pars. Eq. 473; Adlum *v.* Yard, 1 Rawle, 171; Com. *v.* Green, 4 Whart. 604; Carr *v.* Wallace, 7 Watts, 400; Chapman *v.* Chapman, 59 Penn. St. 214; Hinds *v.* Ingham, 31 Ill. 400.

A negligent misstatement of law may estop. Storrs *v.* Baker, 6 Johns. Ch. 166. Supra, § 1079; infra, § 1150.

See, also, Loud Gold Co. *v.* Blake, 24

a particular claim, on the faith of which renunciation B. parts with certain rights, A. cannot afterwards set up such claim against B.[1]

And so as to any contractual representation of a fact.

§ 1145. Again: if A., a creditor of B., directly or indirectly holds himself out as approving a general assignment by B. to C., A. is afterwards estopped from disputing such assignment as against third parties.[2] So, as a general rule, we may say that whenever a representation of a fact (as distinguished from a representation of an intention)[3] has been made or assented to by one party for the purpose of influencing another's conduct, and this representation has been acted on by the latter to his loss, this loss may be redressed in equity if not in law.[4]

§ 1146. As we have already observed, falsity, in cases of bilateral admissions, does not affect liability. Hence where parties

Fed. Rep. 191; Hervey *v.* R. R., 28 Fed. Rep. 169; St. Louis Smelting Co. *v.* Green, 4 McCrary, 232; Tibbetts *v.* Shapleigh, 60 N. H. 487; Green *v.* Smith, 57 Vt. 268; Griffin *v.* Lawrence, 135 Mass. 365; May *v.* Gates, 137 Mass. 389; Aldrich *v.* Billings, 14 R. I. 233; Cooper, in re, 93 N. Y. 507; Weaver *v.* Lutz, 102 Penn. St. 593; Grim's Appeal, 105 Penn. St. 375; Fidelity Co.'s Appeal, 106 Penn. St. 144; Kimball *v.* Lee, 40 N. J. Eq. 403; Swayze *v.* Carter, 41 N. J. Eq. 231; Burns *v.* Gallagher, 62 Md. 462; Bridenbaugh *v.* King, 42 Ohio St. 410; Athens *v.* R. R., 72 Ga. 800; Giddens *v.* Crenshaw, 74 Ala. 471; Larkin *v.* Mead, 77 Ala. 485; Gilmore *v.* Gilmore, 109 Ill. 277; Whipple *v.* Whipple, 109 Ill. 418; South Park *v.* Todd, 112 Ill. 379; Hill *v.* Blackwelder, 113 Ill. 283; Pool *v.* Breeze, 114 Ill. 594; Franee *v.* Haynes, 67 Iowa, 479.

[1] Goodell *v.* Bates, 14 R. I. 65; Beals *v.* Lewis, 43 Ohio St. 220; Roberts *v.* Davis, 72 Ga. 819; Wilkinson *v.* Learey, 74 Ala. 243; Erskine *v.* Lowenstein, 82 Mo. 301; Escolle *v.* Franks, 67 Cal. 137.

[2] Guiterman *v.* Landis, 1 Weekly Notes, 622.

[3] Taylor's Evidence, § 771, citing Jorden *v.* Money, 5 H. of L. Cas. 185.

[4] Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 45, 62, n., per Lord Cottenham; 88, per Lord Campbell; Neville *v.* Wilkinson, 1 Br. C. C. 543; Montefiore *v.* Montefiore, 1 W. Bl. 363; Bentley *v.* Mackay, 31 Beav. 155, per Romilly, M. R.; Laver *v.* Fielder, 32 L. J. Ch. 375, per Romilly, M. R.; 32 Beav. 1, *S. C.*; Gale *v.* Lindo, 1 Vern. 475; Jorden *v.* Money, 5 H. of L. Cas. 185; Money *v.* Jorden, 15 Beav. 372; Hutton *v.* Rossiter, 7 De Gex, M. & G. 9; Pulsford *v.* Richards, 17 Beav. 87, 94, per Romilly, M. R.; Yeomans *v.* Williams, 1 Law Rep. Eq. 184; Hodgson *v.* Hutchinson, 5 Vin. Abr. 522; Cookes *v.* Mascall, 2 Vern. 200; Waukford *v.* Fotherly, Ibid. 322; Luders *v.* Anstey, 4 Ves. 501. See Wright *v.* Snowe, 2 De Gex & Sm. 321; Maunsell *v.* White, 4 H. of L. Cas. 1039; Bold *v.* Hutchinson, 24 L. J. Ch. 285, per Romilly, M. R.; 20 Beav. 258, *S. C.*; 5 De Gex, M. & G. 558, *S. C.* on appeal; Traill *v.* Baring, 4 Giff. 485; *S. C.* cited Taylor's Ev. § 185.

have knowingly agreed to act upon an assumed state of facts, their rights will be made to depend on such assumption, and not upon the truth.[1] Thus, it has been held in England, that if an agent or a workman knowingly renders an untrue account to his principal or employer, and such account is adopted by the party to whom it is given, it cannot afterwards be gainsaid by the person who rendered it.[2] A *bonâ fide* purchaser, also, of a non-negotiable security, from one upon whom the owner has conferred the apparent ownership, obtains a good title against the owner, who is estopped from asserting title thereto.[3]

Parties knowingly contracting on erroneous assumption cannot afterwards repudiate.

§ 1147. Another illustration of the rule above given is, that a party selling or assigning cannot, unless there be fraud or gross mistake, dispute his right to make the sale, as against his vendee or assignee.[4] It has been also held that a corporation issuing bonds purporting to be executed in conformity with statute cannot, as against *bonâ fide* holders of such bonds, deny such conformity;[5] that where commissioners were empowered by a local act to issue mortgage securities, they cannot, as against a *bonâ fide* holder for value, set up an illegality in the original issue of any security;[6] and that a company cannot rely on an informality in the issue of their debentures as an answer to a petition for winding up.[7] It is also laid down that where a company registers a person as a shareholder, and induces him, on the faith of such registration, to pay a call, they cannot be allowed to dispute his title to the shares.[8]

Party selling cannot set up invalidity of sale against purchaser.

[1] Supra, § 1087; M'Cance *v.* R. R. Co., 3 H. & C. 343.

[2] Molton *v.* Camroux, 2 Ex. R. 487; aff. in Ex. Ch. 4 Ex. R. R. 17. See, also, Cave *v.* Mills, 7 H. & N. 913; Skyring *v.* Greenwood, 4 B. & C. 281; Shaw *v.* Picton, Ibid. 715.

[3] Jarvis *v.* Rogers, 13 Mass. 105; Moore *v.* Bank, 55 N. Y. 41; Bank *v.* Livingston, 74 N. Y. 223; and see Cowdrey *v.* Vandenburgh, 101 U. S. 572.

[4] See Bigelow on Estoppel, 452–467; Mangles *v.* Dixon, 1 M. & Gord. 446; Ramsden *v.* Dyson, L. R. 1 H. L. 129; Rolt *v.* White, 3 De Gex, J. & S. 360; Beaufort *v.* Neald, 12 Cl. & F. 249.

[5] Knox Co. *v.* Aspinwall, 21 How. 539; Bissell *v.* Jeffersonville, 24 How. 287; Cowdrey *v.* Vandenburgh, 101 U. S. 572; Society of Savings *v.* New London, 29 Conn. 174. See South Ottawa *v.* Perkins, 94 U. S. 60, cited supra, § 290.

[6] Webb *v.* Herne Bay Commissioners, L. R. 5 Q. B. 642; 19 W. R. 241. See Dooley *v.* Cheshire, 15 Gray, 494; Stoddart *v.* Shetucket, 34 Conn. 542.

[7] Re Exmouth Dock Co., L. R. 17 Eq. 181; 22 W. R. 104.

[8] Hart *v.* Frontino, etc. Gold Mining Co., L. R. 5 Ex. 111; Re Bahia & Francisco Ry. Co. *v.* Tritten, L. R. 3 Q. B.

§ 1148. Parties interested in real estate are in like manner precluded from asserting any latent equity they may hold against a *bonâ fide* purchaser or incumbrancer, whom they have permitted to purchase or incumber without notice of their equity, when they were themselves privy to such purchase or incumbrance.[1] The following canons on this point have been laid down by the law lords in the English House of Lords: "If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a court of equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. So if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined."[2] By Lord Kingsdown it was said, in addition, that "If a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."[3] So where the defendant in an execution, from whom a waiver of an inquisition has been fraudulently obtained, is present at the sheriff's sale under the inquisition, but gives no notice of his claim based on the fraudulency of the waiver, he is afterwards estopped from disputing the validity of the sale.[4] Of incumbrances or assignments of record, however, such notice is not necessary.[5]

Owner of land bound in the same way.

584; 9 B. & S. 844, *S. C.* See, also, Webb *v.* Herne Bay Improving Com., L. R. 3 Q. B. 642, *S. C.*

[1] See cases cited supra, §§ 1142–5. See, also, Gregory *v.* Mighell, 18 Ves. 328.

[2] Ramsden *v.* Dyson, L. R. 1 H. of L. 129.

[3] Lord Kingsdown, in Ramsden *v.* Dyson, L. R. 1 H. of L. 129; affirming Gregory *v.* Mighell, 18 Ves. 328.

[4] Jackson *v.* Morter, 82 Penn. St. 291; relying on Hageman *v.* Salisberry, 74 Penn. St. 280; and qualifying Hope *v.* Everhart, 70 Penn. St. 234; and see fully cases cited supra, § 1144.

[5] Sulphine *v.* Dunbar, 55 Miss. 255.

Whether estoppels of this class can pass a title, as against the statute of frauds, is a question still open to doubt.[1]

[1] In Hays *v.* Levingston, 34 Mich. 384, Cooley, J., maintains that where the statute requires the transfer in writing, such transfer cannot be worked by estoppel. From this opinion the following passages are extracted :—

"It is not to be denied, however, that there are several cases that apply the principle of estoppel indiscriminately to both real and personal estate. The cases in Maine are very decided. Hatch *v.* Kimball, 16 Me. 147; Durham *v.* Alden, 20 Me. 228; Rangeley *v.* Spring, 21 Me. 137; Copeland *v.* Copeland, 28 Me. 525; Stevens *v.* McNamara, 36 Me. 176; Bigelow *v.* Foss, 59 Me. 162. These cases appear to have overruled Hamlin *v.* Hamlin, 19 Me. 141. The following are usually referred to as supporting the Maine cases: McCune *v.* McMichael, 29 Geo. 312; Beaupland *v.* McKeen, 28 Penn. St. 124; Shaw *v.* Bebee, 35 Vt. 205; Brown *v.* Wheeler, 17 Conn. 345; Brown *v.* Bowen, 30 N. Y. 519; Basham *v.* Turbeville, 1 Swan, 437. Of these the Georgia case related to a parol partition of slaves, acquiesced in until after the death of one of the parties, and was decided without any discussion of, or reference to, the distinction between real and personal estate. The case in Pennsylvania was a suit on a promissory note given on a purchase of lands, the payment of which was resisted on the ground of failure of title. The persons in whom the title was alleged to be had been the plaintiff's agents in the sale, and had been paid a commission for making it; and they were held to be estopped from denying the plaintiff's right. It is to be observed of this case that the title was only incidentally in question, and also that in Pennsylvania the distinction between legal and equitable remedies is not kept up. In the Vermont case, the court is contented to dispose of the question very briefly, by saying that the rule of estoppel, which is applied to personal property 'upon reason and principle, to prevent fraud and promote justice, should be extended to real property.' It would have been more satisfactory if the court had pointed out on what ground, when the legislature, 'to prevent frauds and promote justice,' had applied wholly different rules to the transfer of personal property and of real property, the courts would justify their action in venturing to abolish the distinction. The Connecticut case was one in which the question of estoppel related to a distribution of property, which, though not in pursuance of the statute, had been sanctioned by a written agreement of the parties. In the New York case the complaint was of the flooding of the plaintiff's mill by a dam which let the water back upon it; and the question was whether the defendants were estopped from asserting title to the land on which the mill stood, by the fact that their ancestor, through whom they claimed, had asserted his right at the time the plaintiffs bought the land and built the mill, though aware of all the facts. The case was begun and tried under the Code, which does away with the distinction between legal and equitable actions. The case in Swan goes to the extreme of sustaining an estoppel against an infant, and certainly should not be followed in this state. Ryder *v.* Flanders, 30 Mich. 336."

"Equity," such is the distinction taken, "may always compel the owner of the title to release it, when that is the proper redress for a fraud commit-

§ 1149. As a general rule, a party taking a subordinate title is precluded (unless there be fraud) from maintaining that the party from whom he takes had no title at the time of the transfer.[1] Hence a licensee is estopped from denying the title of licensor to grant the license; and consequently a licensee of a patent cannot dispute the title of the patentee.[2] A tenant cannot dispute his landlord's title,[3] nor can an agent dispute that of his principal.[4] A bailee, also, is estopped from denying that his bailor had at the time the bailment was made authority to make it,[5] though when the bailee is evicted by title paramount he can set up such title against the bailor.[6]

Subordinate in title cannot dispute the title under which he takes, nor bailee that of bailor.

§ 1150. To constitute an estoppel, however (whether the alleged estopping act consist in suppression or assertion), the party alleged to be influenced must in some way change his position in consequence of the impression thus made upon him.[7] In other words, the estopping act must be either contractual as distinguished from non-contractual,[8]

Other party's action must be affected and the misleading conduct

ted by him in respect to the title; but the remedy is properly administered by compelling the fraudulent owner to convey, instead of treating the case as one of estoppel in the strict sense."

It was consequently held that title to realty cannot be transferred at law merely by the application of the doctrine of estoppel; and that where the owner of realty denied his own title thereto, and procured its sale through another, to one who was ignorant of his rights, but afterwards asserted his title in a court of law, he could not be estopped from doing so; but that if any relief could be had against him, it must be in equity.

[1] Sanderson *v.* Collman, 4 M. & G. 209; Stott *v.* Rutherford, 92 U. S. 107.

[2] Doe *v.* Baytop, 3 A. & E. 188; Crossley *v.* Dixon, 10 H. L. Cas. 304; Kinsman *v.* Parkhurst, 18 How. 289.

[3] Bigelow on Estoppel, 350; Williams *v.* Heales, L. R. 9 C. R. 171; Knight *v.* Smythe, 4 M. & S. 347; Balls *v.* Westwood, 2 Camp. 12; Page *v.* Kinsman, 43 N. H. 328; Bailey *v.* Kilburn, 10 Met. 176; Miller *v.* Lang, 99 Mass. 13; Hawes *v.* Shaw, 100 Mass. 187; Whalin *v.* White, 25 N. Y. 462.

[4] Miles *v.* Furber, L. R. 8 Q. B. 77; Dixon *v.* Hammond, 3 B. & Ald. 310. See Whart. on Agency, §§ 242, 573, 761.

[5] Gosling *v.* Birnie, 7 Bing. 338; Cheesman *v.* Exall, 6 Exc. 341; Rogers *v.* Weir, 34 N. Y. 463; Lund *v.* Bank, 37 Barb. 129; King *v.* Richards, 6 Whart. 418.

[6] Biddle *v.* Bond, 6 B. & S. 225. See Sinclair *v.* Murphy, 14 Mich. 392; Dixon *v.* Hammond, 2 B. & A. 310; Stonard *v.* Dunkin, 2 Camp. 344; Hall *v.* Griffin, 10 Bing. 246; Zulietta *v.* Vinent, 1 De Gex, M. & G. 315; Knights *v.* Willen, L. R. 5 Q. B. 660.

[7] See cases cited supra, § 1136.

[8] See supra, §§ 1078, 1081.

must impose a liability based either on contract or on negligence.

or must be infected with such negligence as was likely, in the usual order of things, to have led the party injured to incur the damage of which he complains.[1] The latter phase is thus stated: "If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct or culpable negligence calculated to have that result, and such *culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice*, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."[2] Thus, a party who draws a check so negligently as to enable a holder to fill in blank so as to elude the most skilful criticism, cannot throw its loss on the bank who pays the check.[3]

[1] Arnold *v.* Cheque Bank, L. R. 1 C. P. D. 578.

[2] 1 Story's Eq. 391; Carr *v.* R. R., L. R. 10 C. P. 316. Supra, §§ 1144–6.

"To the same purport is the language of the adjudged cases. Thus it is said by the Supreme Court of Pennsylvania, that 'The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up.' Hill *v.* Epley, 31 Penn. St. 334; Henshaw *v.* Bissell, 18 Wall. 271; Biddle Boggs *v.* Merced Mining Co., 14 Cal. 368; Davis *v.* Davis, 26 Ibid. 23; Commonwealth *v.* Moltz, 10 Barr, 531; Copeland *v.* Copeland, 28 Me. 539; Delaplaine *v.* Hitchcock, 6 Hill, 14; Haves *v.* Marchant, 1 Curtis C. C. 136; Zuchtman *v.* Robert, 109 Mass. 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established. There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting; as where one of two innocent parties must suffer from the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss; and where one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining its benefits. But such cases are generally referable to other principles than that of equitable estoppel, although the same result is produced; thus the first case here mentioned is the affixing of liability upon the party who from negligence indirectly occasioned the injury, and the second is the application of the doctrine of ratification or election. Be this as it may, the general ground of the application of the principle of equitable estoppel is as we have stated." Field, J., Brant *v.* Coal Co., 93 U. S. 326.

[3] Young *v.* Grote, 4 Bing. 253. See Greenfield Bk. *v.* Stowell, 123 Mass. 196; McGrath *v.* Clark, 56 N. Y. 34; cf. Lehman *v.* R. R., 12 Fed. Rep. 595.

Unless, however, there is a change of position produced in the party to whom the representations are (either tacitly or expressly) made, or on whom the inculpatory negligence thus acts, no estoppel is worked.[1] Thus, it has been held that a railroad company is not ordinarily estopped from showing that certain goods, alleged to have been delivered to them as carriers, had never reached their hands, although the plaintiff had received from them advice notes for such goods;[2] nor is a party giving a receipt ordinarily estopped by the receipt.[3]

A character assumed cannot afterwards be repudiated when the basis of another's action.

§ 1151. We have already[4] noticed that a party may, in assuming a character, express himself as effectually as he could by a verbal statement. It follows from this that when the assumption of a character is the consideration for a contract, such assumption binds contractually, and estops the party making it.[5] Thus, where A., by the assumption of a false character, induces a railway company to register him as a proprietor of shares, and, subsequently, to bring an action against him for calls on such shares, he will be precluded from disputing the validity of the transfer to him, or from otherwise denying his character as a shareholder.[6] So, at least in equity, the same liability may be imposed on an infant who has actually deceived a tradesman by fraudulently representing himself to be of full age, and who has thus obtained credit for goods supplied to him.[7] It has also been ruled that, if a party has taken advantage of, or voluntarily acted under, the bankrupt

[1] Infra, § 1155.

[2] Ibid.; supra, § 1070. See, also, Gosley *v.* Birnie, 7 Bing. 339; 5 M. & P. 160; Hawes *v.* Watson, 2 B. & C. 540; Sheridan *v.* Quay Co., 4 C. B. N. S. 618.

[3] See supra, §§ 1044, 1066, 1144.

[4] Supra, § 1081.

[5] Robinson *v.* Kitchin, 21 Beav. 365; *S. C.*, 8 De Gex, M. & G. 88. See, also, supra, § 1087.

[6] Sheffield & Manch. Ry. Co. *v.* Woodcock, 7 M. & W. 574, 582, 583; Cheltenham & Gt. West. Union Ry. Co. *v.* Daniel, 2 Q. B. 281, 292; In re North of Eng. Jt. St. Bk. Co., ex parte Straffon's Ex'ors, 22 L. J. Ch. 194, 202, 203; Taylor *v.* Hughes, 2 Jones & Lat. 24. See Swan *v.* North Brit. Australasian Co., 7 H. & N. 603; *S. C.* in Ex. Ch. 2 New R. 521; 2 H. & C. 175; and 32 L. J. Ex. 273; cited in Taylor's Ev. § 773. That this applies to corporations, see Pollock on Cont. 118; Webb *v.* Home Bay Co., L. R. 5 Q. B. 642; Railroad Co. *v.* Howard, 13 How. 307; Pendleton *v.* Amy, 13 Wall. 297.

[7] Ex parte Unity Jt. St. Mutual Bank. Associat. in re King, 3 De Gex & J. 63; Nelson *v.* Stocker, 28 L. J. Ch. 760; 4 De Gex & J. 458, *S. C.*

or insolvent laws, he will not be permitted, as against parties to the proceedings, to deny their regularity.[1] So a party, recognizing another as his agent as to third parties, cannot afterwards repudiate, as to such parties, the agency;[2] and the same rule applies to the recognition by a husband of a wife.[3] And a party by silently entering a railway car binds himself to pay the fare.

§ 1152. When, however, there are liabilities to be assumed, a party, merely standing by when informed that he is in a position which imposes the liabilities, cannot be held to have accepted the liabilities. "No authority can be found for holding that a person, by simply doing nothing, may be rendered liable. The mere fact of standing by and being told there is something done which you have not authorized cannot fix you with the heavy liabilities which shares in a joint stock company would create."[4] In other words, in such case the admission is not contractual, and cannot, therefore, estop.[5] It may be otherwise when the admission becomes contractual by a change of position on the other side. Thus, where a company, under circumstances which made it doubtful whether the agreement was binding on its shareholders, transferred its business to a new company, one of the terms of agreement being that the shareholders in the old company should receive shares in the new company, and share certificates were sent to all the shareholders in the old company, it was held, that a shareholder who had acknowledged the receipt of and retained the certificates was a shareholder in the new company; but that one who had taken no notice of the communication was not a shareholder.[6] And where shares were allotted to a person, in pursuance of an authority signed by him to have his name entered as a shareholder, and he paid calls and received a dividend on such shares, such person was held precluded from denying that he was a shareholder.[7]

But silence on being told of an unauthorized act does not estop.

[1] Like *v.* Howe, 6 Esp. 20; Clarke *v.* Clarke, Ibid. 61; Gouldie *v.* Gunston, 4 Camp. 381; Watson *v.* Wace, 5 B. & C. 153; explained in Heane *v.* Rogers, 9 B. & C. 586, 587; Mercer *v.* Wise, 3 Esp. 219; Harmar *v.* Davis, 7 Taunt. 577; Flower *v.* Herbert, 2 Ves. Sen. 326.

[2] Summerville *v.* R. R., 62 Mo. 391.

[3] Johnston *v.* Allen, 39 How. (N. Y.) Pr. 506. See supra, §§ 84, n., 1081.

[4] Lord Hatherley in Bank of Hindustan *v.* Allison, L. R. 6 C. P. 22.

[5] Supra, §§ 1078–1085.

[6] Challis's case, 19 W. R. 453; L. R. 6 Ch. 266.

[7] Sewell's case, L. R. 3 Ch. 131; 15 W. R. 1031.

"Where a company had registered an assignment of debentures, it was held that they could not equitably set

§ 1153. Closely related to the last position is another on which we shall have further occasion to dilate.[1] If I recognize another as holding an official character, this, so far as I am concerned, is such an acceptance of his official character as makes it unnecessary for him, in a suit against me in this relation, to prove his official character.[2] If I libel another, ascribing to him a particular office, this is a *primâ facie* case against me, so far as concerns his right to hold such office.[3] So I cannot, after executing a bond to a corporation, deny the corporate capacity of the corporation to do business.[4] In each of these cases, however, it is of course open to me to set up fraud by which I was entrapped into the recognition.[5] And where I have a right to elect between two debtors, it will require a strong case of recognition of the one to preclude me from having recourse to the other.[6]

Admission of official character of a person is *primâ facie* admission of his title.

§ 1154. We have already touched generally upon the question how far a memorandum of indebtedness from A. to B., found among A.'s papers, can be used by B. against A.[7] We should, in this relation, keep in mind that the fact that an unanswered letter, or other document, is found in the custody of a party, is not ordinarily ground for

Letter in possession of a party, not admissible against him.

off against the transferee any claim which they had against the transferor. Higgs *v.* North Assam Tea Co., L. R. 4 Ex. 87; 17 W. R. 1125; followed by Lord Romilly, in re North Assam Tea Co., L. R. 10 Eq. 465; 18 W. R. 126; cf. In re General Estates Co., L. R. 3 Ch. 758; 16 W. R. 919. This last doctrine has recently been extended to a case where there was no registration; for a company having received notice of an assignment for value of one of their debentures, and acknowledged the receipt by stamping the duplicate notice, Malins, V. C., held that this stamping estopped them from setting up against the transferee any equities attaching between themselves and the transferor. Brunton's case, L. R. 19 Eq. 302, 23 W. R. 286." Powell's Evidence, 4th ed. 249.

[1] See infra, §§ 1315–17; supra, § 739 *a*.

[2] Radford *v.* McIntosh, 3 T. R. 632; Peacock *v.* Harris, 10 East, 104; Lipscome *v.* Holmes, 2 Camp. 441; Pritchard *v.* Walker, 3 C. & P. 212, per Vaughan, B., Dickinson *v.* Coward, 1 B. & A. 677; Inglis *v.* Spence, 1 C., M. & R. 432; Crofton *v.* Poole, 1 B. & Ad. 561; Jay *v.* Carthage, 48 Me. 353; Clough *v.* Whitcomb, 105 Mass. 482; Seeds *v.* Kahler, 76 Penn. St. 262.

[3] Barryman *v.* Wise, 4 T. R. 368.

[4] St. Louis *v.* Shields, 62 Mo. 247.

[5] Supra, § 931.

[6] Curtis *v.* Williamson, L. R. 10 Q. B. 87. See Whart. on Agency, §§ 463–470–2.

[7] Supra, § 1123.

the admission of the document as evidence against him.[1] Were it otherwise, an innocent man might, by the artifices of others, be charged with a *primâ facie* case of guilt which he might find it difficult to repel.[2] "It was a great deal too broad a proposition to say, that every paper which a man might hold, purporting to charge him with a debt or liability, was evidence against him if he produced it."[3] "What is said to a man before his face he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains."[4] It is otherwise, however, when the party addressed in any way invited the sending to him of the letter;[5] or when there is any ground to infer that he acted on the letter.[6] So, if it appear that a letter from A., making certain claims or charges, has been received by B., and partially answered, or otherwise recognized, the letter may be read for what it is worth against B.;[7] and so when with such letters goods are forwarded, with bills, and received without return or protest.[8]

[1] U. S. *v.* Crandall, 4 Cranch C. C. 683; People *v.* Green, 1 Parker C. R. 11. See Learned *v.* Sillotson, 97 N. Y. 1, and cases cited supra, §§ 618, 1103.

[2] R. *v.* Hevey, 1 Lea. Cr. C. 232; R. *v.* Plumer, R. & R. 264; Doe *v.* Frankis, 11 A. & E. 795; Com. *v.* Eastman, 1 Cush. 189; Smiths *v.* Shoemaker, 17 Wall. 630; Dutton *v.* Woodman, 9 Cush. 262; Robinson *v.* R. R., 7 Gray, 92; Fearing *v.* Kimball, 4 Allen, 125; Com. *v.* Edgerly, 10 Allen, 184; People *v.* Green, 1 Parker C. R. 11; Waring *v.* Tel. Co., 44 How. (N. Y.) Pr. 69.

[3] Lord Denman, Doe *v.* Frankis, 11 A. & E. 795.

[4] Lord Tenterden, in Fairlie *v.* Denton, 3 C. & P. 103; St. Louis R. R. *v.* Thomas, 85 Ill. 464.

[5] R. *v.* Cooper, L. R. 1 Q. B. D. 19. In this case it was held that when a letter is put in course of transmission, the postmaster-general holds it as the agent of the receiver, citing R. *v.* Jones, 1 Den. Cr. C. 551; 19 L. J. (M. C.) 162; R. *v.* Buttery, cited 4 B. & Ald. 179; and that, therefore, letters in the post-office, invited by the defendant, might be put in evidence against the defendant, though the letters had never been held by him.

[6] Dewett *v.* Piggott, 9 C. & P. 75; R. *v.* Horne Tooke, 25 How. St. Tr. 120; R. *v.* Watson, 2 Stark. 140; Smiths *v.* Shoemaker, 17 Wall. 630. Supra, § 175.

[7] Gaskill *v.* Skeene, 14 Q. B. 668; Fenno *v.* Weston, 31 Vt. 345; Allen *v.* Peters, 4 Phil. R. 78; Higgins *v.* R. R., 7 Jones N. C. (L.) 470; Haynes *v.* Crutchfield, 7 Ala. 189. See, also, Lucy *v.* Mouflet, 5 H. & N. 229; Doe *v.* Frankis, 11 A. & E. 795; Gore *v.* Hawsey, 3 F. & F. 509; Pacific R. R. *v.* Thomas, 19 Kans. 256.

[8] Sturtevant *v.* Wallack, 141 Mass. 119.

Where tacit recognition is claimed, the whole proceedings which constitute the recognition must be given.[1]

§ 1155. We must again, in closing the question of estoppels by silence and by conduct, recur to the fundamental distinction already laid down[2] between contractual and non-contractual admissions. A non-contractual admission is, at the best, but slight evidence, susceptible of being easily rebutted. Peculiarly is this the case with regard to admissions made without the intention of being acted on, or which, if acted on, have not operated to change for the worse the condition of the party so acting.[3] Hence it is that while an admission may be contractual as to the party to whom it is made, it may be non-contractual as to third parties.[4] Thus, where a person brought an action of trover for a dog, he was held not to be precluded from proving his title to it, though he had previously authorized a third party, against whom the defendant had brought a similar action, to deliver it to the defendant, in the place of paying £50, which was the alternative directed by the verdict; the third person having, at the time of delivery, demanded back the dog, on behalf of the plaintiff, as his property.[5] Again, it is now held that a sheriff's return, though it be conclusive evidence in the particular cause in which it is made, or for the purposes of an attachment, does not operate as an estoppel in any other action or proceeding, either as against the sheriff or as against his bailiff.[6] But at the

Admissions made non-negligently without the intention of being acted on, or without being acted on, do not estop; and so as to third parties: otherwise as to negligence.

[1] Mattocks *v.* Lyman, 16 Vt. 113; supra, §§ 1103, 1108.

[2] Supra, §§ 1078–85.

[3] Howard *v.* Hudson, 2 E. & B. 1; Foster *v.* Ins. Co., 3 E. & B. 48; Lackington *v.* Atherton, 7 M. & Gr. 360; Bank of Hindustan *v.* Allison, L. R. 6 C. P. 227; Nourse *v.* Nourse, 116 Mass. 101; and see cases cited supra, § 1150.

[4] Supra, § 923.

[5] Sandys *v.* Hodgson, 10 A. & E. 472.

[6] Stimson *v.* Farnham, L. R. 7 Q. B. 175; Standish *v.* Ross, 3 Ex. R. 527; Brydges *v.* Walford, 6 M. & Sel. 42; 1 Stark. R. 389, n., *S. C.*; Jackson *v.* Hill, 10 A. & E. 477; Remmett *v.* Lawrence, 15 Q. B. 1004; Levy *v.* Hale, 29 L. J. C. P. 127. Holmes *v.* Clifton, 10 A. & E. 673, overruling Beynon *v.* Garrat, 1 C. & P. 154.

Freeman *v.* Cooke, 2 Ex. R. 654, according to Mr. Taylor (Ev. § 782), carries this doctrine to its extreme limit, if it does not transgress the strict bounds of law. That was an action of trover brought against a sheriff for seizing the plaintiff's goods under a *fi. fa.* against his brother, to

same time a party who by his negligence causes another person to take a step injurious to himself, may be bound to recompense the party so injured for the injury.[1]

V. ADMISSIONS BY PREDECESSORS IN TITLE.

§ 1156. The self-disserving admissions of a predecessor in title, as a rule, are admissible against those who follow and claim under him, when such admissions (1) were made when such predecessor was in possession; and (2) are compatible with the rule that parol evidence is not admissible to vary dispositive writings.[2] Declarations of this class

Predecessor's admissions admissible against successor.

which the defendant pleaded not guilty, not possessed, and leave and license. It appeared at the trial that the plaintiff, fearing an execution, had removed his goods to his brother's house, and when the sheriff's officer came there, the plaintiff, supposing that he had a writ against himself, warned him not to seize the goods, as they belonged to his brother. The officer, however, producing his writ, which was against the brother, the plaintiff, before the goods were actually seized, told him that they were the property of a third party; but the officer disregarded this last statement, and seized and sold the goods as belonging to the brother. On this state of facts, the jury found that the goods were the plaintiff's, but that, before the seizure, he falsely stated to the officer that they belonged to his brother, and that the officer was thereby induced to seize them as his brother's. The court, on this finding, directed the verdict to be entered for the plaintiff, on the grounds, first, that the plaintiff did not intend to induce the officer to seize the goods as those of the brother; and, next, that no reasonable man would have seized the goods on the faith of the plaintiff's representations *taken altogether*.

[1] Supra, § 1150.

[2] Supra, § 237; Bp. of Meath *v.* M. of Winchester, 3 Bing. N. C. 183; Maddison *v.* Nuttall, 6 Bing. 226; 3 M. & P. 544, *S. C.*; Doe *v.* Cole, 6 C. & P. 359, per Patterson, J.; De Whelpdale *v.* Milburn, 5 Price, 485; Barr *v.* Mostyn, 5 Ex. R. 69; Gery *v.* Redman, L. R. 1 Q. B. Div. 173; Sly *v.* Dredge, L. R. 2 P. D. 91 (see supra, § 226); Trimlestown *v.* Kemmis, 9 Cl. & F. 749; Bowen *v.* Chase, 98 U. S. 254; Clark, in re, 9 Blatch. 379; Samson *v.* Blake, 6 Bankr. Reg. 410; Dale *v.* Gower, 24 Me. 563; Beedy *v.* Macomber, 47 Me. 451; Wentworth *v.* Wentworth, 71 Me. 72; Pike *v.* Hayes, 14 N. H. 19; Badger *v.* Story, 16 N. H. 168; Baker *v.* Haskell, 47 N. H. 479; Smith *v.* Forest, 49 N. H. 230; Hunt *v.* Haven, 56 N. H. 87; Beecher *v.* Parmele, 9 Vt. 352; Blake *v.* Everett, 1 Allen, 248; Coyle *v.* Cleary, 116 Mass. 208; Pickering *v.* Reynolds, 119 Mass. 111; Flagg *v.* Mason, 141 Mass. 64; Rogers *v.* Moore, 10 Conn. 13; Spaulding *v.* Hallenbeck, 35 N. Y. 204; Smith *v.* McNamara, 4 Lans. 169; Kent *v.* Harcourt, 33 Barb. 491; Chadwick *v.* Fonner, 69 N. Y. 404; Townsend *v.* Johnson, 3 Pen. (N. J.) 706; Ten Eyck *v.* Runk, 26 N. J. L. 513; Edwards *v.* Derrickson, 28 N. J. L. 39; Union Canal *v.* Loyd, 4 Watts & S. 393; Sergeant

are to be received not only in disparagement or diminution of the property which the declarant enjoyed in the premises, but as evidence of any fact which is not foreign to the statement against interest, and which forms substantially a part of it.[1] 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;[2] and declarations of a former owner as to boundaries are in like manner admissible.[3] So, declarations by a tenant have been admitted to show the extent of the tenement occupied by him,[4] the amount of rent paid, and the fact of its payment;[5] and the name of the landlord.[6] It may also be generally declared that whatever accompanies a title, in the way of recital or description, qualifies, at least *primâ facie*, the title.

v. Ingersoll, 15 Penn. St. 343; Horn *v.* Brooks, 61 Penn. St. 407; Weems *v.* Disney, 4 Har. & M. 156; Gaither *v.* Martin, 3 Md. 146; Keener *v.* Kauffman, 16 Md. 296; Hall *v.* Bishop, 78 Ind. 370; McSweeny *v.* McMillan, 96 Ind. 298; Comstock *v.* Smith, 26 Mich. 306; Peoples *v.* Devault, 11 Heisk. 431; Yates *v.* Yates, 76 N. C. 142; Gidney *v.* Logan, 79 N. C. 214; Headen *v.* Womack, 88 N. C. 468; Renwick *v.* Renwick, 9 Rich. (S. C.) 50; Richardson *v.* Mounce, 19 S. C. 477; McClendon *v.* Wells, 20 S. C. 514; Horn *v.* Ross, 20 Ga. 210; Meek *v.* Holten, 22 Ga. 491; Cloud *v.* Dupree, 28 Ga. 170; Harrell *v.* Culpepper, 47 Ga. 635; Ozment *v.* Anglin, 60 Ga. 348; Brewer *v.* Brewer, 19 Ala. 481; Fralick *v.* Presley, 29 Ala. 457; Baucum *v.* George, 65 Ala. 259; Moses *v.* Dunham, 71 Ala. 173; Graham *v.* Busby, 34 Miss. 272; Mulliken *v.* Greer, 5 Mo. 489; Gamble *v.* Johnston, 9 Mo. 605; Potter *v.* McDowell, 31 Mo. 62; Anderson *v.* McPike, 86 Mo. 293; Allen *v.* McGaughey, 31 Ark. 252; Hunt *v.* Evans, 49 Tex. 311; Wright *v.* Carillo, 22 Cal. 595; McFadden *v.* Wallace, 38 Cal. 51; McFadden *v.* Ellmaker, 52 Cal. 348.

As to declarations of deceased mortgagor as against mortgagee, see Stowell *v.* Hazlett, 66 N. Y. 635.

See Moss *v.* Dearing, 45 Iowa, 530, where declarations of a grantor, to the effect that he was indebted to a grantee, when in possession, were admitted to sustain a conveyance when attacked by grantor's creditors.

Where heirs set up, in derogation of the widow's rights, an ante-nuptial agreement, the existence of which she denied, it was held that her husband's declarations made during his lifetime were admissible in behalf of the widow. Hunt's Appeal, 100 Penn. St. 590.

[1] R. *v.* Birmingham, 1 B. & S. 763.

[2] Doe *v.* Pratt, 5 B. & A. 223.

[3] Supra, §§ 237 *et seq.*; Dawson *v.* Mills, 32 Penn. St. 302; Cansler *v.* Fite, 5 Jones (N. C.) L. 424.

[4] Mountnoy *v.* Collier, 1 E. & B. 630. See infra, § 1161.

[5] R. *v.* Birmingham, 5 B. & S. 763; R. *v.* Exeter, L. R. 4 Q. B. 341; 10 B. & S. 433.

[6] Peaceable *v.* Watson, 4 Taunt. 16; Holloway *v.* Rakes, cited by Buller, J., in Davies *v.* Pierce, 2 T. R. 55; Doe *v.* Green, 1 Gow R. 227.

Thus, the rule before us admits, as against succeeding holders of a title, maps, recitals in deeds, monuments, and boundaries of which an owner, during his ownership, was author.[1] Such evidence may be received, not only against privies, but against strangers.[2] The reason for this conclusion is, that possession implies *primâ facie* an absolute interest, and any statement which would tend to limit it to a less interest is self-disserving. But for this same reason such declarations cannot be used as evidence of *title* at all; they are only evidence of the grounds on which the tenant claims possession.[3] For he might be but a tenant at will, and yet claim to be a tenant for life, which, being less than a fee, would be presumptively *self-disserving*, though really self-serving. In short, they are evidence that the occupant never pretended to have more than a limited right or estate, not as showing, or even tending to show, that he really had such a right or estate.

As will be hereafter more fully seen, such declarations are not receivable if made after the declarant had parted with his title.[4]

As a condition of admissibility, it has been said not to be necessary that the declarant should be dead,[5] though the better view is to restrict the admissibility of declarations of living predecessors, in

[1] Supra, §§ 237, 1041-2; Bridgman *v.* Jennings, 1 Ld. Ray, 734; Daggett *v.* Shaw, 5 Met. 223; Davis *v.* Sherman, 7 Gray, 291; Penrose *v.* Griffith, 4 Binn. 231; Weidman *v.* Kohr, 4 Serg. & R. 174; Gratz *v.* Beates, 45 Penn. St. 495; Allen *v.* Allen, 45 Penn. St. 468; Cumberl. Valley R. R. *v.* McLanahan, 59 Penn. St. 23; Grubb *v.* Grubb, 74 Penn. St. 25; Stumpf *v.* Osterhage, 111 Ill. 82; Davis *v.* Jones, 3 Head, 603.

[2] Carne *v.* Nicoll, 1 Bing. N. C. 430; Davies *v.* Pierce, 2 T. R. 53; Peaceable *v.* Watson, 4 Taunt. 16; Doe *v.* Coulthred, 7 A. & E. 235; Doe *v.* Langfield, 16 M. & W. 497; Gery *v.* Redman, L. R. 1 Q. B. D. 161. Supra, § 237.

[3] Tabor *v.* Van Tassell, 86 N. Y. 642; Murphy *v.* Butler, 75 Ala. 381; Morning *v.* McBride, 62 Tex. 309; Stone *v.* O'Brien, 7 Col. 458. See U. S. *v.* Griswold, 7 Sawy. 311.

[4] Infra, § 1165. Where a grantor, after conveyance, remained in possession, made improvements, and insured them, it was held that on the question of whether his deed, absolute in form, was intended as a mortgage, his declarations made in connection with the improvements and insurance were admissible. Creighton *v.* Hoppis, 99 Ind. 369.

[5] Walker *v.* Broadstock, 1 Esp. 458, per Thomson B.; Doe *v.* Rickarby, 5 Esp. 4, per Ld. Alvanley. To same effect is Brolaskey *v.* McClain, 61 Penn. St. 146, as to declarations of occupants as to nature of their possession. In Papendick *v.* Bridgewater, 5 E. & B. 166, Walker *v.* Broadstock was questioned.

suit against strangers, to cases where such declarations are part of the *res gestae*.[1]

§ 1157. What has been said is subject to the condition that the declarations sought to be introduced should not contradict the record title. For this purpose they cannot be received.[2] Nor can they be received when they go to create an incumbrance which, under the statute of frauds, or the recording acts of the jurisdiction, cannot be created by parol. If, however, the former owner of an estate, with the qualifications above noticed, has made an admission in respect to such estate, such admission is to be received in evidence, as against the representatives and successors of such former owner, as much as it would be against such owner himself.[3]

Such declarations must not conflict with record title; must not be hearsay, and must be self-disserving.

Burdens and limitations pass with estate.

[1] Papendick *v.* Bridgewater, 5 E. & B. 166; Taylor's Ev. § 617; citing Doe *v.* Wainwright, 8 A. & E. 700, 701; Doe *v.* Langfield, 16 M. & W. 513, 514, per Parke, B. In Phillips *v.* Cole, 10 A. & E. 111, Ld. Denman, in pronouncing the judgment of the court, observes: "It is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, *merely* because they are against the interests of those who make them." See supra, § 237, and cases cited § 1163 *b*.

[2] Doe *v.* Webster, 12 A. & E. 442; Dodge, *v.* Savings Co., 93 U. S. 379; Pain *v.* M'Intier, 1 Mass. 69; Pitts *v.* Wilder, 1 N. Y. 625; Gibney *v.* Marchay, 34 N. Y. 301; Hancock Ins. Co. *v.* Moore, 34 Mich. 41. See Ozmore *v.* Hood, 53 Ga. 114; Anderson *v.* Kent, 14 Kans. 207. Supra, §§ 920, 942; infra, § 1160.

[3] Supra, § 237; 1 Wash. Real Prop. (4th ed.), 497; 2 Ibid. 282–4; 3 Ibid. 427; Walker's case, 3 Co. 23; Beverley's case, 4 Co. 123–4; Coole *v.* Braham, 3 Exc. 185; Dodge *v.* Savings Co., 93 U. S. 379; Peabody *v.* Hewett, 52 Me. 33; Smith *v.* Powers, 15 N. H. 546; Dow *v.* Jewell, 18 N. H. 340; Bell *v.* Woodward, 46 N. H. 315; Hurlburt *v.* Wheeler, 40 N. H. 73; Denton *v.* Perry, 5 Vt. 382; Howe *v.* Howe, 99 Mass. 88; Pickering *v.* Reynolds, 119 Mass. 111; White *v.* Loring, 24 Pick. 319; Hodges *v.* Hodges, 2 Cush. 455; Bosworth *v.* Sturtevant, 2 Cush. 392; Hill *v.* Bennett, 24 Conn. 363; Gibney *v.* Marchay, 34 N. Y. 301; Pope *v.* O'Hara, 48 N. Y. 446; Pierce *v.* McKeehan, 3 Penn. St. 136; Alden *v.* Grove, 18 Penn. St. 377; Van Blarcom *v.* Kip, 26 N. J. L. 351; Hale *v.* Monroe, 28 Md. 98; McCanless *v.* Reynolds, 67 N. C. 268; Howell *v.* Howell, 47 Ga. 492; Pearce *v.* Nix, 34 Ala. 183; Arthur *v.* Gayle, 38 Ala. 259; Cavin *v.* Smith, 24 Mo. 221; Carpenter *v.* Carpenter, 8 Bush, 283; Bollo *v.* Navarro, 33 Cal. 459. See, however, Clarke *v.* Waite, 12 Mass. 439. Admissions, however, to operate as above, must be specific. Hugus *v.* Walker, 12 Penn. St. 173.

That a grantor's declarations at time of execution of trust deeds are admissible to explain possession, see Gidney *v.* Logan, 79 N. C. 214; affirming Car-

The same rule holds with regard to limitations imposed on an estate. Thus deeds to strangers, to give a single illustration, from one under whom defendants, in a suit of ejectment, claim, are admissible against the defendants, to show the grantor's view as to the boundary lines of the land granted.[1] It should, however, be remembered that the admissions of a grantor cannot, as we have observed, be received to contradict the tenor of a deed, unless, as has been heretofore seen, there be such ground laid of fraud or mistake as would lead a chancellor to reform the instrument.[2] Nor are they evidence if they rest merely on hearsay.[3] Hence an answer to a bill in chancery, narrating what the declarant has heard

away *v.* Cox, 8 Ired. 79; Kirby *v.* Master, 70 N. C. 540.

Acts and declarations of the owner manifesting an intent to devote the property to a public use are proper evidence to prove a dedication, and the acceptance may be proved by long public use, or by the acts of the proper public officers recognizing and adopting the highway. Cook *v.* Harris, 61 N. Y. 448. "The declarations of a party in possession are admissible in evidence against the party making them, or his privies in blood or estate, not to attack or destroy the title, for that is of record and of a higher and stronger nature than to be attacked by parol evidence. They are competent simply to explain the character of the possession in a given case. Thus, the declaration of the ancestor that he held as a tenant of a person named, is admissible in an action brought by such tenant against the heir. Pitts *v.* Wilder, 1 Comst. 525; Jackson *v.* Miller, 6 Cow. 751; 6 Wend. 228; 4 Taunt. 16, 17." Hunt, J., Gibney *v.* Marchay, 34 N. Y. 303.

[1] Hale *v.* Rich, 48 Vt. 217; citing Davis *v.* Judge, 44 Vt. 500.

If such evidence is compatible with the rule that parol proof cannot be received to affect writings, "any declaration by the possessor that he is tenant in tail, or for life, or for years, or by sufferance, as it makes strongly against his own interest, may safely be received in evidence, on account of its probable truth." Chambers *v.* Bernasconi, 1 C. & J. 457, per Ld. Lyndhurst; Peaceable *v.* Watson, 4 Taunt. 17, per Sir J. Mansfield, C. J.; Crease *v.* Barrett, 1 C. M. & R. 931; 5 Tyr. 473, *S. C.*, per Parke, B.; Doe *v.* Langfield, 16 M. & W. 497. It matters not whether the declaration be made verbally. Carne *v.* Nicoll, 1 Bing. N. C. 430; 1 Scott, 466, *S. C.*; Baron de Bode's case, 8 Q. B. 243, 244; R. *v.* Birmingham, 31 L. J. M. C. 63; 1 B. & S. 763, *S. C.*; R. *v.* Exeter, 4 Law Rep. Q. B. 341; 38 L. J. M. C. 127; 10 B. & S. 433, *S. C.*; or in writing; Doe *v.* Jones, 1 Camp. 367; R. *v.* Exeter, 4 Law Rep. Q. B. 341; 38 L. J. M. C. 127; and 10 B. & S. 433, *S. C.*; or by deed; Doe *v.* Coulthred, 7 A. & E. 235; Garland *v.* Cope, 11 Ir. Law R. 514; or in answer to a bill in chancery. Trimlestown *v.* Kemmis, 9 Cl. & F. 779; Taylor's Ev. § 618.

[2] Supra, § 1019.

[3] Trimlestown *v.* Kemmis, 9 Cl. & F. 784, affirming unanimous opinion of judges.

another person state respecting his title, is not admissible to defeat his estate, at least if he does not add that he believes such statement to be true.[1] Nor are they admissible unless self-disserving;[2] nor can the declarations of a party, made before acquiring an interest in property, be used against vendees to whom, after subsequently acquiring such property, he conveys it.[3] A marked exception to this rule, however, exists in cases in which declarations are made by a party in possession as showing the character under which he claims.[4]

Executors are so bound by their decedent.

§ 1158. As a further illustration of the general rule which is before us, it may be noticed that the admissions of a decedent made as to debts due by him are evidence against his executor or administrator,[5] supposing such admissions go to matters of *fact* as distinguished from matters of *right*,[6] and are adequately established.[7] How far an executor, bringing an action on a life policy, where the issue was suicide, could be affected by his decedent's declarations of an intention to commit suicide, was discussed in an interesting case before the Supreme Court of Pennsylvania in 1876. Declarations

[1] Trimlestown *v.* Kemmis, *ut sup.*

[2] Supra, § 237; infra, § 1169; Putnam *v.* Fisher, 52 Vt. 191; Feig *v.* Meyers, 102 Penn. St. 10; Lewis *v.* Adams, 61 Ga. 559. See McDow *v.* Rabb, 56 Tex. 157.

Where a mortgagor mortgaged his life interest in real estate under the will of a person therein named, the deed of mortgage is admissible after the mortgagor's death to show that such a will existed, as the deed amounted to a declaration by the mortgagor against his interest as limiting his estate to an estate for life under a particular will. Sly *v.* Dredge, 2 Prob. D. 91.

Declarations of a mortgagor, while the owner and in possession, as to payments made by him on the mortgage, are not competent as against the plaintiff in an application by a grantee of the premises to have the mortgage cancelled as paid. Foote *v.* Beecher, 78 N. Y. 155; *S. C.*, 7 Abb. (N. Y.) N. Cas. 358.

[3] Eckert *v.* Cameron, 43 Penn. St. 120; Campan *v.* Dubois, 39 Mich. 274.

[4] Supra, § 1102.

[5] Smith *v.* Smith, 3 Bing. N. C. 29; *S. C.* 7 C. & P. 401; Jones *v.* Jones, 21 N. H. 219; Albert *v.* Ziegler, 29 Penn. St. 50; Gordner *v.* Heffly, 49 Penn. St. 163. See Cheeseman *v.* Kyle, 15 Ohio St. 15; Nash *v.* Gibson, 16 Iowa, 305; Burckmyer *v.* Mairs, Riley, S. C. 208; Boone *v.* Thompson, 17 Tex. 605. And so as to provisions made by the decedent. Smith *v.* Maine, 25 Barb. 33.

In Watson *v.* Snyder, 40 L. T. N. S. 37, it was held by Lopes, J., that in an action by an executor to recover a debt due to the estate, a parol statement by his testator against his pecuniary interest with reference to such debt is admissible.

[6] Supra, § 1082.

[7] Supra, § 469.

indicating such an intention were admitted; but it was held that to such admissibility it is essential that the intent should be specific.[1]

Landlord's admissions receivable against tenant.

§ 1159. A landlord's admissions in a prior lease, on the principles already stated, have been held evidence so far as they charge the estate, against a lessee claiming under a subsequent lease;[2] and, generally, what a landlord admits is evidence against the tenant, in a suit against the tenant, provided such evidence does not derogate from the written title under which the tenant holds, supposing the lease to be in good faith, and not collusive.[3]

Tenancy and other burdens may be so proved.

§ 1160. The rule is the same whether the declarant has parted with the whole of his estate, after making the declarations, or has parted with only a portion. Thus, in cases where such declarations do not conflict with the statute of frauds or the recording acts, and do not contravene the record title, a predecessor's declarations can be received, in a suit against the successor or grantee, to show that the predecessor held the land as tenant of the party bringing suit,[4] or for any other purpose which casts a burden on the successor as privy in estate to his predecessor.[5] But such declarations, as we have seen, cannot be received for the purpose of contradicting the averments of deeds executed by the declarant, unless fraud or mistake be set up.[6] And it should be remembered that such declarations, if made by mistake, or in ignorance, do not bind either the party making them or his successors, unless they operate by way of estoppel.[7]

[1] Continental Ins. Co. *v.* Delpeuch, 82 Penn. St. 225. See, as to other cases of declarations in life insurance cases, supra, § 269.

[2] Crease *v.* Barrett, 1 C. M. & R. 932.

[3] See Crane *v.* Marshall, 16 Me. 27.

[4] Doe *v.* Pettett, 5 B. & A. 223.

[5] Bridgman *v.* Jennings, 1 Ld. Ray. 734; Woolway *v.* Rowe, 1 A. & E. 114; Davies *v.* Pierce, 2 T. R. 53; Blake *v.* Everett, 1 Allen, 248; Stearns *v.* Hendersass, 9 Cush. 497; Hyde *v.* Middlesex, 2 Gray, 267; Plimpton *v.* Chamberlain, 4 Gray, 320; Rogers *v.* Moore, 10 Conn. 13; Weidman *v.* Kohr, 4 Serg. & R. 174; Dawson *v.* Mills, 32 Penn. St. 302; Willard *v.* Willard, 56 Penn. St. 119; Robinson *v.* Robinson, 22 Iowa, 427; Thomas *v.* Wheeler, 47 Mo. 363.

[6] See supra, §§ 920, 1019; Doe *v.* Webster, 12 A. & E. 442; Carpenter *v.* Hollister, 13 Vt. 552; Wood *v.* Willard, 36 Vt. 82; Pain *v.* McIntier, 1 Mass. 69; Pinner *v.* Pinner, 2 Jones L. 398; Walker *v.* Blassingame, 17 Ala. 810.

[7] Jackson *v.* Miller, 6 Cow. 751; Hawley *v.* Bennett, 5 Paige, 104; Heaton *v.* Findlay, 12 Penn. St. 304. Supra, §§ 1078–1085.

§ 1161. An occupant of land, however, as a tenant or otherwise, cannot affect by his admissions his landlord's title; and hence, in an action by a party claiming an easement in land against the owner, the admissions of an occupant of the land are inadmissible for the plaintiff,[1] though in the common law action of ejectment, from the technical peculiarities of that action, the admissions of the tenant in possession can be produced as against the landlord.[2] So admissions of a tenant for life do not bind the remainderman.[3] Nor can the declarations of a tenant for years, by admitting an incumbrance, be received against the owner of the fee.[4]

Admissions of party holding subordinate title do not affect principal.

§ 1162. The position of a judgment debtor may be such, as to his goods taken in execution, as to deprive his declarations, when made after judgment, of that self-disserving character which is necessary to establish admissibility so far as concerns subsequent purchasers of such goods.[5] Yet, so far as the debtor is the party through whom the title is traced, execution purchasers, claiming under him, are liable to be prejudiced by his declarations and acts when self-

Judgment debtor's declarations admissible against successor.

[1] Infra, § 1350; Scholes *v.* Chadwick, 2 M. & Rob. 507; Papendick *v.* Bridgewater, 5 E. & B. 166. See Tickle *v.* Brown, 4 A. & E. 378; Taylor's Ev. § 714; Hanly *v.* Erskine, 19 Ill. 265.

[2] Doe *v.* Litherland, 4 A. & E. 784.

[3] Infra, § 1350; Papendick *v.* Bridgewater, 5 E. & B. 166; Howe *v.* Malkin, 40 L. T. (N. S.) 196; Hill *v.* Roderick, 4 Watts & S. 221; Pool *v.* Morris, 29 Ga. 374.

In Howe *v.* Malkin (supra), C. P. D. Ap. 1879, it was held that declarations of a tenant for life in possession as to boundaries could not be received to affect the remainderman. "The rule is," said Grove, J., "that, though you cannot give in evidence a declaration *per se*, yet when there is an act accompanied by a statement which is so mixed up with it as to become part of the *res gestae*, evidence of such statement may be given. The statements here do not come fairly within that rule."

And Denman, J., added: "The case of Papendick *v.* Bridgewater (*ubi supra*) disposes of Mr. Bosanquet's strongest argument. That case decided that a declaration by a tenant was not sufficient to bind the reversioner. It is true that it was not a case of boundary, but I think it is in point in principle. It is urged that Tickle *v.* Brown (*ubi supra*) was an authority for the defendant on the strength of a dictum which fell from Patterson, J. But in the present case the declarations sought to be given in evidence were not declarations accompanying an act, no evidence being tendered of any act whatever having been done by the declarant."

[4] Supra, § 237; Gordon *v.* Ritenour, 87 Mo. 54.

[5] See Vandyke *v.* Bastedo, 15 N. J. L. 224; Renshaw *v.* The Pawnee, 19 Mo. 532.

disserving.[1] Declarations of an escaped or non-arrested debtor have been held admissible in an action against the sheriff for escape, or for a false return, though such declarations, to be properly admissible, should be part of the *res gestae*.[2]

§ 1163. Where A., the possessor of a chattel, or *chose in action*, assigns it to B., B. takes it charged with burdens which could have been maintained against A., supposing that B. has notice or ought to take notice of such equities; and from this it follows that B., under such circumstances, is exposed to the admission against him of A.'s self-disserving[3] declarations made when holding the title,[4] as to such burdens.[5] From the very limitations of this proposition, however, it will be noticed that as against a *bonâ fide* purchaser, without notice, such admissions cannot be received.[6] Aside from

Vendee or assignee of chattel bound by vendor's or assignor's admissions with notice.

[1] Outcalt *v.* Ludlow, 32 N. J. L. 239; King *v.* Wilkins, 11 Ind. 347; Ross *v.* Hayne, 3 Greene (Iowa), 211; Stephens *v.* Williams, 46 Iowa, 540; Roebke *v.* Andrews, 26 Wis. 311. See Avery *v.* Clemons, 18 Conn. 306; Pomeroy *v.* Bailey, 43 N. H. 118; Martel *v.* Somers, 26 Tex. 551; Mulholland *v.* Ellitson, 1 Coldw. 307.

[2] Sloman *v.* Herne, 2 Esp. 695; Rogers *v.* Jones, 7 B. & C. 89.

[3] If self-serving, they are inadmissible unless part of the *res gestae*. Riddle *v.* Dixon, 2 Penn. St. 372. Hence, when made without knowledge or complicity of the assignee, they cannot be received for the purpose of showing a conspiracy to defraud creditors. Scott *v.* Heilager, 14 Penn. St. 238; McElfatrick *v.* Hicks, 21 Penn. St. 402.

[4] Alger *v.* Andrews, 47 Vt. 238, following Miller *v.* Bingham, 29 Vt. 82; and overruling Hines *v.* Soule, 14 Vt. 99. That declarations made after the title has been parted with are inadmissible unless agency be proved, see Many *v.* Jagger, 1 Blatch. C. C. 372; Magee *v.* Raiguel, 64 Penn. St. 110; Benson *v.* Lundy, 52 Iowa, 142, and cases cited infra.

[5] Supra, § 1156, and cases there cited; Welstead *v.* Levy, 1 M. & Rob. 138; Beauchamp *v.* Parry, 1 B. & Ad. 19; Harrison *v.* Vallance, 1 Bing. 45; Hatch *v.* Dennis, 1 Fairf. 244; Fisher *v.* True, 38 Me. 534; White *v.* Chadbourne, 41 Me. 149; Alger *v.* Andrews, 47 Vt. 238; Bond *v.* Fitzpatrick, 4 Gray, 89; Brindle *v.* McIlvaine, 10 S. & R. 282; Kellogg *v.* Krauser, 14 S. & R. 137; Gibblehouse *v.* Strong, 3 Rawle, 437; Blackstock *v.* Long, 19 Penn. St. 340; Lincoln *v.* Wright, 23 Penn. St. 76. See Paige *v.* Cagwin, 7 Hill, 361; Bunbury *v.* Brett, 18 Inn. 363; Vennum *v.* Thompson, 38 Ill. 143; Sandifer *v.* Hoard, 59 Ill. 246; Penn *v.* Oglesby, 89 Ill. 110; Ritchy *v.* Martin, Wright (Ohio), 441; Wyckoff *v.* Carr, 8 Mich. 44; Horton *v.* Smith, 8 Ala. 73; Brown *v.* McGraw, 20 Miss. 267; Murray *v.* Oliver, 18 Mo. 405; Gallagher *v.* Williamson, 23 Cal. 331; Hinson *v.* Walker, 65 Tex. 104. That the declarations of a debtor, whose debt has been attached, are evidence, if made before the attachment, see Magee *v.* Raiguel, 64 Penn. St. 110.

[6] Harrison *v.* Vallance, 1 Bing. 45; Smith *v.* De Wraitz Ry. & M. 212;

this ground of admissibility, declarations of an assignor, when coincident with the transactions in litigation, are receivable as part of the *res gestae*.[1]

Declarations by the owner of a chattel signifying his intention to give it away, may be part of the proof on which the donee of the chattel may rely.[2] And declarations of an assignor, permitted to remain in possession, are admissible to show fraud as to creditors,[3] though, strictly speaking, this should only be received on proof of concert between assignor and assignee.[4]

Indorser's declaration inadmissible against indorsee.

§ 1163 *a*. Of the rule that the declarations of the owner of a chattel, or *chose in action*, may be used against a vendee with notice, one of the most familiar instances is that of the indorsee of an overdue note, or of a note as to whose defects he has notice, and who, when suing on such note, is chargeable with the self-disserving admissions of his indorser or assignor, made when holding the note, that the note was without consideration, or is paid, or is infected with other defects.[5]

Dodge *v*. Savings Co., 93 U. S. 379; Jones *v*. Witter, 13 Mass. 304; Tonsley, *v*. Barry, 16 N. Y. 497; Truax *v*. Slater, 86 N. Y. 630; Clews *v*. Kehr, 90 N. Y. 633; Deasey *v*. Thurman, 1 Idaho (N. S.), 775. See Edington *v*. Ins. Co., 69 N. Y. 193. See, also, Winchester Co. *v*. Creary, 116 U. S. 160; and as in some degree dissenting from the above, Woodruff *v*. Westcott, 12 Conn. 134.

[1] Supra, § 262; Bushnell *v*. Wood, 85 Ill. 88.

[2] Larimore *v*. Wells, 29 Ohio St. 13.

[3] Adams *v*. Davidson, 10 N. Y. 309.

[4] Souder *v*. Schechterly, 91 Penn. St. 83. See Tilson *v*. Terwilliger, 56 N. Y. 273.

[5] Peckham *v*. Potter, 1 C. & P. 232; Kent *v*. Lowen, 1 Camp. 177; Beauchamp *v*. Parry, 1 B. & Ad. 89; Harrison *v*. Vallance, 1 Bing. 45; Hatch *v*. Dennis, 10 Me. 244; Fisher *v*. Tone, 38 Me. 534; Wheeler *v*. Walker, 12 Vt. 427; Bond *v*. Fitzpatrick, 4 Gray, 89; Roe *v*. Jerome, 18 Conn. 138; Robbins *v*. Richardson, 2 Bosw. 248; Gibblehouse *v*. Strong, 3 Rawle, 437; Hollister *v*. Reznor, 9 Ohio St. 1; Blount *v*. Riley, 3 Ind. 471; Abbott *v*. Muir, 5 Ind. 444; Williams *v*. Judy, 8 Ill. 282; Curtiss *v*. Martin, 20 Ill. 557; Sharp *v*. Smith, 7 Rich. 3; Cleveland *v*. Davis, 3 Mo. 331. Infra, § 1199 *a*. See Patton *v*. Gee, 36 Ark. 506. That if the declarant is alive he must be called, see Hedger *v*. Horton, 3 C. & P. 179. The party against whom the declaration is offered must stand on the same title as the declarant. 2 Parsons on Notes, 472; Phillips *v*. Cole, 10 A. & E. 106; Jackson *v*. Bard, 4 Johns. R. 230. As discussing the position in the text, see Bailey *v*. Wakeman, 2 Denio, 220; Paige *v*. Cagwin, 7 Hill, 361; Beech *v*. Wise, 1 Hill, 612. At the same time we must remember that, as is stated by Andrews, J., in Van Sachs *v*. Kretz, 72 N. Y. 548, "The qualification found in Paige *v*. Cagwin, that the vendee or assignee *must be a purchaser for value*, in order to make the declaration inadmissible, is an essential part of the rule."

On the other hand, where a note is received *bonâ fide*, without notice, and before it is due by the indorsee, he cannot be charged with such admissions.[1] Declarations of a holder of negotiable paper, made either before acquiring or after parting with title to it, are, under the above limitations, inadmissible.[2]

In suits against strangers, declarant, if living, should be called.

§ 1163 *b*. In cases, however, where the declaration, in a suit against strangers, relates to facts which the declarant himself can prove, not being part of the *res gestae*, and he is living at the time, he should be called to prove them.[3]

Bankrupt assignee affected by bankrupt's admissions.

§ 1164. An assignee in insolvency, also, is open to be prejudiced, in a suit against him, by the admissions of his assignor made before the assignment, as the case may be ;[4] but it is otherwise as to declarations made after such period.[5]

And see Edington *v.* Ins. Co., 67 N. Y. 193. Supra, § 269.

When the question is whether a particular promissory note was given to the claimant, statements of the alleged donor, who died before the trial of an action on the note, at different times before and after the alleged gift, and inconsistent therewith, are admissible to contradict the testimony of the claimant, although not made in the latter's presence. Whitewall *v.* Winslow, 132 Mass. 307.

[1] Shaw *v.* Broom, 4 D. & R. 730; Woolray *v.* Rowe, 1 A. & E. 116; Barough *v.* White, 4 B. & C. 325; Matthews *v.* Houghton, 10 Me. 420; Dunn *v.* Snell, 15 Mass. 481; Fitch *v.* Chapman, 10 Conn. 8; Smith *v.* Schank, 18 Barb. 344; Kent *v.* Walton, 7 Wend. 256; Whitaker *v.* Brown, 8 Wend. 490; Weidman *v.* Kohr, 4 S. & R. 174; Eckert *v.* Cameron, 43 Penn. St. 120; Lister *v.* Boker, 6 Blackf. 439; Thorp *v.* Goeway, 85 Ill. 611; Sharp *v.* Smith, 7 Richards, 3; Glanton *v.* Griggs, 5 Ga. 424; Porter *v.* Rea, 6 Mo. 48. See infra, § 1199; Beech *v.* Wise, 1 Hill, N. Y. 612; Earl *v.* Clute, 2 Abb. C. Ap. Dec. 11.

[2] Fisher *v.* True, 38 Me. 534; Scammon *v.* Scammon, 33 N. H. 52; Sylvester *v.* Craps, 15 Pick. 92; Camp *v.* Walker, 5 Watts, 482; Mitchell *v.* Welsh, 17 Penn. St. 339; Criddle *v.* Criddle, 28 Mo. 522.

[3] Hedger *v.* Horton, 3 C. & P. 179; Rand *v.* Dodge, 17 N. H. 343; Coit *v.* Howd, 1 Gray, 547; Currier *v.* Gale, 14 Gray, 504; Topping *v.* Van Pelt, 1 Hoffm. 545; Hanley *v.* Erskine, 19 Ill. 265. See Harriman *v.* Brown, 8 Leigh. 697; Lowry *v.* Moss, 1 Strobh. 63; Lamar *v.* Minter, 13 Ala. 31. See Papendick *v.* Bridgewater, and cases cited supra, § 1156.

[4] Coole *v.* Braham, 3 Exch. R. 185; Jarrett *v.* Leonard, 2 M. & S. 265; Von Sachs *v.* Kretz, 72 N. Y. 548; Brown *v.* McGraw, 20 Miss. 267; Gallagher *v.* Williamson, 23 Cal. 331; Norton *v.* Kearney, 10 Wis. 443; though see Bullis *v.* Montgomery, 3 Lansing, 255. How far a bankrupt assignee, or an assignee who by statute represents *creditors*, and who is consequently a purchaser, is able to contest such admissions, depends upon the statute.

[5] Jarrett *v.* Leonard, 2 M. & Sel. 265; Taylor *v.* Kinloch, 2 Stark. R. 394; Smallcome *v.* Bruges, 13 Price, 136;

Thus, declarations of an insolvent debtor, made after an assignment, are inadmissible against a particular creditor, to prove fraud in a preference given by the assignment to such creditor.[1] And such declarations, even when made coincidently with the assignment, cannot be admitted to defeat its plain provisions.[2]

Inadmissible when made after title is parted with.

§ 1165. As a general rule, applicable to all cases of declarations against proprietary interest, such declarations, made after the declarant has parted with his interest, cannot be received to affect the title of a *bonâ fide* grantee, donee, or successor.[3] The same limitation applies to the

Robson *v.* Kemp, 4 Esp. 234; Adams *v.* Davidson, 10 N. Y. 309; Barber *v.* Terrell, 54 Ga. 146; Weinrich *v.* Porter, 47 Mo. 293. In Haywood *v.* Reed, 4 Gray, 574, subseqnent admissions were received. See infra, § 1166.

[1] Phœnix *v.* Ins. Co., 5 Johns. R. 412. See Bullis *v.* Montgomery, 3 Lansing, 255.

[2] Vance *v.* Smith, 2 Heisk. 343.

[3] Crease *v.* Barrett, 1 C. M. & R. 419; La Touche *v.* Hutton, 9 Ir. R. Eq. 166; Palmer *v.* Cassin, 2 Cranch C. C. 66; Clements *v.* Moore, 6 Wall. 299; Thompson *v.* Bowman, 6 Wall. 316; U. S. *v.* Lot of Jewelry, 13 Blatch. 60; Gillingham *v.* Tebbetts, 33 Me. 360; McLellan *v.* Longfellow, 34 Me. 552; Baxter *v.* Ellis, 57 Me. 179; Eaton *v.* Corson, 59 Me. 510; Worthing *v.* Worthing, 64 Me. 235; Baker *v.* Haskell, 47 N. H. 479; Haywood *v.* Reed, 4 Gray, 574; Lucas *v.* Trumbull, 15 Gray, 306; Lynde *v.* McGregor, 13 Allen, 175; Winchester *v.* Charter, 97 Mass. 140; Holbrook *v.* Holbrook, 113 Mass. 44; Wilcox *v.* Waterman, 113 Mass. 296; Somers *v.* Wright, 114 Mass. 171; Perkins *v.* Barnes, 118 Mass. 484; Warshauer *v.* Jones, 117 Mass. 345; Hayden *v.* Stone, 121 Mass. 413; Frear *v.* Evertson, 20 Johns. R. 142; Padgett *v.* Lawrence, 10 Paige, 170; Hubbell *v.* Alden, 4 Lansing, 214; Jacobs *v.* Remsen, 36 N. Y. 670; Taylor *v.* Marshall, 14 Johns. 204; Beach *v.* Wise, 1 Hill, 612; Sprague *v.* Kneeland, 12 Wend. 161; Paige *v.* Cagwin, 7 Hill, 361; Booth *v.* Swezey, 4 Seld. 279; Hanna *v.* Curtis, 1 Barb. Ch. 263; Ogden *v.* Peters, 15 Barb. 560; Ford *v.* Williams, 3 Kern. 577; Cuyler *v.* McCartney, 40 N. Y. 224; Smith *v.* Exch. Co., 40 N. Y. Sup. Ct. 492; Browning *v.* Ins. Co., 71 N. Y. 574; Swettenham *v.* Leary, 18 Hun, 284; Hutchins *v.* Hutchins, 98 N. Y. 56; Price *v.* Plainfield, 10 Vroom, 608; Eby *v.* Eby, 5 Penn. St. 435; Bailey *v.* Clayton, 20 Penn. St. 295; Pringle *v.* Pringle, 59 Penn. St. 281; Hartman *v.* Diller, 62 Penn. St. 37; Pier *v.* Duff, 63 Penn. St. 37; McLaughlin *v.* McLaughlin, 91 Penn. St. 462; Lewis *v.* Long, 3 Munford, 136; Dilly *v.* Warren, 80 Va. 512; Honston *v.* McCluney, 8 W. Va. 135; Corbleys *v.* Ripley, 22 W. Va. 154; Wynne *v.* Glidewell, 17 Ind. 446; Hubble *v.* Osborn, 31 Ind. 249; Burkholder *v.* Casad, 47 Ind. 418; Campbell *v.* Coon, 51 Ind. 76; Kennedy *v.* Devine, 77 Ind. 490; McSweeney *v.* McMillan, 96 Ind. 298; Daniels *v.* McGinnis, 97 Ind. 549; Cochran *v.* McDowell, 15 Ill. 10; Rivard *v.* Walker, 39 Ill. 413; Danaway *v.* School Direct., 40 Ill. 247; Minor *v.* Phillips, 42 Ill. 126; Bunker *v.* Green, 48 Ill. 243; Randegger *v.* Ehrhardt, 51 Ill. 101; Jewett *v.* Cook, 81 Ill. 260; Savery *v.* Spaulding, 8

declarations of a mortgagee, after assignment of mortgage to a third person;[1] and to a mortgagor's declarations after the execution of the mortgage.[2] Even a donor's depreciatory declarations are inadmissible if made after the gift.[3] *A fortiori* a grantor's subsequent declarations cannot be received to dispute, as against *bonâ fide* purchasers, the averments of his deed.[4]

Iowa, 239; Gray *v.* Earl, 13 Iowa, 188; Keystone Co. *v.* Johnson, 50 Iowa, 142; Benson *v.* Lundy, 52 Iowa, 265; McCormick *v.* Fuller, 56 Iowa, 43; Bixby *v.* Carskadden, 63 Iowa, 164; Roebke *v.* Andrews, 26 Wis. 311; Shirland *v.* Iron Works, 41 Wis. 162; Burt *v.* McKinstry, 4 Minn. 204; Hirschfield *v.* Williamson, 18 Nev. 66; Harshaw *v.* Moore, 12 Ired. L. 247; Hunsucker *v.* Farmer, 72 N. C. 372; Melvin *v.* Bullard, 82 N. C. 33; Headen *v.* Womack, 88 N. C. 468; Smith *v.* Hamblett, 43 Ark. 320; De Bruhl *v.* Patterson, 12 Rich. 363; Gill *v.* Strozier, 32 Ga. 688; Cornett *v.* Cornett, 33 Ga. 219; Harrell *v.* Culpepper, 47 Ga. 635; Barber *v.* Terrell, 54 Ga. 146; Porter *v.* Allen, 54 Ga. 623; Flanders *v.* Maynard, 58 Ga. 56; Bilberry *v.* Mobley, 21 Ala. 277; Holly *v.* Flournoy, 54 Ala. 99; Cleaveland *v.* Davis, 3 Mo. 331; Garland *v.* Harrison, 17 Mo. 282; Weinrich *v.* Porter, 47 Mo. 293; Wright *v.* Hessey, 59 Tenn. 42; Thompson *v.* Herring, 27 Tex. 282; Garrahy *v.* Green, 32 Tex. 202; Hinson *v.* Taylor, 65 Tex. 104; Carpenter *v.* Carpenter, 8 Bush, 283; Sumner *v.* Cook, 12 Kans. 162; Hutchings *v.* Castle, 48 Cal. 152; Taylor *v.* R. R., 67 Cal. 615.

"In all the cases in this state and in Massachusetts, in which declarations have been received, they related to the land in controversy, were made by the declarant while in possession, and were offered in evidence against him or those deriving title under him. Chapman *v.* Twitchell, 37 Me. 59; Bartlett *v.* Emerson, 7 Gray, 174. 'The exceptions to the general rule excluding hearsay evidence,' remarks Gray, J., in Hall *v.* Mayo, 97 Mass. 418, 'which permit the introduction of reputation or tradition, or of declarations of persons deceased, as to matters of public or general interest, or questions of pedigree, do not extend to a question of private boundary, in which no considerable number of persons have a legal interest.'" Appleton, C. J., Sullivan Granite Co. *v.* Gordon, 57 Me. 522.

A deceased person's declarations, however solemnly made, cannot be used to impeach a prior assignment made by him. Pringle *v.* Pringle, 59 Penn. St. 281.

[1] Kinna *v.* Smith, 2 Green Ch. N. J. 14.

[2] Winchester *v.* Charter, 97 Mass. 140; Perkins *v.* Barnes, 118 Mass. 484; distinguishing Sweetzer *v.* Bates, 117 Mass. 466.

[3] Newman *v.* Wilbourne, 1 Hill Ch. S. C. 10; Gregory *v.* Walker, 38 Ala. 26; Cornett *v.* Fain, 33 Ga. 219; Grooms *v.* Rust, 27 Tex. 231. See Jones *v.* Robertson, 2 Munf. 187; Gordon *v.* Ritenour, 87 Mo. 54.

[4] Pierce *v.* Faunce, 37 Me. 63; Brackett *v.* Wait, 6 Vt. 411; Barnard *v.* Pope, 14 Mass. 434; Taylor *v.* Robinson, 2 Allen, 562; Tyler *v.* Mather, 9 Gray, 177; Gates *v.* Mowry, 15 Gray, 564; Varick *v.* Briggs, 6 Paige, 323; Padgett *v.* Lawrence, 10 Paige, 170; Vrooman *v.* King, 36 N. Y. 477; Postens *v.* Postens, 3 Watts & S. 127; Ferguson *v.* Staver, 33 Penn. St. 411; Cochran *v.* McDowell, 15 Ill. 10; Rust *v.* Mansfield, 26 Ill. 36; Gill *v.* Strozier, 32 Ga. 688;

§ 1166. It is otherwise, however, when the grantor's admissions are made in presence of the grantee, and not dissented from by the latter.[1] And, "if the grantor is permitted by the grantee to remain in actual possession of the thing granted, what he says may be given in evidence, on the principle that what a man says who is in possession of either lands or goods is admissible to prove in what capacity he is there.[2] But this exception cannot be extended to a mere constructive possession. The possession is a fact, and how it is held is a fact; and this may be shown by the declarations of the possessor, on the same grounds upon which mere hearsay is permitted when it forms part of the *res gestae*."[3] The same result necessarily follows when there is a fraudulent collusion between grantor and grantee, or donor and donee, by which the latter, after obtaining possession, is a confederate, for fraudulent purposes, of the former.[4] Such fraudulent confederacy, however, must be proved *aliunde*, to the satisfaction of the court, before the declarations of the grantor, after the grant, are admissible.[5]

Exception in case of concurrence or fraud.

Cornett *v.* Cornett, 33 Ga. 219; Price *v.* Bank, 17 Ala. 374; Stewart *v.* Thomas, 35 Mo. 202; Christopher *v.* Corrington, 2 B. Mon. 357; Beal *v.* Barclay, 10 B. Mon. 261; Cohn *v.* Mulford, 15 Cal. 50; Thompson *v.* Herring, 27 Tex. 282.

But a grantor's admissions, though made after execution of the deed, may be admissible to impeach it when against his interest. Perkins *v.* Towle, 59 N. H. 583.

See Field *v.* Tibbetts, 57 Me. 358, to the effect that such admissions would be immaterial.

[1] Lark *v.* Linstead, 2 Md. Ch. 162; Meyers *v.* Kinzie, 26 Ill. 36; Wiler *v.* Manley, 51 Ind. 169; Wilson *v.* Woodruff, 5 Mo. 40. Supra, § 1136.

[2] See, also, Adams *v.* Davidson, 10 N. Y. 309; McDowell *v.* Rissell, 37 Penn. St. 164; Pier *v.* Duff, 63 Penn. St. 59; Wiler *v.* Manly, 51 Ind. 169; Grant *v.* Lewis, 14 Wis. 487. And compare Tedrowe *v.* Esher, 56 Ind. 443.

[3] Sharswood, J., Pier *v.* Duff, 63 Penn. St. 63.

[4] Jones *v.* Simpson, 116 U. S. 608; infra, § 1205.

[5] Steph. Ev. p. 46; Downs *v.* Belden, 46 Vt. 674; Waterbury *v.* Sturtevant, 18 Wend. 353, as qualified in Cuyler *v.* McCartney, 40 N. Y. 228; Reitenbach *v.* Reitenbach, 1 Rawle, 362; Wilbur *v.* Strickland, 1 Rawle, 458; Hartman *v.* Diller, 62 Penn. St. 43; Pier *v.* Duff, 63 Penn. St. 59; Lark *v.* Linstead, 2 Md. Ch. 162; Myers *v.* Kinzie, 26 Ill. 36; Randegger *v.* Ehrhardt, 51 Ill. 101; Jones *v.* King, 86 Ill. 225; Johnson *v.* Quarles, 46 Mo. 423; Boyd *v.* Jones, 60 Mo. 454. Infra, §§ 1194, 1205, and cases in § 1167.

"To make such declarations competent, there must be some evidence of a common purpose or design; but a very slight degree of concert or collusion is sufficient." Woodward, J., McDowell *v.* Rissell, 37 Penn. 164; approved by Sharswood, J., Hartman *v.* Diller, 62

§ 1167. To infect a grantee or vendee, therefore, with his grantor's or vendor's fraud, it is necessary that he should be privy to the fraud; and hence the grantor's declarations as to the transaction being fraudulent on his part are not admissible against the grantee, unless there be proof of collusion *aliunde*.[1] As against creditors, however, such declarations, taken in connection with suspicious conduct by the grantee, are matters for consideration of a jury in determining whether there is fraud.[2] When such declarations are made after the assignment, they are inadmissible, except under the conditions above stated.[3]

Declarations of fraud cannot infect innocent vendee.

§ 1168. It is also a necessary qualification of the rule before us, that such declarations are only admissible when self-disserving; in other words, when made by the predecessor in title knowingly against interest.[4] But declara-

Inadmissible when self-serving.

Penn. St. 43. But is this not going too far? Undoubtedly, as we shall have occasion hereafter to see, there have been extreme rulings on the other side, to the effect that when a criminal offence is charged in a civil suit (*e. g.*, conspiracy), the offence must be made out beyond reasonable doubt. Infra, § 1245. The proper view is, that in this as well as all other issues in civil trials, preponderance of proof is enough. But there must be preponderance of proof to establish a conspiracy, so as to let in declarations of co-conspirators. No mere suspicion of a conspiracy will suffice.

[1] Carpenter *v.* Hollister, 13 Vt. 552; Alexander *v.* Gould, 1 Mass. 165; Tibbals *v.* Jacobs, 31 Conn. 428; Cuyler *v.* McCartney, 40 N. Y. 228 (overruling Waterbury *v.* Sturtevant, 18 Wend. 353); Reichart *v.* Castator, 5 Binn. 109; Payne *v.* Craft, 7 Watts & S. 458. See Venable *v.* Bank U. S., 2 Pet. 107; Littlefield *v.* Getchell, 32 Me. 390; Cochran *v.* McDowell, 15 Ill. 10; Pinner *v.* Pinner, 2 Jones L. 398; Hodge *v.* Thompson, 9 Ala. 131; Mahone *v.* Williams, 39 Ala. 202; Carrolton Bank *v.* Cleveland, 15 La. 616; Enders *v.* Richards, 33 Mo. 598; Zimmerman *v.* Lamb, 7 Minn. 421; Bogert *v.* Phelps, 14 Wis. 88; Selsby *v.* Redlon, 19 Wis. 17.

[2] Bridge *v.* Eggleston, 14 Mass. 245; Jackson *v.* Myers, 11 Wend. 553; Savage *v.* Murphy, 8 Bosw. 75; McDowell *v.* Goldsmith, 6 Md. 319; Hunter *v.* Jones, 6 Rand. 541; Satterwhite *v.* Hicks, Busb. L. 105.

[3] Dennison *v.* Benner, 41 Me. 332; Ellis *v.* Howard, 17 Vt. 330; Horrigan *v.* Wright, 4 Allen, 514; Hall *v.* Hinks, 21 Md. 406; Wheeler *v.* McCorristen, 24 Ill. 40; Mobly *v.* Barnes, 26 Ala. 718; Sutter *v.* Lackman, 39 Mo. 91; Jones *v.* Morse, 36 Cal. 205.

[4] Peabody *v.* Hewett, 52 Me. 33; Smith *v.* Powers, 15 N. H. 546; Newell *v.* Horn, 47 N. H. 379; Ware *v.* Brookhouse, 7 Gray, 454; Niles *v.* Patch, 13 Gray, 254; Smith *v.* Martin, 17 Conn. 399; Jackson *v.* Cris, 11 Johns. R. 437; Riddle *v.* Dixon, 2 Penn. St. 372; Sample *v.* Robb, 16 Penn. St. 305; Alden *v.* Grove, 18 Penn. St. 377; Miller *v.* State, 8 Gill, 141; Dorsey *v.* Dorsey, 3 Har. & J. 410; Masters *v.*

tions not self-disserving may become admissible when part of the *res gestae*, or when incidental to the taking or holding the property, or when offered to rebut contemporaneous statements.[1]

So the declarations must be against particular interest.

§ 1169. It therefore follows that the question is not merely whether the declaration tends to disparage the declarant's estate, but whether, in its bearing on the successor against whom it was offered, it was, as to the utterer, self-disserving when uttered.[2] Nor can the declarant affect by his admissions any estate which he has not power to alienate or incumber. Thus, it is held that a tenant for life cannot prejudice, by an admission, the interest of a remainder man or reversioner, and the same rule should, on principle, apply to a tenant in tail.[3] But it is said that slight evidence of ownership will be sufficient to receive such declarations; and a learned judge has gone so far as to say that where a person was seen felling timber in a wood, this was a sufficient act of ownership, though probably he was in fact a mere laborer, to raise a presumption that he was possessed of the fee, and consequently to let in any statement made by him as to who was the actual proprietor.[4]

Declarations of the insured are admissible for the defence as admissions, only when they were made by him while interested in the policy.[5]

Varner, 5 Grat. 168; Sasser *v.* Herring, 3 Dev. L. 340; Hicks *v.* Forrest, 6 Ired. Eq. 528; Hedrick *v.* Gobble, 63 N. C. 48; Cox *v.* Easely, 11 Ala. 362; McMullen *v.* Mayo, 8 Sm. & M. 298; Watson *v.* Bissell, 27 Mo. 220; Tucker *v.* Tucker, 32 Mo. 464; Leach *v.* Fowler, 20 Ark. 143; Jilson *v.* Stebbins, 41 Wis. 235.

[1] Supra, §§ 258, 1102; Hodgdon *v.* Shannon, 44 N. H. 572; Marcy *v.* Stone, 8 Cush. 4; Hood *v.* Hood, 2 Grant (Penn.), 229; Hugus *v.* Walker, 12 Penn. St. 173; Duffy *v.* Congregation, 48 Penn. St. 46; Dawson *v.* Callaway, 18 Ga. 573; Nelson *v.* Iverson, 17 Ala. 99; Thompson *v.* Drake, 32 Ala. 99.

[2] Supra, § 1157; Farr *v.* Smith, 68 Me. 97.

[3] See, apparently, *contra*, Reynoldson *v.* Perkins, Amb. 563; Pendleton *v.* Rooth, 1 Giff. 45, per Stuart, V. C.; Ibid. 1 Giff. 35; 1 De Gex, F. & J. 81, *S. C.* Reynoldson *v.* Perkins, *ut supra*, was, however, the case of a release, under a decree for foreclosure, by the first tenant in tail. Pendleton *v.* Rooth, 1 De Gex, F. & J., is a peculiar case, and no conclusion can be drawn from it outside of the facts there stated. As a rule, the declarations of a tenant in tail cannot bind the inheritance. Of course, if they are produced in favor of a purchaser, as evidence of a contract on valuable consideration to bar the estate tail, it would be different.

[4] Doe *v.* Arkwright, 5 C. & P. 575, Parke, B.

[5] McGinley *v.* Ins. Co., 8 Daly, 390; Union Cent. Ins. Co. *v.* Cheever, 36 Ohio St. 201; Mobile Ins. Co. *v.* Morris, 3 Lea, 101.

VI. ADMISSIONS BY AGENT, ATTORNEY, AND REFEREE.

§ 1170. When an agent is employed to make a contract on behalf of his principal, this involves the duty and right of doing whatever is necessary to enable the contract to be executed; and whatever statements the agent may make, incidental to the discharge of this duty, bind the principal as much as if they were made by the principal. They are primary evidence, as part of the contract, which it is not necessary to call the agent himself to verify.[1] The principal cannot defend on the ground that the repre-

Agent employed to make contract binds principal by representations which are part of contract.

[1] Hern *v.* Nichols, 1 Salk. 289; Dawson *v.* Atty., 7 East, 367; R. *v.* Hall, 8 C. & P. 358; Doe *v.* Hawkins, 2 Q. B. 212; Fountaine *v.* R. R., L. R. 5 Eq. 316; Mortimer *v.* McCallan, 6 M. & W. 58; Barwick *v.* Bk., L. R. 2 Exch. 259; Mechanics' Bank *v.* Bk. of Columbia, 5 Wheat. 336; Cliquot's Champagne, 3 Wall. 114; Demerrit *v.* Meserve, 39 N. H. 521; Barber *v.* Britton, 26 Vt. 112; Putnam *v.* Sullivan, 4 Mass. 45; Baring *v.* Clark, 19 Pick. 220; Bird *v.* Daggett, 97 Mass. 494; Willard *v.* Buckingham, 36 Conn. 365; Thallhimer *v.* Brinkerhoff, 4 Wend. 394; Sandford *v.* Handy, 23 Wend. 260; Bennett *v.* Judson, 21 N. Y. 230; New York & N. H. R. R. *v.* Schuyler, 34 N. Y. 30; Anderson *v.* R. R., 54 N. Y. 344; Hathaway *v.* Johnson, 55 N. Y. 93; Green *v.* Ins. Co., 62 N. Y. 642; Indianap. R. R. *v.* Tyng, 63 N. Y. 653; Hough *v.* Doyle, 4 Rawle, 294; Penns. R. R. *v.* Plank Road, 71 Penn. St. 350; Columb. Ins. Co. *v.* Masonheimer, 76 Penn. St. 138; Reineman *v.* Blair, 96 Penn. St. 155; Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119; De Voss *v.* Richmond, 18 Grat. 338; Continental Ins. Co. *v.* Kasey, 25 Grat. 268; Coyle *v.* R. R., 11 W. Va. 94; Madison R. R. *v.* Norwich Sav. Co., 24 Ind. 458; Haller *v.* Crawford, 37 Ind. 279; Rowell *v.* Klein, 44 Ind. 290; Mut. Ins. Co. *v.* Cannon, 48 Ind. 265; Wolfe *v.* Pugh, 101 Ind. 294; Chicago, etc. R. R. *v.* Coleman, 18 Ill. 297; Cook *v.* Hunt, 24 Ill. 535; Chicago R. R. *v.* Lee, 60 Ill. 501; Merchants' Co. *v.* Leysor, 89 Ill. 43; Wilson *v.* Sloan, 50 Iowa, 367; Pinnix *v.* McAdoo, 68 N. C. 56; Galceran *v.* Noble, 66 Ga. 367; Baldwin *v.* Ashley, 54 Ala. 82; Doe *v.* Robinson, 24 Miss. 688; Peck *v.* Ritchey, 66 Mo. 114; Webb *v.* Smith, 6 Col. 365. See, also, Great Western Railway *v.* Willis, 18 C. B. N. S. 748. Thus, it has been said: "When it is proved that A. is agent of B., whatever A. does or says, or writes in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B." Per Gibbs, C. J., Langhorn *v.* Allnut, 4 Taunt. 519. Evidence of an interpreter's version of an agent's language is *primâ facie* correct, and is evidence against the principal without calling the interpreter. Reid *v.* Hoskins, 6 E. & B. 953. Powell's Evidence, 4th ed. 259. That a bank cashier may so bind the bank, see Harrisburg Bk. *v.* Tyler, 3 Watts & S. 373; Wh. on Ag. § 675; and that a railroad president may do so within his scope, see Charleston R. R. *v.* Blake, 12 Rich. 634. So as to a pro-

sentations made by the agent, within the apparent scope of the agent's authority, were false. If the principal reap the fruits, he is liable for the misconduct by which these fruits were produced.[1] Such fraudulent representations, also, when touching questions of fact, avoid a contract made under their influence, and expose the parties making or adopting them to an action for deceit.[2] An agent, also, may estop a principal by disclaiming title at a sale.[3] But an agent's declarations, when going to an admission of liability as a question of law, cannot be used against the principal by a party who negligently, without the inquiry incumbent on him, accepts them.[4] And, generally, a misrepresentation as to law will not bind, when there is no fraud, and no misrepresentation of facts.[5]

As a corporation can only act through agents, what an agent admits, it is itself to be regarded as admitting.[6]

test by a master of a vessel as binding his employers. Atkins *v.* Elwell, 45 N. Y. 753.

The statements of a cashier to the effect that a third person, and not the bank, owns certain stock, made at the time of a payment to the cashier by a third person on account of the stock, bind the bank on the question of its ownership. Xenia Bank *v.* Stewart, 114 U. S. 224.

[1] Gladstone *v.* King, 1 Maule & S. 35; Willes *v.* Glover, 1 Bos. & Pul. 14; Fitzherbert *v.* Mather, 1 T. R. 12; Proudfoot *v.* Mountefiori, L. R. 2 Q. B. 50; Maynard *v.* Rhode, 1 C. & P. 360; Roberts *v.* Fonnereau, Park on Ins. 285; Mackintosh *v.* Marshall, 11 Mee. & W. 116; Hammatt *v.* Emerson, 27 Me. 308; Ruggles *v.* Ins. Co., 4 Mason, 74; Kibbe *v.* Ins. Co., 11 Gray, 163; Indianap. R. R. *v.* Tyng, 63 N. Y. 653; Rockford *v.* R. R., 65 Ill. 224; Wiggins *v.* Leonard, 9 Iowa, 194; Whart. on Ag. § 468.

[2] Whart. on Ag. §§ 164 *et seq.*

[3] Richards *v.* Murphy, 1 Whart. 185; Caley *v.* R. R., 80 Penn. St. 363.

[4] Upton *v.* Tribilcock, 91 U. S. 45, Hunt, J., citing Beaufort *v.* Neald, 2 Cl. & F. 248; Smith's case, L. R. 2 Ch. Ap. 613; Denton *v.* McNeil, L. R. 2 Eq. 532. As to the distinction between admissions of fact and admissions of right, see supra, § 1082.

[5] Upton *v.* Tribilcock, *ut supra;* Lewis *v.* Jones, 4 B. & C. 506; Rashall *v.* Ford, L. R. 2 Eq. 750; Starr *v.* Bennett, 5 Hill, 303; Fish *v.* Cleland, 33 Ill. 243.

[6] Nat. Ex. Co. *v.* Drew, 2 Macq. 103; Ranger *v.* R. R., 5 H. L. Cas. 72; Mackay *v.* Com. Bk., L. R. 5 P. C. 391; Barwick *v.* Bk., L. R. 2 Ex. 259; Smith *v.* Winterbotham, L. R. 8 Q. B. 244; Fogg *v.* Griffin, 2 Allen, 1; McGenness *v.* Adriatic Mills, 116 Mass. 177; Green's Brice's Ultra Vires, 425; Whart. on Agency, §§ 57, 670, 671; Angell & Ames on Corp. 9th ed. § 309; and see Bank U. S. *v.* Dunn, 6 Pet. 51; Fairfield *v.* Thorp, 13 Conn. 173; Toll Bridge Co. *v.* Betsworth, 30 Conn. 380; Stewart *v.* Bank, 11 S. & R. 267; Farmers' Bank *v.* McKee, 2 Barr, 321; Spalding *v.* Bk., 9 Barr, 28. See cases cited supra, § 735.

An agent cannot be examined in chief as to his own prior declarations.[1]

Declarations of an agent, not made to third parties, but contained in a confidential report to the principal, are not admissible against the principal.[2]

§ 1171. As an agent authorized to conduct a business enterprise is to be regarded as empowered to take all the necessary steps to carry on such enterprise, he binds his principal, by all representations he may make within the apparent scope of his duties,[3] to parties dealing with him without any notice of a restriction in this respect on his powers. He may not only have no authority to make such representations, but he may be expressly ordered not to make them. As to parties, however, without knowledge of these limitations, he binds his principal.[4] His admissions are bilateral; in other words, they are part of the contract made by his principal, and as such bind the principal. This is eminently the case with insurance companies who cannot repudiate statements made by their agents in procuring custom when such statements are within the ordinary range of such agency.[5]

Such representations binding though unauthorized.

§ 1172. An apparent exception to the above rule arises from the peculiar relation of applicants for insurance to agents soliciting insurances. The agent is the party by whom the application is prepared: the applicant is led to regard the statements before him as mere matters of form, and signs them accordingly. "The reason for this," we are informed, "is, that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant,

Applicant for insurance may contradict written statement made by agent.

[1] Peck *v.* Parcher, 52 Iowa, 46.

[2] Delava Provident Co., in re, 22 Ch. D. 593. Supra, § 593.

[3] Hanover Co. *v.* Iron Co., 84 Penn. St. 279.

[4] Barwick *v.* Eng. Joint St. Co., L. R. 2 Exc. 259; Maddock *v.* Marshall, 18 C. B. (N. S.) 829; Edmunds *v.* Bushell, L. R. 1 Q. B. 97; Howard *v.* Sheward, L. R. 2 C. P. 148; Burnham *v.* R. R., 63 Me. 298; Lobdell *v.* Baker, 1 Met. (Mass.) 193; Mundorff *v.* Wickersham, 63 Penn. St. 87; Over *v.* Schiffling, 102 Ind. 191. See Whart. on Agency, §§ 122, 168, 460, where the cases are examined in detail.

[5] Ibid.

That insurance agents cannot by usage be made agents of the insured unless provided for by the contract, see Grace *v.* Ins. Co., 109 U. S. 278; supra, § 958.

who procured the plaintiff's signature thereto."[1] In other words, in cases of this class, a party is not estopped by representations made in his behalf by a person who, though nominally his agent, is really the agent for the other contracting party.[2] This position, however, is not to be pushed so far as to open the policy, with its

[1] Miller, J., Ins. Co. *v.* Wilkinson, 13 Wall. 222. That the agent of the insurer cannot, by processes of the character above noticed, be made the agent of the insured, so as to estop the insured, see Ins. Co. *v.* Mahone, 21 Wall. 157; Grace *v.* Ins. Co., 109 U. S. 278; Malleable Iron Works *v.* Ins. Co., 25 Conn. 465; Hough *v.* Ins. Co., 29 Conn. 10; Hunt *v.* Ins. Co., 2 Dner, 481; Rowley *v.* Ins. Co., 36 N. Y. 550; Clinton *v.* Ins. Co., 45 N. Y. 454; Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119; North Am. Ins. Co. *v.* Throop, 22 Mich. 146; Anson *v.* Ins. Co., 23 Iowa, 84; New England Ins. Co. *v.* Schettler, 38 Ill. 166; Commerc. Ins. Co. *v.* Ives, 56 Ill. 402; Sullivan *v.* Ins. Co., 43 Ga. 423.

[2] See, as qualifying the above conclusion, Jennings *v.* Ins. Co., 2 Denio, 75; Brown *v.* Ins. Co., 18 N. Y. 385, overruled by subsequent New York cases, cited above. As holding to a stricter view than the text, see Manhattan Ins. Co. *v.* Webster, 59 Penn. St. 227; Aurora Ins. Co. *v.* Eddy, 55 Ill. 222.

See, also, Maher *v.* Ins. Co., 67 N. Y. 283.

The following is part of a comprehensive review of the authorities, by Cooley, J.: "In this case it is conceded that the oral answer made to the inquiry about incumbrances mentioned the large mortgage, but it is disputed that it specified the small one also. The plaintiff claims that he gave the agent full information on the subject, and insists that if there was any failure to mention it in the application, it was for reasons operating exclusively upon the mind of the agent, and not affecting his own action. We think evidence of these facts was competent. Its purpose was, not to vary or contradict the contract of the parties, but to preclude the party who had claimed it from relying upon incorrect recitals to defeat it, when he himself had drafted those recitals, and was morally responsible for their truthfulness. Plumb *v.* Cattaraugus Mutual Ins. Co., 18 N. Y. 394; Rowley *v.* Empire Ins. Co., 36 N. Y. 550 (overruling earlier New York cases); Anson *v.* Winnesheik Ins. Co., 23 Iowa, 84; Malleable Iron Works *v.* Phœnix Ins. Co., 25 Conn. 465; New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166; Hough *v.* City Fire Ins. Co., 29 Conn. 10; Patten *v.* Farmers' F. Ins. Co., 40 N. H. 383; Columbia Ins. Co. *v.* Cooper, 50 Penn. St. 331; Olmstead *v.* Ætna Live Stock, etc. Ins. Co., 21 Mich. 246. And we think the estoppel is precisely the same where the agent of the insurer drafts the papers as it would be in the case of an individual insurer who was himself personally present and acting. Rowley *v.* Empire Ins. Co., 36 N. Y. 550; Anson *v.* Winnesheik Ins. Co., 23 Iowa, 84; Marshall *v.* Columbian F. Ins. Co., 27 N. H. 165; Peoria M. & F. Ins. Co. *v.* Hall, 12 Mich. 214; Woodbury Savings Bank *v.* Charter Oak Ins. Co., 31 Conn. 517." Cooley, J., The North American Fire Insur. Co. *v.* Throop, 22 Mich R. 158. See Hartford Ins. Co. *v.* Davenport, 36 Mich. 609; and criticism on Central Law Journal, March 21, 1879, p. 225.

constituent papers, to parol variation, on the ground that the plaintiff's statement was inadvertently expressed, and that material stipulations made by the agent of the company, and which were part of a parol contract between the insured and the agent, were omitted in preparing the policy.[1] But, whenever the agent's action amounts

[1] In Insurance Co. *v.* Mowry, 96 U. U. 547, it was held inadmissible, when the company set up forfeiture, for the holder of the policy to show that by parol agreement between the parties, before the execution of the policy, forfeiture on non-payment of premium was to be waived. "All previous verbal arrangements," said Field, J., "were merged in the written agreement. . . . If, by inadvertence or mistakes, provisions other than those intended were inserted, or stipulated provisions omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company." So far as the above is inconsistent with Ins. Co. *v.* Wilkinson, we must consider the latter case overruled. See Plum *v.* Ins. Co., 18 N. Y. 392; Rowly *v.* Ins. Co., 36 N. Y. 550, sustaining the admissibility of such evidence, but apparently qualified by Le Roy *v.* Ins. Co., 45 N. Y. 80.

In Combs *v.* Ins. Co., 43 Mo. 148, the insured, in a fire insurance policy, was permitted to show that he truly stated the facts to the agent, but that those were not truly recited in the application, though this was signed by the insured.

In Union Ins. Co. *v.* Wilkinson, 13 Wall. 234, Miller, J., says, in speaking of insurance agents: "The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who in this manner is induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right so to regard him? The powers of the agent are *primâ facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals."

In Millville Ins. Co. *v.* Build. Ass., 43 N. J. L. 652, we have the following points made: "That the authority of the agent will be assumed to be general in all matters relating to the effecting of the insurance, was maintained by Sharswood, J., in Mentz *v.* Lancaster Fire Ins. Co., 79 Penn. St. 476, a case which is cited with approbation by Chancellor Runyon, in Combs *v.* Shrewsbury Ins. Co., 7 Stew. 403. That such an agent may assent to alienation and waive conditions on behalf of an insurance company is established by numerous authorities. Woodbury Savings Bank *v.* Charter Oak Co., 31 Conn. 517; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345; Goit *v.* National Ins. Co., 25 Barb. 189; Sheldon *v.* Atlantic Ins. Co., 26 N. Y. 460; Bodine *v.* Exchange Fire Ins. Co., 51 N. Y. 117; Merserau *v.* Phœnix Mut. Co., 66 N. Y. 274; Durar *v.* Hudson Ins. Co., 4 Zabr. 171; Shearman *v.* Niagara Ins. Co., 46 N. Y. 526; Wood on Fire Ins., §§ 391, 393. See, also,

to a fraud (as where he wrongfully, without the insured's knowledge, took down erroneously the latter's answers), this may be shown by the plaintiff in a suit on the policy.[1] And while a fraudulent misstatement by the insured avoids the policy,[2] it is otherwise with a misstatement believed to be true by the insured,[3] unless expressly provided otherwise by statute,[4] or unless the policy is expressly conditioned on the truth of such statements.[5]

Agent's admission receivable when part of the *res gestae*.

§ 1173. Whenever an agent makes a business arrangement or does an act representing his principal, what he does in respect to the arrangement or act, while it is in progress, is so far part of the *res gestae* as to be subsequently admissible in evidence on behalf of either party. Whenever the agent's acts are so admissible, then his contemporaneous declarations, explanatory of these acts, are admissible; nor in proving such declarations is it necessary that he should be himself called.[6]

Miller *v.* Phœnix Ins. Co., 27 Iowa, 203; Catoir *v.* American Ins. Co., 4 Vroom, 487."

[1] Supra, §§ 931, 1009, 1019; Ins. Co. *v.* Mahone, 21 Wall. 157.

[2] See supra, § 1019.

[3] Union Ins. Co. *v.* Wilkinson, 13 Wall. 222.

[4] Macdonald *v.* Ins. Co., L. R. 9 Q. B. 328.

[5] Miles *v.* Ins. Co., 3 Gray, 580. See Voss *v.* Ins. Co., 6 Cush. 42. See Mouler *v.* Ins. Co., 101 U. S. 708.

[6] Bree *v.* Holbrook, Doug. 654; Fitzherbert *v.* Mather, 1 T. R. 12; Biggs *v.* Lawrence, 3 T. R. 454; Fairlie *v.* Hastings, 10 Ves. 123; Garth *v.* Howard, 8 Bing. 451; Mortimer *v.* McCallen, 6 M. & W. 58; Howard *v.* Sheward, L. R. 2 C. P. 148; Lee *v.* Munroe, 7 Cranch, 366; Flint *v.* Transp. Co., 7 Blatch. 536; Xenia Bank *v.* Stewart, 114 U. S. 224; Lamb *v.* Barnard, 16 Me. 364; Burnham *v.* R. R., 63 Me. 298; Baring *v.* Clark, 19 Pick. 220; Cooley *v.* Norton, 4 Cush. 93; Lobdell *v.* Baker, 1 Met. (Mass.) 193; Willard *v.* Buckingham, 36 Conn. 395: Bristol Knife Co. *v.* Bank, 41 Conn. 421; Bank U. S. *v.* Davis, 2 Hill (N. Y.), 451; Sandford *v.* Handy, 23 Wend. 260; Thalhimer *v.* Brinkerhoof, 6 Cowen, 90; McCotter *v.* Hooker, 4 Seld. 497; Price *v.* Powell, 3 Comst. 322; Luby *v.* R. R., 17 N. Y. 131; Anderson *v.* R. R., 54 N. Y. 340; Merchants' Bank *v.* Griswold, 72 N. Y. 473; Hannay *v.* Stewart, 6 Watts, 487; Stockton *v.* Demuth, 7 Watts, 39; Reed *v.* Dick, 8 Watts, 479; Woodwell *v.* Brown, 44 Penn. St. 121; Hanover R. R. *v.* Coyle, 55 Penn. St. 396; Dodge *v.* Bache, 57 Penn. St. 421; Union R. R. *v.* Riegel, 73 Penn. St. 72; Mullan *v.* Steamship Co., 78 Penn. St. 25; Grim *v.* Bonnell, 78 Penn. St. 152; Thomas *v.* Sternheimer, 29 Md. 268; Youngstown *v.* Moore, 30 Ohio St. 133; Sisson *v.* R. R., 14 Mich. 489; Toledo R. R. *v.* Goddard, 25 Ind. 185; Whiteside *v.* Margarel, 51 Ill. 507; Sweatland *v.* Tel. Co., 26 Iowa, 433; Simmons *v.* Rust, 39 Iowa, 241; Pinnix *v.* McAdoo, 68 N. C. 370; McComb *v.* R. R., 70 N. C. 178; South Exp. Co. *v.* Duffey, 48 Ga. 358; Newton Man. Co. *v.* White, 53 Ga. 395; Adams *v.* Humphreys, 54 Ga. 496;

§ 1174. The statements, as well as the conduct of an agent during the performance of a tort, are imputable to the principal, whenever the tort itself is so imputable.[1] Thus, the admissions of the captain of a steamer, as to damage to crops on shore by fire from the steamer, made while she was running under his command, and at the time the fire was communicated, are evidence against the owners who employed him,[2] and so of the admissions of a captain of a vessel at the time of carrying off a slave;[3] and of the declarations of the servants of a railroad company at the time of a casualty;[4] and of the admissions of the servant of a common carrier during the period of the carrying, if such admissions are coincident with the act, and are therefore the act itself talking, not a talking about the act.[5] It is essential, however, that they should be part of the events to which they refer. If made after there has been an interval giving time for reflection, then, unless the agent be empowered to speak for his employer at such time, statements of the agent, explaining or even admitting the act, no matter how much they inculpate the employer, cannot be received, though he continues in his employment.[6] At

So in torts if connected with act charged.

Strawbridge *v.* Shawn, 8 Ala. 820; Bohannan *v.* Chapman, 13 Ala. 641; Beardslee *v.* Steinmesch, 38 Mo. 168; Union Savings Co. *v.* Edwards, 47 Mo. 445; Malecek *v.* R. R., 57 Mo. 17; Robinson *v.* Walton, 58 Mo. 380; Neely *v.* Naglee, 23 Cal. 152; Smith *v.* Wallace, 25 Wis. 55; Owens *v.* Northrup, 30 Wis. 482.

"It has been often held that, to make declarations admissible on this ground, they must not have been mere narratives of past occurrences, but 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 character of the acts they were intended to explain, and to so harmonize with them as to constitute a single transaction. Enos *v.* Tuttle, 3 Conn. R. 250; Comstock *v.* Hadlyme, 8 Ibid. 263; Russell *v.* Frisbie, 19 Ibid. 209; Ford *v.* Haskell, 32 Ibid. 492; Bradbury *v.* Bardin, 35 Ibid. 583; Sears *v.* Hayt, 37 Ibid. 406." Phelps, J., Rockwell *v.* Taylor, 41 Conn. R. 59.

[1] Rhodes *v.* Lowry, 54 Ala. 4. See, however, Cooper *v.* Slade, 6 H. of L. 746.

[2] Gerke *v.* Steam Nav. Co., 9 Cal. 251.

[3] Price *v.* Thornton, 10 Mo. 135.

[4] Toledo R. R. *v.* Goddard, 25 Ind. 185; Waller *v.* R. R., 83 Mo. 608.

[5] Packet Co. *v.* Clough, 20 Wall. 540; Burnside *v.* R. R., 47 N. H. 554.

[6] To the same effect, see Allen *v.* Denstone, 8 C. & P. 760; Fairlie *v.* Hastings, 10 Ves. 123; Garth *v.* Howard, 8 Bing. 431; Langhorn *v.* Allnut, 4 Taunt. 519; Mortimer *v.* McCallan, 6 M. & W. 58; Great W. R. R. *v.* Willis, 18 C. B. (N. S.) 748; Maury *v.* Talmadge, 2 McLean, 157; Packet Co. *v.* Clough, 20 Wal. 540; Robinson *v.* R. R., 7 Gray, 92; Wakefield *v.* R. R., 117 Mass. 544; Enos *v.* Tuttle, 3 Conn.

the same time we must remember that, as has been already seen, the period of the performance of a tort varies upon the concrete case.[1]

When admissions are not by a general agent, in the scope of his business, nor part of

§ 1175. We have already noticed,[2] that a principal is estopped, as against the other contracting parties, by such of his agent's representations as were among the inducements leading such other contracting parties to execute the contract. But, as *prima fâcie* proof against the principal may also be introduced (in all cases in which the agent is authorized so to speak for the principal) the

250; Sears *v.* Hayt, 37 Conn. 406; Rockwell *v.* Taylor, 41 Conn. 59; Luby *v.* R. R., 17 N. Y. 131; Anderson *v.* R. R., 54 N. Y. 334; Furst *v.* R. R., 72 N. Y. 542; Price *v.* R. R., 31 N. J. L. 229; Penna. R. R. *v.* Books, 57 Penn. St. 339; Am. S. S. Co. *v.* Landreth, 102 Penn. St. 131; Atlantic Ins. Co. *v.* Carlin, 58 Md. 336; Dietrich *v.* R. R., 58 Md. 347; Va. & Tenn. R. R. *v.* Sayers, 26 Grat. 329; Mich. Cent. R. R. *v.* Gongaz, 55 Ill. 503; Mich. Cent. R. R. *v.* Coleman, 28 Mich. 446; Mabley *v.* Kittleberger, 37 Mich. 360; Osgood *v.* Bringolf, 32 Iowa, 265; Treadway *v.* R. R., 40 Iowa, 527; Cramer *v.* Burlington, 45 Iowa, 627; Milwaukee R. R. *v.* Finney, 10 Wis. 388; Hazleton *v.* Bank, 32 Wis. 34; Rounsavell *v.* Peese, 45 Ill. 506; Randall *v.* Tel. Co., 54 Wis. 140; Patterson *v.* R. R., 4 S. C. 153; Griffin *v.* R. R., 26 Ga. 111; East Tenn. R. R. *v.* Duggan, 51 Ga. 212; Cent. R. R. *v.* Kelly, 58 Ga. 107; Mobile R. R. *v.* Ashcraft, 48 Ala. 15; Murphy *v.* May, 9 Bush. 33; Nashville R. R. *v.* Messino, 1 Sneed, 220; Scovill *v.* Glasner, 79 Mo. 449; Kelly *v.* R. R., 88 Mo. 534; Union Pacific R. R. *v.* Fray, 35 Kan. 700, and see fully for distinctions stated infra, § 1176. See Balt., etc. R. R. *v.* State, 62 Md. 479. In Vicksburg *v.* O'Brien, 119 U. S. 99, it was held that the statement of the engineer of a train as to its rate of speed made from ten to thirty minutes after the accident which formed the cause of action, is not admissible in evidence against his employer, the railroad company. "His declarations," said Harlan, J., "after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of 18 miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question rose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestae*, simply an assertion or representation, in the course of conversation as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted." S. P. North Hudson R. R. *v.* May, 48 N. J. L. 401. See, also, cases cited supra, § 265.

As extending the period of the *res gestae*, see Malecek *v.* R. R., 57 Mo. 20. As taking a wider view than that of the text, see Chapman *v.* R. R., 55 N. Y. 579.

[1] Supra, §§ 256–262.

[2] Supra, § 1170.

the *res gestae*, special authorization must be proved.

agent's non-contractual admissions, made after the contract is executed. Of these admissions, two incidents are to be noticed: (1.) Being non-contractual and unilateral,[1] they are not conclusive on the principal; and, (2.) They cannot be put in evidence unless authority to make them can be proved. "As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must rise out of some peculiarity of situation, coupled with the declarations made by one. An agent may, undoubtedly, within the scope of his authority, bind his principal by his agreement; and in many cases by his acts.[2] What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did make the statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business in which the person making that assertion was employed as agent."[3] When, therefore, the admissions are not part of a course of general agency, special authority must be shown.[4] Peculiarly is this the case with regard to admis-

[1] See supra, § 1083.

[2] See infra, § 1177; German Ins. Co. *v.* Grunert, 112 Ill. 68; Branch *v.* R. R., 88 N. C. 573; Mars *v.* Ins. Co., 17 S. C. 514; McDermott *v.* R. R., 73 Mo. 516; Verry *v.* R. R., 47 Iowa, 549; Schaefer *v.* Gilden, 3 Col. 15.

[3] Sir W. Grant in Fairlie *v.* Hastings, 10 Ves. 126.

[4] Infra, § 1183; Doe *v.* Roberts, 16 M. & W. 778; Faussett *v.* Faussett, 7 Ec. & Mar. 93; Garth *v.* Howard, 8 Bing. 451; Chicago *v.* Greer, 9 Wall. 726; Ins. Co. *v.* Malone, 21 Wall. 152; Gooch *v.* Bryant, 13 Me. 386; Bank *v.* Steward, 37 Me. 519; Burnham *v.* Ellis, 39 Me. 319; Woods *v.* Banks, 14 N. H. 101; Page *v.* Parker, 40 N. H. 47; Lowe *v.* R. R., 45 N. A. 370; Barnard *v.* Henry, 25 Vt. 289; Upham *v.* Wheelock, 36 Vt. 27; Wheelock *v.* Hardwick, 48 Vt. 19; Corbin *v.* Adams, 6 Cush. 93; Dorne *v.* Man. Co., 11 Cush. 205; Johnson *v.* Trinity Church, 11 Allen, 123; Fogg *v.* Pew, 10 Gray, 409; Blanchard *v.* Blackstone, 102 Mass. 343; Wilson *v.* Bowden, 113 Mass. 422; Anderson *v.* Bruner, 112 Mass. 14; Lane *v.* R. R., 112 Mass. 455; Richmond Works *v.* Hayden, 132 Mass. 190;

sions made by an agent as to the character of a past act as to which his principal is charged with liability.[1]

§ 1176. In respect to torts, a distinction is to be noticed between torts based on contract, and torts consisting of a violation of the *Sic utere tuo ut non alienum laedas*, or, as they are called in the Roman

Murray *v.* Chase, 134 Mass. 92; Cortland Co. *v.* Herkimer, 44 N. Y. 22; Lansing *v.* Coleman, 58 Barb. 611; Happy *v.* Mosher, 48 N. Y. 313; Hoag *v.* Lamont, 60 N. Y. 96; First Nat. Bk. *v.* Ocean Bk., 60 N. Y. 279; Runk *v.* Ten Eyck, 24 N. J. L. 756; Fawcett *v.* Bigley, 59 Penn. St. 411; Pier *v.* Duff, 63 Penn. St. 59; Custar *v.* Gas Co., 63 Penn. St. 381; Columb. Ins. Co. *v.* Masonheimer, 76 Penn. St. 138; Balt. R. R. *v.* School Dist., 96 Penn. St. 65; Bradford *v.* Williams, 2 Md. Ch. 1; Wheatley *v.* Wheeler, 34 Md. 62; Balt. & O. R. R. *v.* Gallahue, 12 Grat. 655; Balt. R. R. *v.* Christie, 5 W. Va. 325; Renneker *v.* Warren, 17 S. C. 139; Griffin *v.* R. R., 26 Ga. 11; Weight *v.* R. R., 26 Ga. 330; Wilcox *v.* Hall, 53 Ga. 635; Newton *v.* White, 53 Ga. 395; Todd *v.* Bank, 54 Ga. 497; Governor *v.* Baker, 14 Ala. 652; Winter *v.* Bent, 31 Ala. 33; Alabama R. R. *v.* Johnson, 42 Ala. 242; Mobile R. R. *v.* Ashcraft, 48 Ala. 15; Galbreath *v.* Cole, 61 Ala. 139; Memphis *v.* R. R., 63 Ala. 402; Wailes *v.* Neal, 65 Ala. 59; Sunner *v.* Ins. Co., 77 Ala. 184; Thomas *v.* Rutledge, 67 Ill. 213; Linblom *v.* Ramsey, 75 Ill. 246; Grimshaw *v.* Paul, 76 Ill. 164; Converse *v.* Blumrich, 14 Mich. 109; Peck *v.* Detroit, 29 Mich. 313; Fort Wayne R. R. *v.* Gildersleeve, 33 Mich. 133; Kalamazoo *v.* McAlister, 36 Mich. 327; Monaghan *v.* Ins. Co., 53 Mich. 238; Smith *v.* Wallace, 25 Wis. 55; Lucas *v.* Barrett, 1 Greene (Iowa), 510; Swenson *v.* Aultman, 14 Kans. 273; Golson *v.* Ebert, 52 Mo. 260; Cosgrove *v.* R. R., 54 Mo. 495; Hamilton *v.* Berry, 74 Mo. 176; Caldwell *v.* Henry, 76 Mo. 254; French *v.* Wade, 35 Kan. 391; Cook *v.* Whitfield, 41 Miss. 541.

A freight agent at the place of delivery cannot, after delivery, bind his principal by admissions as to negligence in transit. Boston, etc. R. R. *v.* Ordway, 140 Mass. 510. "A freight agent cannot affect his principal by admissions merely as such. In the cases cited for the defendant in review, the admissions were statements made when delivery of the goods was applied for; Lane *v.* R. R., 112 Mass. 455; or when information was sought from the person designated by the general representative of the principal; Gott *v.* Dinsmore, 111 Mass. 45; or in some similar way were raised from the rank of mere admissions to authorized acts done on behalf of the principal in furtherance of the principal's legal duty. The admissions, too, were not mere admissions of liability, *but of specific facts which it was the agent's province to know.*" Ibid, Holmes, J.

[1] Infra, § 1180; Packet Co. *v.* Clough, cited in last section; Franklin Bk. *v.* Cooper, 36 Me. 179; Craig *v.* Gilbreth, 47 Me. 416; Lime Rock Bk. *v.* Hewett, 52 Me. 531; Pemigewasset Bk. *v.* Rogers, 18 N. H. 255; Austin *v.* Chittenden, 33 Vt. 553; Robinson *v.* R. R., 7 Gray, 192; Chelmsford *v.* Demarest, 7 Gray, 1; Wakefield *v.* R. R., 117 Mass. 544; Anderson *v.* R. R., 54 N. Y. 334; Church *v.* Howard, 79 N. Y. 415; Price *v.* R. R., 31 N. J. L. 229; Bank *v.* Davis, 6 Watts & S. 285; Bigley *v.* Williams, 80 Penn. St. 107; Mobile R. R. *v.* Ashcraft, 48 Ala. 15. See more fully Wharton on Agency, § 160.

law, Aquilian torts.[1] (1) If I order an agent to make a contract into which fraud or other wrong enters, so that the contract is tortious, then I am bound by all the statements he may make in the performance of his agency; and I am estopped by these statements so far as they induce the other contracting party to alter his position.[2] (2) If I direct an agent to injure another person (*e. g.*, to pull down his house, or assault his person), then, as my agent is a co-conspirator with me, his admissions can be put in evidence against me, if made while the relationship continues;[3] though, since they are unilateral[4] (*i. e.*, not part of a contract), they may be explained or rebutted by me. But (3) if, when in performance of my lawful duty to a third person, my agent, from carelessness, injures such third person (*e. g.*, as is the case with the agents of a railroad company negligently injuring a passenger), then, as his tort is entirely outside of his agency, such only of his statements as are part of the tortious act are admissible against me, and these statements (being non-contractual, *i. e.*, not part of the consideration of a contract) can be rebutted by me. His *subsequent* statements are not admissible against me, because he was not my agent, either real or apparent, for the purpose of making such statements. These statements are, therefore, mere hearsay.[5] Thus, it has been correctly held that the statements of subordinate agents of a railroad company, as to the condition of the brakes on the cars, or as to the condition of the road at the place where the accident occurred, such statements having been made some time before or some time after the accident, are not admissible against the company, no authority in the agent to make the admissions being proved.[6] So the admission of a brakeman after an accident, imputing negligence to the engineer, cannot be received.[7]

So as to torts.

§ 1177. As has been already incidentally seen, a party who commits the management of his whole business, or of a particular

[1] See Whart. on Neg. §§ 8, 786, for an expansion of this distinction. And see Halsey *v.* R. R., 45 N. J. L. 26. As unduly extending the rule, see McPherrin *v.* Jennings, 66 Iowa, 622.

[2] See supra, § 1170.

[3] Infra, § 1205. See Dobbins *v.* U. S., 96 U. S. 395, to the effect that the admission of the lessee of an alleged distillery may bind owner.

[4] See supra, § 1079.

[5] See authorities, supra, § 1174; Green *v.* Woodbury, 48 Vt. 5; Kelly *v.* R. R., 88 Mo. 534.

[6] Va. & Tenn. R. R. Co. *v.* Sayers, 26 Grattan, 329. Though see Chapman *v.* R. R., 55 N. Y. 579.

[7] Michigan Cent. R. R. *v.* Coleman, 28 Mich. 446; and see other cases cited supra, § 1174.

line of his business, to an agent, is bound by the admissions of the agent, as to his entire business committed to him; nor, when the agent is a general agent, representing his principal continuously, is it necessary for the admission of such declarations that they should either have been part of the *res gestae*, or should have been specially authorized. Eminently is this the case with corporations. Thus, it has been held in England that on a suit against a railroad company for a lost parcel, a statement made by the station-master, generally representing the defendant, intimating that the parcel was stolen by a porter of the defendant, is admissible against the defendant.[1] So, in Massachusetts, in an action against a manufacturing corporation for a nuisance, a statement of its superintendent that the nuisance existed and would be remedied, and that "he would not have it around his place for $500," is competent evidence against the corporation, the superintendent being the corporation's general representative.[2] So, in Kansas, it has been held that a conversation between the chief engineer of a road and the road master having charge of a division, is admissible against the company for the purpose of showing the condition of the division.[3] And, generally, power to an agent to admit, transfers the agent's admissions to the principal.[4]

General agents may make non-contractual admissions.

[1] Kirkstall *v.* R. R., L. R. 9 Q. B. 468. See Morse *v.* R. R., 6 Gray, 450. Supra, § 1175.

[2] McGenness *v.* Adriatic Mills, 116 Mass. 177.

"The remaining question is in reference to the admission of evidence of the statement of the superintendent. The defendant is a corporation, and can only act through its agents, and, in the absence of any evidence to the contrary, the superintendent in charge of the mill must be deemed the proper person to whom to make complaint, and to have authority to give information and direction in regard to the drainage from it. His recognition that it was a matter that required to be attended to and should be, was therefore properly put in evidence. Morse *v.* Connecticut River R. R., 6 Gray, 450. The expression used by him, that he 'would not have it around his place, as it was around there, for $500,' was a mere mode of stating that the nuisance existed, and could not have been considered as an admission that this sum was the amount of the damages, nor do we understand that it was put in evidence as such." Devens, J., McGenness *v.* Adriatic Mills, 116 Mass. 180. See, to same effect, Charleston R. R. *v.* Blake, 12 Rich. S. C. 634.

[3] St. Louis, etc. R. R. *v.* Weaver, 35 Kan. 413.

[4] Burt *v.* Palmer, 5 Esp. 145; Coates *v.* Bainbridge, 5 Bing. 58; Anderson *v.* Sanderson, 2 Stark. 204; Dowdall *v.* R. R., 13 Blatch. 463; Morse *v.* R. R., 6 Gray, 450; Hyland *v.* Sherman, 2 E. D. Smith, 234; Ins. Co. *v.* Woodruff, 26 N. J. L. 541; Custar *v.* Gas Co., 63 Penn. St. 381; Bennett *v.* Holmes, 32 Ind. 108; Howe *v.* Snow, 32 Iowa, 433;

§ 1178. Where, however, there is no special power given to an agent to represent the principal for the purpose of settlement, or other action involving the power to admit, then, it must be again noticed, the agent's declarations as to facts are hearsay, unless part of the *res gestae*. The agent himself must be called to prove these facts; his statements as to them, as reported by other witnesses, cannot be received,[1] nor, if received, do they conclude. "The admission of an agent cannot be assimilated to the admission of the principal. The party is bound by his own admission; and is not" (when it is part of the contract) "permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, respecting his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, and not by his mere assertion."[2]

Non-contractual admissions open to correction.

§ 1179. Statements of an agent, not part of a contract, are, in the few cases in which they are admissible in evidence, open to correction and explanation by the principal. This is the case, as we have seen, with similar statements by the principal himself.[3] This rule is peculiarly applicable to statements which are thrown off by the agent carelessly, and without full knowledge of the circumstances.[4]

In contracts, after business is closed, agent's power of representation ceases.

§ 1180. So far as concerns dispositive or contractual representations, the power of an agent (who is not a general agent for such purposes) to bind his principal in this way ceases when the principal's business is transacted. His representations, made during the negotiations, conclude his principal, as we have seen, when they are part of the consideration of the contract. His admissions (if he be a mere special agent for the particular purpose), made after the contract is executed, are not even admissible against the principal.[5]

Ward *v.* Leitch, 30 Md. 326; Buchanan *v.* Collins, 42 Ala. 419; Northrup *v.* Ins. Co., 47 Mo. 435. This position is pushed to undue length in Malecek *v.* R. R., 57 Mo. 20.

[1] See for authorities supra, § 1174.

[2] Sir William Grant, in Fairlie *v.* Hastings, 10 Ves. 126.

[3] Supra, §§ 1078, 1083.

[4] Craig *v.* Gilbreth, 47 Me. 416; Austin *v.* Chittenden, 33 Vt. 553; Hubbard *v.* Elmer, 7 Wend. 441; Tracy *v.* McManns, 58 N. Y. 257; Patton *v.* Minesinger, 25 Penn. St. 393; Custar *v.* Gas Co., 63 Penn. St. 381; Franklin Bank *v.* Nav. Co., 11 Gill & J. 28; Milwaukee R. R. *v.* Finney, 10 Wis. 388.

[5] Hern *v.* Nichols, 1 Salk. 289; Fair-

We therefore, in this relation, fall back on the general rule, that non-contractual admissions (in other words, admissions not forming

lie *v.* Hastings, 10 Ves. 125; Kirkstall Co. *v.* R. R., L. R. 9 Q. B. 468; Western Bk. of Scotland *v.* Addie, L. R. 1 Sc. & D. 145; Goetz *v.* Bank, 119 U. S. 551; Stiles *v.* Danville, 42 Vt. 282; Lobdell *v.* Baker, 1 Met. (Mass.) 193; Stiles *v.* R. R., 8 Met. 44; Lowell *v.* Winchester, 8 Allen, 109; Hubbard *v.* Elmer, 7 Wend. 446; Jex *v.* Board of Education, 1 Hun (N. Y.), 159; White *v.* Miller, 71 N. Y. 118; Magill *v.* Kauffman, 4 S. & R. 320; Hough *v.* Doyle, 4 Rawle, 291; Clark *v.* Baker, 2 Whart. 340; Bank of Northern Liberties *v.* Davis, 6 W. & S. 285; Stewartson *v.* Watts, 8 Watts, 392; Penn. R. R. *v.* Books, 57 Penn. St. 339; Phelps *v.* R. R., 60 Md. 536; Waterman *v.* Peet, 11 Ill. 648; Chic. etc. R. R. *v.* Lee, 60 Ill. 501; Chic. B. & Q. R. R. *v.* Riddle, 60 Ill. 534; Rowell *v.* Klein, 44 Ind. 290; Bowen *v.* School District, 36 Mich. 149; Pollard *v.* R. R., 7 Bush. 597; Williams *v.* Williams, 11 Ired. L. 281; Pinnix *v.* McAdoo, 68 N. C. 56; McComb *v.* R. R., 70 N. C. 178; Raiford *v.* French, 11 Rich. (S. C.) 367; Colquitt *v.* Thomas, 8 Ga. 268; East. B. *v.* Taylor, 41 Ala. 93; Reynolds *v.* Rowley, 2 La. An. 890; Caldwell *v.* Garner, 31 Mo. 131; Levy *v.* Mitchell, 6 Ark. 138; Greer *v.* Higgins, 8 Kans. 519; Clunie *v.* Lumber Co., 67 Cal. 313.

"The opinion of an agent, based on past occurrences, is never to be received as an admission of his principals; and this is doubly true when the agent is not a party to those occurrences." Strong, J., Ins. Co. *v.* Mahone, 21 Wall. 157; citing Packet Co. *v.* Clough, 20 Wall. 528; Hough *v.* Doyle, 4 Rawle, 291; Hubbard *v.* Elmer, 7 Wend. 446; Stiles *v.* R. R., 8 Met. 46; Clark *v.* Baker, 2 Whart. 340. See, to same effect, Tuggle *v.* R. R., 62 Mo. 425; Ashmore *v.* Towing Co., 38 N. J. L. 13.

"It is a well-established rule that the declarations of an agent, made at the time of the particular transaction, which is the subject of inquiry, and while acting within the scope of his authority, may be given in evidence against his principal, as a part of the *res gestae*. It is equally as well settled that the declarations of an agent, made after the transaction is 'fully completed and ended,' are not admissible. The declarations of officers of a corporation rest upon the same principles as apply to other agents." Penn. R. R. *v.* Books, 57 Penn. St. 229; Huntington R. R. *v.* Decker, 82 Penn. St. 119.

The admissions of telegraph operators, made after the message is delivered, and not part of the *res gestae*, cannot be received to affect the company, in a suit against it for negligence. McAndrew *v.* Tel. Co., 17 C. B. 3; Robinson *v.* R. R., 7 Gray, 92; Grinnell *v.* Tel. Co., 112 Mass. 299; U. S. *v.* Gildersleeve, 29 Md. 232; Sweatland *v.* Tel. Co., 29 Iowa, 433; Aiken *v.* Tel. Co., 5 S. C. 358.

In an action against a national bank, as gratuitous bailee of property which had been stolen by burglars, a witness, who had testified to conversations with defendant's president, in which he notified him of attempts by burglars to enter the bank, and of indications of an intended robbery, and urged upon him the necessity of greater care, was permitted to testify, under objection, that the president, after the burglary, requested him not to mention such conversations. It was held by the court of appeals that the admission was erroneous, as the president's acts and declarations after the transaction, and when not acting within the limits of his authority, were not binding upon, and could not affect, the defendant. First Nat. Bank of Lyons *v.* Ocean Nat.

part of the consideration of a contract)[1] are not admissible unless part of the *res gestae*, or unless they are made with the special authority of the principal, or by his general representative.[2]

§ 1181. A servant, as distinguished from an agent, as is elsewhere shown,[3] is regarded by the law as so far a mechanical extension of his master, that whatever he does, in the discharge of his master's orders, is so much his master's action that for it his master is suable. Hence, the acts and words of a servant, so far as they are incidental to and explanatory of his action when executing his master's orders, are evidence against his master.[4] Thus, when the soundness of a cable is questioned in an action against the owners of a vessel for damage caused by the breaking of the cable, the declarations of the crew, when paying out the cable, may be put in evidence;[5] and so the acts and remarks of a workman, while engaged in manufacturing an article alleged to be pirated, are admissible against his master in a suit for infringing the patent.[6]

Admissions of servant are subject to same restrictions as to time.

Bank, 60 N. Y. 279. Van Leuven *v.* First Nat. Bank, 54 N. Y. 671, distinguished.

[1] See supra, §§ 1173–5.

[2] Fairlie *v.* Hasting, 10 Ves. 123; Garth *v.* Howard, 8 Bing. 451; Langhorn *v.* Allnut, 4 Taunt. 519; Mortimer *v.* McCallan, 6 M. & W. 58; Great W. R. R. *v.* Willis, 18 C. B. (N. S.) 748; Allen *v.* Denstone, 8 C. & P. 760; Polleys *v.* Ins. Co., 14 Met. 141; Robinson *v.* R. R., 7 Gray, 92; Wakefield *v.* R. R., 117 Mass. 544; Anderson *v.* R. R., 54 N. Y. 334; Price *v.* R. R., 31 N. J. L. 229; Hynds *v.* Hays, 25 Ind. 31; Lafayette R. R. *v.* Ehman, 30 Ind. 83; Bennett *v.* Holmes, 32 Ind. 108; Bellefontaine R. R. *v.* Hunter, 33 Ind. 335; Dickenson *v.* Colter, 45 Ind. 445; Pittsburgh R. R. *v.* Theobald, 51 Ind. 246; Michigan Cent. R. R. *v.* Carrow, 73 Ill. 348; Mobile R. R. *v.* Ashcraft, 48 Ala. 15; Price *v.* Thornton, 10 Mo. 135; Ready *v.* Highland Mary, 20 Mo. 264.

"The admissions of an agent, not made at the time of the transaction, but subsequently, are not evidence. Thus, the letters of an agent to his principal, containing a narrative of the transaction in which he had been employed, are not admissible in evidence against the principal." Rogers, J., Hough *v.* Doyle, 4 Rawle, 294. "It would be a mere affectation of learning to cite the long array of cases from Hannay *v.* Stewart, 6 Watts, 487, to Fawcett *v.* Bigley, 9 P. F. Smith, 411, in which this rule has been reiterated and applied. The declarations in question were certainly admissible, as those of an agent of a common carrier in the course of his employment as such, but not to prove a prior special contract." Sharswood, J., Pennsylvania Railroad Co. *v.* Plank Road Co., 71 Penn. St. 355.

[3] Wharton on Agency, § 536.

[4] Wharton on Agency, §§ 159 *et seq.*; Weeks *v.* Barron, 38 Vt. 420; Black *v.* R. R., 45 Barb. 40.

[5] Reed *v.* Dick, 8 Watts, 479.

[6] Aikin *v.* Bemis, 3 Wood. & M. 348.

§ 1182. Yet we must remember that a servant moves within a limited orbit, one far more limited than that of an agent; and that consequently the admissions of a servant are more jealously guarded than are those of an agent. An agent is authorized to exercise discretion; when a servant is authorized to exercise discretion, then he ceases to be a servant and becomes an agent. Those dealing with a mere servant, and knowing him to be such, know that except in the immediate discharge of a mechanical duty he is not authorized to bind his master by his admissions. Hence, ordinarily, a master, except within such range, is not so bound.[1] But where a servant is made an agent for a particular purpose (*e. g.*, where a porter or other servant is employed to represent a railroad company in all matters concerning baggage), then his declarations may be admissible against his employer.[2]

As to scope, are more limited than those of agent.

§ 1183. As declarations of an agent are only admissible when the agency is proved, to permit the proving of the agency by proving the declarations of the agent would be assuming without proof that which is a prerequisite to the admissibility of the declarations.[3] It would be a *petitio principii* to say that he was an agent because his declarations were admissible, and his declarations were admissible because he was an agent. Hence the rule is settled that such declarations cannot be received until there be proof of the agency *aliunde*.[4] An error in

Agency must be established by proof *aliunde*.

[1] Robinson *v.* R. R., 7 Gray, 92; McGregor *v.* Wait, 10 Gray, 72; Wakefield *v.* R. R., 117 Mass. 544; Anderson *v.* R. R., 54 N. Y. 334; Penns. R. R. *v.* Books, 57 Penn. St. 339; Michigan Central R. R. *v.* Carrow, 73 Ill. 348; Mobile R. R. *v.* Ashcraft, 48 Ala. 15.

[2] Morse *v.* R. R., 6 Gray, 450; Lane *v.* R. R., 112 Mass. 455; Cortland *v.* Herkimer Co., 44 N. Y. 22. See Malecek *v.* R. R., 57 Mo. 17.

[3] As to proof of agency, see infra, §§ 1315, 1316.

[4] Supra, § 1175; Fairlie *v.* Hastings, 10 Ves. 126; Mussey *v.* Beecher, 3 Cush. 517; Brigham *v.* Peters, 1 Gray, 139; McGregor *v.* Wait, 10 Gray, 72; Haney *v.* Donnelly, 12 Gray, 361; Bowker *v.* Delong, 141 Mass. 315; Fitch *v.* Chapman, 10 Conn. 8; Jaeger *v.* Kelley, 52 N. Y. 274; Hill *v.* R. R., 63 N. Y. 101; Gifford *v.* Landrines, 37 N. J. L. 127; Clark *v.* Baker, 2 Whart. 340; Chambers *v.* Davis, 3 Whart. 40; Robeson *v.* Nav. Co., 3 Grant (Penn.), 186; Jordan *v.* Stewart, 23 Penn. St. 244; Williams *v.* Davis, 69 Penn. St. 21; Grim *v.* Bonnell, 78 Penn. St. 152; Whiting *v.* State, 91 Penn. St. 349; Central Penn. R. R. *v.* Thompson, 112 Penn. St. 118; Rosenstook *v.* Tormey, 32 Md. 169; Farmer *v.* Lewis, 1 Bush, 66; Royal *v.* Sprinkle, 1 Jones L. 505; Grandy *v.* Ferebee, 68 N. C. 356; Stenhouse *v.* R. R., 70 N. C. 542; Francis *v.* Edwards, 77 N. C. 271; Renneker *v.* Warren, 17 S. C. 139; Mapp *v.* Phillips, 32 Ga. 72; Wilcoxen *v.* Bohanan,

this respect, however, is cured, if after the declarations are received the agency is proved satisfactorily by independent evidence.[1]

§ 1184. As a matter of practice, an attorney, by admissions made during the trial of a case, or in correspondence relating to such trial, may conclude his client, in cases in which, on the faith of such admissions, a change of position is adopted on the other side. Such admissions, part of a mutual plan for the trial of the case, are irrevocable in the particular case by the client, except in case of fraud.[2] It is otherwise, however, with non-contractual admissions of the attorney, not

Attorney's admissions bind client.

53 Ga. 219; Wailes *v.* Neal, 65 Ala. 59; Craghead *v.* Wells, 21 Mo. 404; Hamilton *v.* Berry, 74 Mo. 176; Caldwell *v.* Henry, 76 Mo. 254; Coon *v.* Gurley, 49 Ind. 199; Breckenridge *v.* McAfee, 54 Ind. 141; La Rose *v.* Bank, 102 Ind. 332; Reynolds *v.* Ferrell, 86 Ill. 590; Erie Co. *v.* Cecil, 112 Ill. 189; Proctor *v.* Tows, 115 Ill. 138; Reynolds *v.* Ins. Co., 36 Mich. 151; North *v.* Metz, 57 Mich. 612; Sypher *v.* Savery, 39 Iowa, 258; McPherkin *v.* Jennings, 66 Iowa, 622; Streeter *v.* Poor, 4 Kans. 412; Howe Machine Co. *v.* Clark, 15 Kans. 492; Howcott *v.* Kilbourn, 44 Ark. 213.

"'An agent is competent to prove his own authority when it is by parol, but his declarations *in pais* are not proof of it; and though they become evidence, as parts of the *res gestae*, if made in the conduct of the business intrusted to him, yet other evidence must first establish his authority to speak before his words shall bind his principal. Jordan *v.* Stewart, 11 Harris, 244. Agency cannot be proved by the declarations of the agent, without oath, and in the absence of the party to be affected by them.' Clark *v.* Baker, 2 Wharton, 340; Chambers *v.* Davis, 3 Wharton, 44." Woodward, J., Grim *v.* Bonnell, 78 Penn. St. 152.

Nor can an agent's declarations be received on behalf of the principal, to prove that a third party was not also the principal's agent. Short Mountain Coal Co. *v.* Hardy, 114 Mass. 197.

As to inference of agency, see Thomas *v.* Wells, 140 Mass. 517.

[1] Rowell *v.* Klein, 44 Ind. 291. See Pinnix *v.* McAdoo, 68 N. C. 56.

Where a shareholder in a corporation applied to have his name taken from the register, alleging that he was persuaded to become a shareholder by a material misrepresentation in a prospectus issued by the company, and the only evidence of the untruth of the representation was a statement made by the chairman of the company in a speech addressed by him to a meeting of the shareholders, it was held that the statement was not admissible evidence against the company, inasmuch as the chairman in making it was not acting as the agent of the company in a transaction between them and a third party, but was making a confidential report to his own principal. Meux's Executor's case (2 D., M. & G. 522) distinguished. Devala Provident Gold Mining Company, In re Abbott, ex parte, 22 Ch. D. 593; 52 L. J. Ch. 434.

[2] Stephen's Ev. art. 17; Langley *v.* Oxford, 1 M. & W. 508; Elton *v.* Larkins, 1 M. & Rob. 196; 5 C. & P. 385; Doe *v.* Bird, 7 C. & P. 6; Marshall *v.* Cliffs, 4 Camp. 133; Pike *v.* Emerson, 5 N. H. 393; Burbank *v.* Ins. Co., 24 N. H. 550; Smith *v.* Hollister, 32 Vt. 695; Lewis *v.* Sumner, 13 Met. 269;

accepted as part of the mutual arrangements for the trial of the case.[1] Such admissions may be rebutted; but nevertheless they constitute *primâ facie* evidence, or, in other words, they relieve, at the first instance, the opposing party from the burden of proving that which they admit, supposing the authority of the attorney to be first proved.[2] Thus, an attorney, by admitting a signature to a document in litigation, relieves the opposing party from proving such signature;[3] by calling upon the opposite side to produce a bill

Herbert *v.* Alexander, 2 Call, 499; Daniel *v.* Ray, 1 Hill S. C. 32; Smith *v.* Bossard, 2 McCord Ch. 406; Wilson *v.* Spring, 64 Ill. 18; Lacoste *v.* Robert, 11 La. An. 33; Kohn *v.* Marsh, 3 Robt. La. 48; Smith *v.* Mulliken, 2 Minn. 319; Central R. R. *v.* Stroup, 28 Kan. 394. See fully Whart. on Agency, §§ 585 *et seq.* When a mistake may be recalled during the trial, see infra, § 1189.

"It has been repeatedly held that an attorney may admit facts on the trial, or, in pleading, waive a right of appeal, review, notice, etc., and confess a judgment. Talbot *v.* McGee, 4 Mon. 377; Pike *v.* Emerson, 5 N. H. 393; Alton *v.* Gilmanton, 2 Ibid. 520.

"In the case of Herbert *v.* Alexander, 2 Call, Va. R. 499, it was held that an attorney represents his clients, and in court may do such acts as his client might do himself.

"In the case of Pierce *v.* Perkins, 2 Dev. Eq. 250, it was held that a party after decree cannot dispute the authority of his attorney to bind him in any agreement made in conducting and determining the suit.

"In Smith *v.* Bossard, 2 McC. Ch. 406, it was held the attorney might bind the client by referring the matter in dispute to accountants without the knowledge of his client, and his assent to their report will be binding.

"From these adjudged cases, as well as upon principle, it is apparent that such admissions as were made on the trial in this case must bind the party, unless fraudulently and collusively made. Nor can it matter that one of the parties is a *feme covert*. Having committed her rights to an attorney, he must be held to have power to do the same acts on the trial which she could perform in person, and no one can controvert her power to admit that a particular sum was due on a mortgage executed by her, so as to be binding." Walker, J., Wilson *v.* Spring, 64 Ill. 18.

[1] Young *v.* Wright, 1 Camp. 141; Floyd *v.* Hamilton, 33 Ala. 235. By statute in Massachusetts formal pleadings are not evidence on trial. Supra, § 1116.

[2] Moulton *v.* Bowker, 115 Mass. 36; Lord *v.* Bigelow, 124 Mass. 185; Bathgate *v.* Haskin, 59 N. Y. 533; Perry *v.* Simpson Man. Co., 40 Conn. 313; Thomas *v.* Kinsey, 8 Ga. 421; McLean *v.* Clark, 47 Ga. 24; Cassels *v.* Usry, 51 Ga. 621; McRea *v.* Bank, 16 Ala. 755; People *v.* Garcia, 25 Cal. 531.

In Lord *v.* Bigelow, *ut sup.*, it was held that when an attorney, on a motion for an amendment, said, in support of his case, and in his client's presence, that his client would testify to certain facts, this was an admission by the client, which could be used against him in a suit by a third party.

[3] Milward *v.* Temple, 1 Camp. 375. An admission by counsel before a justice relieves from proving handwriting on appeal. Overholzer *v.* McMichael, 10 Penn. St. 139.

"accepted by A." (the client) admits A.'s acceptance:[1] by appearing for parties as owners of a ship admits their joint ownership.[2] And so on a second trial, a written agreement admitting certain facts signed by the counsel when the first trial opened, has been regarded as dispensing *primâ facie* with the proof of such facts,[3] though it would be otherwise as to oral admissions made for temporary use.[4] And a written admission to an auditor, to be used by the auditor in making up his report, is operative against the party in future proceedings in the same case.[5] But mere conversational admissions by an attorney, thrown off collaterally, cannot bind his client, the attorney being a special, not a general agent;[6] nor are such admissions receivable when made tentatively, for purposes of compromise,[7] nor are they admissible to establish facts in other cases than that in which they were made.[8] So casual and informal admissions by counsel at a formal trial are not evidence on a subsequent trial.[9] And in any view, an attorney's power thus to admit ceases when he withdraws from the case.[10]

Attorney's admissions on trial may be used by strangers.

§ 1185. An attorney's admission, when duly authorized, is to be treated as if made by the party himself.[11] Hence such admission may subsequently be used against such party by a stranger.[12]

[1] Holt *v.* Squire, Ry. & M. 282.

[2] Marshall *v.* Cliff, 4 Camp. 133.

[3] Van Wart *v.* Wolley, Ry. & M. 4; Truby *v.* Seybert, 12 Penn. St. 101; Merchants' Bk. *v.* Marine Bk., 3 Gill, 98.

[4] Mullen *v.* Ins. Co., 56 Vt. 69. See McKeen *v.* Gammon, 33 Me. 187. As to statements in opening addresses, see Oscanyon *v.* Arms Co., 103 U. S. 261; Person *v.* Wilcox, 19 Minn. 449.

[5] Holderness *v.* Baker, 44 N. H. 414.

[6] Doe *v.* Richards, 2 C. & K. 216; Patch *v.* Lyon, 9 Q. B. 147; Watson *v.* King, 3 C. B. 608; Holton *v.* Lake Co., 55 Ind. 194. See Murray *v.* Chase, 134 Mass. 92; Owen *v.* Cawley, 36 N. Y. 600.

"Admission of an attorney, in order to bind his client, must be distinct and formal, and made for the express purpose of dispensing with formal proof of a fact at the trial. Those which occur in mere conversations, though they relate to the matters in issue in the case, cannot be received in evidence against the client." 1 Greenleaf's Evid. § 186; Beck, J., Treadway *v.* R. R., 40 Iowa, 526.

[7] Saunders *v.* McCarthy, 8 Allen, 42. See Solomon R. R. *v.* Jones, 34 Kan. 444. Supra, § 1090.

[8] Tompkins *v.* Ashby, Moody & M. 32; Elting *v.* Scott, 2 Johns. 187, 163; Bayler *v.* Smithers, 1 T. B. Mon. 6; Isabelle *v.* Iron Co., 57 Mich. 120.

[9] Colledge *v.* Horn, 3 Bing. 119; R. *v.* Coyle, 7 Cox C. C. 74; Saunders *v.* McCarthy, 8 Allen, 43; Rockwell *v.* Taylor, 41 Conn. 55; Adee *v.* Howe, 15 Hun, 20; Douglass *v.* Mitchell, 35 Penn. St. 441; Wilkins *v.* Stidger, 22 Cal. 231.

[10] Janeway *v.* Skerritt, 30 N. J. L. 37.

[11] See supra, §§ 836 *et seq.*

[12] Ibid. In Truby *v.* Seybert, 12

Implied admissions of counsel bind particular case.

§ 1186. It must be remembered that in every trial there are facts with the proof of which counsel may tacitly agree to dispense. When a case is tried on this principle and is closed, such facts cannot ordinarily be disputed by the party by whom they have been tacitly admitted.[1]

Attorney's authority must be proved *aliunde*.

§ 1187. The employment of an attorney, like the employment of an agent, cannot be proved by his own admission; his admissions cannot be received, unless he is shown to be an attorney *aliunde*,[2] nor can his admissions out of court be received without proof of special authority.[3] The em-

Penn. St. 101, as explained in McDermott *v.* Hoffman, 70 Penn. St. 32, the point ruled was, "that if a party, or his counsel in his defence, make a concession of a fact within his own knowledge, which is pertinent in another issue with another plaintiff, the record of the first suit as introductory to evidence of the concession, and the concession itself, though proved by parol, are good evidence for the new plaintiff; and what is said by Mr. Justice Bell in that case is certainly true, that a record between other parties may be admissible in evidence whenever it contains a solemn admission or judicial declaration by any such parties in regard to the existence of any particular fact."

[1] Child *v.* Roe, 1 E. & B. 279; Stracy *v.* Blake, 1 M. & W. 168.

In the case of Colledge *v.* Horn, 3 Bing. 119; *S. C.* 10 Moore, 431; Taylor's Ev. § 709, on a second trial the defendant endeavored to avoid part of his opponent's demand, by proving an admission, which, on the former trial, had been made in the plaintiff's presence by the plaintiff's counsel, in his opening address to the jury. The judge rejected this evidence; and although the court above subsequently granted a new trial, they did so, not on the ground that the ruling was wrong, but because the facts were not sufficiently before them. Mr. Justice Burrough declared that if the plaintiff was in court, and heard what his counsel said, and made no objection, he was bound by the statement; but the other learned judges, it is said, forbore giving any opinion on a question which they held to be one of great nicety. See Haller *v.* Worman, 2 F. & F. 165; R. *v.* Coyle, 7 Cox C. C. 74. As to the authority of counsel to bind a client by a compromise or agreement made at the trial, see Swinfen *v.* Swinfen, 25 L. J. C. P. 303; 26 Ibid. 97; 1 Com. B. N. S. 364, *S. C.*; 27 L. J. Ch. 35, coram Romilly, M. R. *S. C.*; 24 Beav. 549, *S. C.*; Judgm. of M. R. aff'd by Lds. Js. 2 De Gex & J. 38; 27 L. J. Ch. 491, *S. C.*; Chambers *v.* Mason, 5 Com. B. N. S. 59; Swinfen *v.* Ld. Chelmsford, 5 H. & N. 890; Pristwick *v.* Poley, 34 L. J. C. P. 189; *S. C. nom.* Prestwick *v.* Poley, 18 Com. B. N. S. 806; Strauss *v.* Francis, L. R. 1 Q. B. 379; *S. C.* 7 B. & S. 365, and cases cited in Whart. on Agency, §§ 589 *et seq.*

[2] Supra, 1183; Burghart *v.* Angerstein, 6 C. & P. 645; Pope *v.* Andrews, 9 C. & P. 564; Wagstaff *v.* Wilson, 4 B. & Ad. 339.

[3] Snyder *v.* Armstrong, 6 Weekly Notes, 412. See Brightly Dig. 896.

ployment must be proved to include the particular suit as to which admission is made,[1] and as to matters not part of an attorney's duties to be special.[2]

Admissions of attorney's clerk equivalent to admissions of attorney.

§ 1188. The admissions made by an attorney's clerk, in performance of his ordinary office duties, are treated, when in the scope of his authorization, as tantamount to the admissions of the attorney himself.[3] The power of attorneys and their assistants, in this relation, is discussed at large in another work.[4]

Attorney's admissions may be recalled before judgment.

§ 1189. So far as concerns matters of law, no error of counsel can prejudice the client if such error is recalled before judgment. The court, in fact, as has been seen, can on its own motion correct defective law presented to it by counsel.[5] So far as concerns errors in fact, the statements of counsel, when made in the client's presence, and as his representative, are by the Roman law treated as if made by the client himself. "Ea quae advocati praesentibus his, quorum causae aguntur, allegant, perinde habenda sunt, ac si ab ipsis dominis litium proferantur."[6] But this is accepted with the qualification that the client is entitled to recall the admission at any time before judgment entered, if it should appear that the error is not traceable to any wrongful intent of his own, and that the opposite party is not prejudiced thereby.[7] It is otherwise when, in consequence of the attorney's admissions, the position of the opposite party has been altered so that it would be detrimental to the latter for the admission to be revoked.[8]

[1] Whart. on Agency, § 582; Wagstaff *v.* Wilson, 4 B. & Ad. 339; Moffit *v.* Witherspoon, 10 Ired. L. 185.

[2] Thus, when an attorney, on a motion upon application for a continuance, made affidavit that an absent witness would, if present, give certain testimony, but the witness afterwards attended the trial and testified differently, the fact of the attorney having made such affidavit was held not admissible in evidence against his client, it not appearing that the latter authorized it. Murray *v.* Chase, 134 Mass. 92.

[3] Griffiths *v.* Williams, 1 T. R. 710; Truelove *v.* Burton, 9 Moore, 64; Taylor *v.* Willans, 2 B. & Ad. 845; Standage *v.* Creighton, 5 C. & P. 406; Power *v.* Kent, 1 Cow. 211; Birkbeck *v.* Stafford, 14 Abb. (N. Y.) 285; *S. C.* 23 How. Pr. 236.

[4] Whart. on Agency, § 579.

[5] Supra, §§ 276, 283; Weber, Hefter's ed. 65.

[6] L. 1. C. de error advoc.

[7] See Mitchell *v.* Cotton, 3 Fla. 136, and cases cited supra, § 1184.

[8] See supra, § 1085.

§ 1190. A party who, when applied to for information as to a negotiation, says, "Go to R., who represents me in this matter," is bound by R.'s representations, within the scope of the reference, to the same effect as if R. was his duly appointed agent for the purpose.[1] This is eminently the case where one of several associates is constituted the mouthpiece of a firm for the purpose of specially answering questions.[2] On the same principle parties may bind themselves by the opinion of counsel acting as referee.[3] Such agreement to refer may be inferred from actions as well as from words.[4]

Referee's admissions bind principal.

§ 1191. If, in an agreement to refer, the parties mutually engage to be bound by the decision of the referee, the doctrine of estoppel would preclude a further agitation of the question;[5] but it is otherwise when there is simply a loose engagement by one party to bind himself if the other should determine a certain question in a particular way; for an engagement of this kind is open to attack on ground of misconception, mistake, or fraud.[6] In any view, the agreement to refer must be clearly shown,[7] and the answer of the referee must be within the scope of the reference.[8]

Party not estopped by unilateral reference.

A mere reference by a party in answer to inquiries as to his character, to the business men of the place he lives in, will not be sufficient to justify the declarations of such business men being put in evidence against him.[9]

[1] Hood *v.* Reeve, 3 C. & P. 532; Williams *v.* Innes, 1 Camp. 234; Daniel *v.* Pitt, 6 Esp. 74; Allen *v.* Killenger, 8 Wall. 480; Chapman *v.* Twitchel, 37 Me. 59; Bailey *v.* Blanchard, 62 Me. 168; Folsom *v.* Batchelder, 22 N. H. 47; Tuttle *v.* Brown, 4 Gray, 457; Chadsey *v.* Greene, 24 Conn. 562; Duval *v.* Covenhoven, 4 Wend. 561; Bedell *v.* Ins. Co., 3 Bosw. 147; Sands *v.* Shoemaker, 4 Abb. (N. Y.) App. 149; Wehle *v.* Spelman, 1 Hun, 634; *S. C.* 4 Thomp. & C. 648; Lambert *v.* People, 6 Abb. N. C. 181; Trustees *v.* Cokely, 5 Ind. 164; Hudspeth *v.* Allen, 26 Ind. 165; Delesline *v.* Greenland, 1 Bay, 458; McNeeley *v.* Hunton, 24 Mo. 281. But the authorization must be specific, Lambert *v.* People, N. Y. Ct. of App. 1879.

[2] Shaw *v.* Stone, 1 Cush. 228.

[3] Sybray *v.* White, 1 M. & W. 435; Downs *v.* Cooper, 2 Q. B. 256; Price *v.* Hollis, 1 M. & Sel. 105.

[4] Gardner *v.* Moult, 10 A. & E. 464; Pritchard *v.* Bagshawe, 11 C. B. 459; Boileau *v.* Rutlin, 2 Exch. R. 675.

[5] See Males *v.* Lowenstein, 10 Ohio St. 512; Burrows *v.* Guthrie, 61 Ill. 70; Trustees *v.* Cokely, 5 Ind. 164; Reynolds *v.* Roebuck, 37 Ala. 408.

[6] Garnet *v.* Bell, 3 Stark. R. 160; though see Lloyd *v.* Willan, 1 Esp. 178.

[7] Barnard *v.* Macy, 11 Ind. 536.

[8] Duvall *v.* Covenhoven, 4 Wend. 561.

[9] Rosenbury *v.* Angell, 6 Mich. 508.

VII. ADMISSIONS BY PARTNERS AND PERSONS JOINTLY INTERESTED.

§ 1192. When several persons are jointly interested in a common enterprise, the declarations of one of them are receivable in evidence against the others, as well as against himself, if such declarations were made when the declarant was engaged in carrying on the enterprise. Each party becomes the agent of the others, privileged to bind the others, under the limitation heretofore expressed as to agency.[1] This liability extends to non-contractual as well as to contractual admissions. Thus, where the obligee of a bond filed a bill against two joint and several obligors, alleging that the bond had been delivered up to one of them by mistake, and praying that he, the obligee, might recover the amount due on it, an admission by the party to whom the bond was given up, that it had been delivered to her by mistake, was held to be evidence against the coöbligor, though the joint answer of the defendants had traversed the allegation as to mistake, and, simply admitting the delivery of the bond, had stated that the party to whom it was given up had destroyed it.[2] And incidental statements made by one joint proprietor of a theatre have been admitted against his co-proprietors.[3]

Admissions of persons jointly interested receivable against each other.

§ 1193. Such declarations, however, to be admissible, must relate to a matter of joint business in which there is reciprocal liability;

[1] Kemble *v.* Farren, 3 C. & P. 623; American Fur Co. *v.* U. S., 2 Pet. 358; State *v.* Soper, 16 Me. 293; Davis *v.* Keene, 23 Me. 69; State *v.* Thibeau, 30 Vt. 100; Martin *v.* Root, 17 Mass. 222; Com. *v.* Brown, 14 Gray, 419; Colt *v.* Eves, 12 Conn. 243; Crippen *v.* Morss, 49 N. Y. 63; Chester *v.* Dickerson, 54 N. Y. 1; Trego *v.* Lewis, 58 Penn. St. 463; Walker *v.* Pierce, 21 Grat. 722; Dickinson *v.* Clark, 5 W. Va. 280; Rollins *v.* Henry, 84 N. C. 569; Bernhardt *v.* Smith, 86 N. C. 473; Patten *v.* Ohio, 6 Ohio St. 467; Dickerson *v.* Turner, 12 Ind. 223; Falkner *v.* Leith, 15 Ala. 9; Stewart *v.* State, 26 Ala. 44; Mask *v.* State, 32 Miss. 405; Armstrong *v.* Farrar, 8 Mo. 627; State *v.* Ross, 29 Mo. 32; Irby *v.* Brigham, 9 Humph. 750; State *v.* Hogan, 3 La. An. 714; Tuttle *v.* Turner, 28 Tex. 759.

Where A. and others petitioned for damages for the taking of separate parcels of land by a city in constructing water-works, declarations made by A. before the taking to the effect that the lands in the neighborhood would be benefited by the water-works, were admitted against all the petitioners, although A. was at the time a member of the city government. Williams *v.* Taunton, 125 Mass. 34.

[2] Crosse *v.* Bedingfield, 12 Sim. 35.

[3] Kemble *v.* Farren, 3 C. & P. 623.

mere community of interest, as we will see,[1] will not be enough to sustain such admissibility.[2] Thus, where a member of a firm of machinists, in Baltimore, engaged in an enterprise for the running of an ice and tow boat, his declarations in this relation were held not admissible against his partners in the machine business.[3] It may be otherwise as to acts and declarations of tenants in common in each other's presence when offered to settle their respective rights.[4]

Such declarations must relate to a joint business.

§ 1194. Wherever a settled partnership is first established, the admissions of one partner are admissible against his fellow partners, when made as to partnership affairs, during the continuance of the partnership,[5] though they cannot be received to prove the partnership.[6] Even the

Admissions of partners reciprocally admissible.

[1] Infra, § 1199.

[2] 1 Phil. Ev. 378; Brannon *v.* Hursell, 112 Mass. 63; Eliott *v.* Dudley, 19 Barb. 326; Union Bank *v.* Underhill, 102 N. Y. 336; Edwards *v.* Tracy, 62 Penn. St. 378; White *v.* Gibson, 11 Ired. L. 283; Hilton *v.* McDowell, 87 N. C. 364; South. Life Ins. Co. *v.* Wilkinson, 53 Ga. 545, and cases cited infra, § 1199. See Newan *v.* Rapier, 57 Miss. 100.

[3] Wells *v.* Turner, 16 Md. 133.

[4] Crippen *v.* Morss, 49 N. Y. 63.

[5] Rapp *v.* Latham, 2 B. & Ald. 795; Fox *v.* Clifton, 6 Bing. 792; Latch *v.* Wedlake, 11 Ad. & E. 959; Nicholls *v.* Dowding, 1 Stark. R. 81; R. *v.* Hardwick, 11 East, 589; Sandilands *v.* March, 2 B. & Ald. 673; Lincoln *v.* Claflin, 7 Wall. 132; Bank U. S. *v.* Lyman, 20 Vt. 666; Barrett *v.* Russell, 45 Vt. 43; Smith *v.* Collins, 115 Mass. 388; Gandolfo *v.* Appleton, 40 N. Y. 533; Moers *v.* Martens, 17 How. Pr. 280; Wells *v.* Turner, 16 Md. 133; McKee *v.* Hamilton, 33 Ohio St. 1; Adams *v.* Funk, 53 Ill. 219; Hahn *v.* Savings Bank, 50 Ill. 456; Bennett *v.* Holmes, 32 Ind. 108; State *v.* Nash, 10 Iowa, 81; Peck *v.* Lusk, 38 Iowa, 93; People *v.* Pitcher, 15 Mich. 397; McFadyen *v.* Harrington, 67 N. C. 29; Johnson *v.* State, 29 Ala. 62; Cady *v.* Kyle, 47 Mo. 346; Oldham *v.* Bentley, 6 B. Mon. 428. Where A., B., and C. sue D. as partners, upon an alleged contract for the shipment of bark, an admission by A. that the bark was his exclusive property, and not that of the firm, has been held receivable against B. and C. Lucas *v.* De La Cour, 1 M. & S. 249.

[6] Ibid.; infra, § 1200; Edwards *v.* Tracy, 62 Penn. St. 378; Cross *v.* Langley, 50 Ala. 8; Campbell *v.* Hastings, 29 Ark. 512; McCann *v.* McDonald, 7 Neb. 305.

"The declarations of a party to the suit as to the existence of a partnership are unquestionably competent to prove him to have been a member of the alleged firm, and who were admitted by him to have been the persons composing it. Such declarations are not, however, competent evidence against the others, and it is the duty of the court so to instruct the jury. Taylor *v.* Henderson, 17 S. & R. 453; Johnston *v.* Warden, 3 Watts, 101; Haughey *v.* Strickler, 2 W. & S. 411; Lenhart *v.* Allen, 8 Casey, 312; Bowers *v.* Still, 13 Wright, 65; Crossgrove *v.* Himmel-

admissions of a silent partner, not made a party in the case, may be used against his associates.[1]

§ 1195. By Lord Tenterden's Act of 1828 (adopted in several of the United States) one partner cannot, even by a written acknowledgment of a debt, either during the partnership, or after its dissolution, take the case out of the statute of limitations, as against the other members of the firm.[2] In New York the same rule is held at common law as to claims which would otherwise be barred,[3] unless agency may be inferred so as to bind the partners affected.[4] But in other jurisdictions, such an admission by one partner, after dissolution of the firm, has been held at common law to do away with the statute as to prior partnership liabilities.[5] The same difference of opinion exists as to the power of one joint debtor to bind his co-debtor by his acknowledgment of a debt which would otherwise have expired. The better view is that this power does not exist unless specially conferred, wherever the joint debt is not continuous and in itself confers no authority to either debtor to keep it alive.[6]

As to acknowledgment to take case out of statute of limitations.

rich, 4 P. F. Smith, 203. The same rule has been applied to the admissions of a defendant not served with process, and not, therefore, a party to the issue. Porter *v.* Wilson, 1 Harris, 641." Sharswood, J., Edwards *v.* Tracy, 62 Penn. St. 378.

Proof of hostile relations between partners may affect credibility, but does not exclude. Western Ass. Co. *v.* Towle, 65 Wis. 247.

[1] Weed *v.* Kellogg, 6 McLean, 44; Fickett *v.* Swift, 41 Me. 65; Webster *v.* Stearns, 44 N. H. 498; Odiorne *v.* Maxcy, 15 Mass. 39; Munson *v.* Wickwire, 21 Conn. 513; Chester *v.* Dickerson, 54 N. Y. 1; Folk *v.* Wilson, 21 Md. 538; Holmes *v.* Budd, 11 Iowa, 186; Fail *v.* McArthur, 31 Ala. 26; American Iron Co. *v.* Evans, 27 Mo. 552; Mamlock *v.* White, 20 Cal. 598.

[2] Taylor's Evidence, §§ 537, 675. As to similar statutes in this country, see Bailey *v.* Corliss, 51 Vt. 366; Faulkner *v.* Bailey, 123 Mass. 538; Rogers *v.* Anderson, 40 Mich. 290.

[3] Van Kensen *v.* Parmalee, 2 N. Y. 503. See Gaunce *v.* Backhouse, 37 Penn. St. 350.

[4] Nichols *v.* White, 85 N. Y. 531.

[5] Buxton *v.* Edwards, 134 Mass. 567; Bissell *v.* Adams, 35 Conn. 299; Merritt *v.* Day, 38 N. J. L. 32. But see infra, § 1201; Story on Partnership, § 324 *a*.

[6] Shoemaker *v.* Benedict, 11 N. Y. 176; Wallis *v.* Randall, 81 N. Y. 164; Slaymaker *v.* Gundacker, 10 S. & R. 75; Buch *v.* Stowell, 71 Penn. St. 208; Hance *v.* Hair, 25 Ohio St. 349. See, *contra*, Shapley *v.* Waterhouse, 22 Me. 497; Dennie *v.* Williams, 135 Mass. 28; Caldwell *v.* Sigourney, 19 Conn. 37.

§ 1196. Although, after dissolution of the partnership, the power to bind by admissions ceases,[1] it may be kept alive by special agreement.[2] And it has been further ruled that a self-disserving admission, by a former partner, after the dissolution of the firm, as to a firm transaction which is still unclosed, is admissible as *primâ facie* evidence against the firm;[3] though, if the partner ceases to have any interest in the result, the reason for such admission fails.[4]

Power ceases at dissolution.

Entries in the partnership books by one partner are admissible, after the partnership is closed, to charge a copartner, when the latter had opportunity to examine the books at the time of entry, and did not dissent.[5]

§ 1197. In a suit by joint contractors, the admissions of one of their number who acts for the others are receivable as the declarations of all;[6] and hence in a suit against parties who have agreed to buy a boat, the admissions of one, in the scope of the business, bind the others.[7] The admissions of a joint covenantor, no matter how small may be his interest,[8] are by the same reasoning admissible against his associates.

So as to joint contractors and other associates.

[1] Kilgour *v.* Finlyson, 1 H. Bl. 155; Parker *v.* Merrill, 6 Greenl. 41; Baker *v.* Stackpoole, 9 Cow. 420; Bank of Vergennes *v.* Cameron, 7 Barb. 143; Williams *v.* Manning, 41 How. (N. Y.) Pr. 454; Tassey *v.* Church, 4 W. & S. 141; Hogg *v.* Orgill, 34 Penn. St. 344; Miller *v.* Neimerick, 19 Ill. 172; Winslow *v.* Newlan, 45 Ill. 145; Pennoyer *v.* David, 8 Mich. 407; Daniel *v.* Nelson, 10 B. Mon. 316; Morgan *v.* Hubbard, 66 N. C. 394; Johnson *v.* Marsh, 2 La. An. 772; Dowzelot *v.* Rawlings, 58 Mo. 75; Flowers *v.* Helm, 29 Mo. 324. Infra, § 1202.

"While the partnership continues, the declarations or admissions of each of the partners made in respect to the business of the firm will bind it. But upon the occurrence of a dissolution, this power to bind the firm, by either acts or declarations, comes to an end." Dowzelot *v.* Rawlings, 58 Mo. 77; Sherwood, J. See Shelmire's Appeal, 70 Penn. St. 285.

[2] Burton *v.* Issit, 5 B. & Ald. 267; Ide *v.* Ingraham, 5 Gray, 106.

[3] Pritchard *v.* Draper, 1 Rus. & M. 191; Pierce *v.* Wood, 23 N. H. 519; Loomis *v.* Loomis, 26 Vt. 198; Bridge *v.* Gray, 14 Pick. 55; Hitt *v.* Allen, 13 Ill. 592; Fisher *v.* Tucker, 1 McCord Ch. 169; Cochran *v.* Cunningham, 16 Ala. 448; Curry *v.* Kurtz, 33 Miss. 24; Nalle *v.* Gates, 20 Tex. 315.

[4] Taylor's Evidence, citing Parker *v.* Morrell, 2 Phill. 464; *S. C.* 2 C. & Kir. 599; Gillinghan *v.* Tebbetts, 33 Me. 360; Coppage *v.* Barnett, 34 Miss. 621.

[5] Dunnell *v.* Henderson, 23 N. J. Eq. 174. Supra, §§ 1131–3.

[6] Bank U. S. *v.* Lyman, 20 Vt. 666.

[7] Rotan *v.* Nichols, 22 Ark. 244.

[8] Walling *v.* Rosevelt, 16 N. J. L. 41.

§ 1198. Admissibility, in the cases we have just enumerated, does not depend upon the declarant being summoned as a party to the suit in which his declarations are offered. If, at the time of the declarations, he were engaged in a joint enterprise with either of the parties to the suit, his declarations are admissible, when within the scope of the joint interest, against them.[1]

Persons interested, but not parties to suit, may affect such suit by their admissions.

§ 1199. There must, however, in order to prejudice parties by each other's declarations, be such a joinder, or concert in the particular matter from which the declaration emanates, as makes them each other's representatives in the enterprise. The mere possession of common interests does not impose this reciprocal liability;[2] nor will even A.'s joint liability with B., in absence of any proof of agency or other representative capacity, cause A. to be bound by B.'s admissions.[3] Thus, the admission of the receipt of money by one of several trustees, joint defendants, but not personally liable, has been held not receivable to charge the other trustees;[4] nor the admission of one of several tort-feasors, unless part of the *res gestae*;[5] nor can the admission of one executor be received to prove a debt against his co-executors;[6] nor the admission of one part-owner of a schooner as to the cost of certain repairs, against the other

Mere community of interest not enough to extend such liability.

[1] Whitcomb *v.* Whiting, 2 Dougl. 652; Wood *v.* Braddick, 1 Taunt. 104; Weed *v.* Kellogg, 6 McLean, 44; Bucknam *v.* Barnum, 15 Conn. 68, and cases cited supra, § 1192.

[2] Fox *v.* Waters, 12 Ad. & E. 43; Scholey *v.* Walton, 12 M. & W. 514; Tullock *v.* Dunn, R. & M. 416; Lamar *v.* Micon, 112 U. S. 452; Brannon *v.* Hursell, 112 Mass. 63; Elliott *v.* Dudley, 19 Barb. 326; Slaymaker *v.* Gundacker, 10 S. & R. 75; Edwards *v.* Tracy, 62 Penn. St. 378; Wells *v.* Turner, 16 Md. 133; Eakle *v.* Clarke, 30 Md. 322; Chamberlain *v.* Dow, 10 Mich. 319; Wonderly *v.* Booth, 19 Ind. 169; Blakeney *v.* Ferguson, 14 Ark. 641; Dickenson *v.* Clarke, 5 W. Va. 280; White *v.* Gibson, 11 Ired. 283; South. Life Ins. Co. *v.* Wilkinson, 53 Ga. 545; McCune *v.* McCune, 29 Mo. 117; McDermott *v.* Mitchell, 47 Cal. 249. See McElroy *v.* Ludlum, 32 N. J. L. 828. A bare trustee cannot thus bind his principal. Godbee *v.* Sapp, 53 Ga. 283.

[3] Wallis *v.* Randall, 81 N. Y. 164.

[4] Davies *v.* Ridge, 3 Esp. 101; Walker *v.* Dunspaugh, 20 N. Y. 170; Jex *v.* Board, 1 Hun, 157.

[5] Carpenter *v.* Welden, 5 Sandf. 77.

[6] Fox *v.* Waters, 12 Ad. & E. 43; Tullock *v.* Dunn, Ry. & M. 416; Scholey *v.* Walton, 12 M. & W. 514; Elwood *v.* Deifendorf, 5 Barb. 398; Hammon *v.* Huntley, 4 Cow. 493; Church *v.* Howard, 79 N. Y. 415. See infra, § 1199 *a*. See Pease *v.* Phelps, 10 Conn. 62. Compare 8 Cent. L. J. 82.

part-owners, they being tenants in common and not partners;[1] nor the admission of one of several part-owners or tenants in common against his associates;[2] nor for such purpose the admission by one of several members of a board of public officers;[3] nor by one of several underwriters on the same policy;[4] nor the admissions of some of several legatees as to the insanity of the testator, as against the rest;[5] nor, generally, the statements of one of several co-distributees, co-legatees, or co-devisees against another, even though the declarant should be a party to the case, unless concert as to the admissions be proved.[6] It is otherwise, as we have seen, with declarations of tenants in common, in each other's presence, as to their respective rights.[7] Nor, notwithstanding the opinion of high authorities to the contrary,[8] can the admissions of inhabitants of a town or other municipal body be received as evidence against such body.[9]

[1] The New Orleans, 106 U. S. 13.

[2] Jaggers *v.* Binnings, 1 Stark. R. 64; McLellan *v.* Cox, 36 Me. 95; Page *v.* Swanton, 39 Me. 400; Cuyler *v.* McCartney, 40 N. Y. 228; Dan *v.* Brown, 4 Cow. 483; Pier *v.* Duff, 63 Penn. St. 63. See Bryant *v.* Booze, 55 Ga. 438.

[3] Lockwood *v.* Smith, 5 Day, 309; Jex *v.* Board, 1 Hun, 157.

[4] Lambert *v.* Smith, 1 Cranch C. C. 361.

[5] Irwin *v.* West, 81 Penn. St. 157; McMillan *v.* McDill, 110 Ill. 47; Coryell *v.* Stone, 62 Ind. 307.

[6] Shailer *v.* Bumpstead, 99 Mass. 130; Osgood *v.* Manhattan Co., 3 Cow. 612; Boyd *v.* Eby, 8 Watts, 66; Hauberger *v.* Root, 6 W. & S. 431; Dotts *v.* Fetzer, 9 Penn. St. 88; Clark *v.* Morrison, 25 Penn. St. 453; Titlow *v.* Titlow, 54 Penn. St. 222; Walkup *v.* Pratt, 5 Har. & J. 53; Forney *v.* Ferrell, 4 W. Va. 729; Thompson *v.* Thompson, 13 Ohio St. 356; McMillan *v.* McDill, 110 Ill. 47; Hayes *v.* Burkham, 51 Ind. 130; Roberts *v.* Frawick, 13 Ala. 68; Blakey *v.* Blakey, 33 Ala. 616; Prewett *v.* Coopwood, 30 Miss. 369; Turner *v.* Belden, 9 Mo. 787; Hambright *v.* Brockman, 59 Mo. 52. See, *contra*, Greenleaf's Ev. § 174; Atkins *v.* Sanger, 1 Pick. 192; Jackson *v.* Vail, 7 Wend. 125. And see Milton *v.* Hunter, 13 Bush, 163, where it is held that the declarations of one legatee may be received against another legatee, being appellees on a question of probate, the question being whether there was undue influence or imposition at the execution of the will, such declarations not being received as admissions, but as declarations against interest.

Where several devisees contest the validity of a will, the declarations and admissions of a deceased devisee are admissible in evidence as regards his interest against a devisee who had acquired said interest on the ground of privity of estate. Mueller *v.* Rebham, 94 Ill. 142. See Hayes *v.* Burkham, 67 Ind. 359.

[7] Crippen *v.* Morss, 49 N. Y. 63.

[8] See 1 Greenl. Ev. § 175; R. *v.* Whitley Lower, 1 M. & S. 637; R. *v.* Adderbury, 5 Q. B. 187.

[9] See Burlington *v.* Calais, 1 Vt. 385; Low *v.* Perkins, 10 Vt. 385; Watertown *v.* Cowen, 4 Paige, 510.

§ 1199 *a*. The admission of an heir cannot prejudice the executor;[1] nor that of a tenant for life, the remainderman.[2] Nor are the declarations of an administrator admissible against a special administrator, appointed to act during the administrator's absence from the country.[3] Nor, as we have seen, do the admissions of an executor in themselves bind co-executors,[4] nor a subsequent administrator *de bonis non*,[5] nor do a sole executor's declarations bind the estate, unless made when acting officially.[6] Nor does one of two executors' admissions bind the estate or his co-executor.[7] Nor can the admission of an indorser of negotiable paper prejudice another *bonâ fide* indorser,[8] though it may be otherwise as to joint indorsers who indorsed in concert.[9] Where a party takes negotiable paper that is overdue, or with notice, he is open to be affected on trial by the admissions of his predecessors in title,[10] provided such admissions were before the assignment.[11]

Admissions of heirs, executors, and parties to negotiable paper.

§ 1200. Yet we must remember that we cannot prove that a party is jointly interested by his own declarations, and then introduce his declarations for the reason that he is jointly interested, even though he be joined in the record. This would be equivalent to saying that his declarations

Declarations of declarant cannot prove his

[1] Osgood *v.* Manhattan Co., 3 Cow. 612; Dillard *v.* Dillard, 2 Strobh. 89; though see Reagan *v.* Grim, 13 Penn. St. 508, as to cases in which the administrator is the mere representative of the heirs.

[2] Hill *v.* Roderick, 4 Watts & S. 221; Pool *v.* Morris, 29 Ga. 374. Supra, § 1161.

[3] Rush *v.* Peacock, 2 M. & Rob. 162. See McArthur *v.* Carrie, 32 Ala. 75.

[4] See cases cited supra, § 1199; Bridan *v.* Allan, 10 Ill. Ap. 91.

But in a suit by A., administratrix of B., against C., son and administrator of B.'s husband, as an individual, and not as an administrator, to recover chattels alleged to belong to her estate, C.'s admissions are admissible. Whiton *v.* Snyder, 88 N. Y. 299.

[5] Pease *v.* Phelps, 10 Conn. 62. See Eckert *v.* Triplett, 48 Ind. 174, to the effect that such admissions are *primâ facie* evidence.

[6] Infra, § 1210; Lamar *v.* Micon, 112 U. S. 452; Brooks *v.* Goss, 61 Me. 307; Church *v.* Howard, 79 N. Y. 415.

[7] Supra, § 1119.

[8] Russell *v.* Doyle, 15 Me. 112; Washburn *v.* Ramsdell, 17 Vt. 299; Baker *v.* Briggs, 8 Pick. 122; Lewis *v.* Woodworth, 2 Comst. 512; Beach *v.* Wise, 1 Hill (N. Y.), 612; Slaymaker *v.* Gundacker, 10 S. & R. 75; Crayton *v.* Collins, 2 McCord, 457; Perry *v.* Graves, 12 Ala. 246; Dowty *v.* Sullivan, 19 La. An. 448; Blancjour *v.* Tutt, 32 Mo. 576. See § 1163 *a*.

[9] Howard *v.* Cobb, 3 Day, 309; Bound *v.* Lathrop, 4 Conn. 336; Painter *v.* Austin, 37 Penn. St. 458; Camp *v.* Dill, 27 Ala. 553.

[10] Supra, § 1163 *a*.

[11] Ibid.

joint interest as against his alleged partners.

are admissible because he is a party, and that he is a party because his declarations are admissible. In order to introduce such declarations, we must first prove to the satisfaction of the court that the person making them was jointly interested in a common enterprise with the parties against whom his declarations were offered, and that his declarations were in the carrying on of this common enterprise.[1] This is familiar law when partnership is sought to be proved by the admission of a putative partner;[2] and even a statement by one partner, that certain indebtedness incurred by himself is for the firm, is inadmissible to charge the firm.[3] The same doctrine has been expressed in a suit against three persons charged with having jointly made a promissory note. In such case, it is held, the joint making must be proved before the admission of one of the alleged makers can be used against the other.[4] But if the declarant be by any process sued alone, as survivor, or if judgment has been taken by default against his associates, then as against himself such declarations can be received.[5]

[1] Supra, § 1194; Gray *v.* Palmers, 1 Esp. 135; Catt *v.* Howard, 3 Stark. R. 3; Buckingham *v.* Burgess, 1 McLean, 549; Burnham *v.* Sweatt, 16 N. H. 418; Burke *v.* Miller, 7 Cush. 547; Winchester *v.* Whitney, 138 Mass. 549; Cuyler *v.* McCartney, 40 N. Y. 228; Kimmell *v.* Geeting, 2 Grant (Penn.), 125; Benford *v.* Sanner, 40 Penn. St. 9; Cowan *v.* Kinney, 33 Ohio St. 422; Boswell *v.* Blackman, 12 Ga. 591; Rimel *v.* Hayes, 83 Mo. 200.

[2] Gibbons *v.* Wilcox, 2 Stark. 81; Grant *v.* Jackson, Peake, 214; Flower *v.* Young, 3 Camp. 240; Cooper *v.* Smith, 4 Taunt. 802; Queen Caroline's case, 2 Br. & B. 302; Pleasants *v.* Fant, 22 Wallace, 116; Burgess *v.* Lane, 3 Me. (3 Greenl.) 165; Gooch *v.* Bryant, 13 Me. 386; Grafton Bank *v.* Moore, 13 N. H. 99; Tuttle *v.* Cooper, 5 Pick. 414; Burke *v.* Miller, 7 Cush. 547; Dutton *v.* Woodman, 9 Cush. 255; Bucknam *v.* Barnum, 15 Conn. 68; Whitney *v.* Ferris, 10 Johns. R. 66; Jones *v.* Hurlbut, 39 Barb. 403; Harris *v.* Wilson, 7 Wend. 57; Flanigin *v.* Champion, 2 N. J. Eq. 51; Uhler *v.* Browning, 28 N. J. L. 79; Lenhart *v.* Allen, 32 Penn. St. 312; Edwards *v.* Tracy, 62 Penn. St. 378; Clawson *v.* State, 14 Ohio St. 234; Pierce *v.* McConnell, 7 Blackf. 170; Boor *v.* Lowrey, 103 Ind. 468; Wiggins *v.* Leonard, 9 Iowa, 194; Metcalf *v.* Conner, Litt. (Ky.) Cas. 497; McCorkle *v.* Doby, 1 Strobh. 396; White *v.* Gibson, 11 Iredell L. 283; Henry *v.* Willard, 73 N. C. 35; Scott *v.* Dansby, 12 Ala. 714; Cross *v.* Langley, 50 Ala. 8; Clark *v.* Huffaker, 26 Mo. 264; Berry *v.* Lathrop, 24 Ark. 12; Campbell *v.* Hastings, 29 Ark. 512.

Partnership cannot be proved by report of a mercantile agency unless authorized by the partners. Cook *v.* State Co., 36 Ohio St. 135.

[3] Elliott *v.* Dudley, 19 Barb. 326; White *v.* Gibson, 11 Ired. L. 283.

[4] Gray *v.* Palmers, 1 Esp. 135.

[5] Ellis *v.* Watson, 2 Stark. R. 453, Abbott, C. J.

After dissolution the power ceases. Supra, § 1196.

And in any view, partnership may be established by the several declarations and acts of the partners charged.[1]

It has been held that the declaration of one of two alleged partners, that he, the declarant, was solely liable on the debt, is admissible, when self-disserving, on behalf of the other alleged partner.[2] It is otherwise, however, in cases in which such partner could be called as a witness.[3]

After death admissions by survivor cannot bind estate of associates nor the converse.

§ 1201. If one of the parties engaged in a common enterprise die, death, in dissolving the relationship, closes, as we have seen, the power of the survivor to charge, by his admissions, the estate of the deceased.[4] For the same reason, the declarations of the executor or the administrator of the deceased party cannot affect the survivor.[5]

Admissions in fraud of associates may be rebutted.

§ 1202. Supposing a case to occur in which one associate makes admissions in fraud of another, the associates thus prejudiced have it open to them to apply the same checks, as will presently be noticed, in respect to fraudulent admissions by a nominal plaintiff. It will be permitted to the parties, against whom such admissions are offered, to prove their fraud and falsity.[6] It is true that if the admissions are contractual, and if the party making them had apparent authority to make them, his associates are bound to parties *bonâ fide* acting on such admissions.[7] But if the admissions are non-contractual, they can be rebutted.[8]

Self-serving declarations of associate not admissible.

§ 1203. When the effect of a declaration, by one party to a joint obligation, is to throw the indebtedness on the other, such declaration is inadmissible, in a suit to fix the other.[9]

[1] Reed *v.* Kremer, 111 Penn. St. 482.

[2] Lucas *v.* De la Cour, 1 M. & Sel. 249; Starke *v.* Kenan, 11 Ala. 818; Danforth *v.* Carter, 4 Iowa, 230.

[3] Carlyle *v.* Plumer, 11 Wisconsin, 96.

[4] Supra, §§ 1180, 1196; Story on Partnership, § 324 *a*; Atkins *v.* Tredgold, 2 B. & C. 63; Fordham *v.* Wallis, 10 Hare, 217; Slaymaker *v.* Gundacker, 10 S. & R. 75; Gaunce *v.* Backhouse, 37 Penn. St. 350. See Boyd *v.* Foot, 5 Bosw. 110. And as to binding by taking debt out of statute, see supra, § 1195.

[5] Slater *v.* Lawson, 1 B. & Ad. 396; Hathaway *v.* Haskell, 9 Pick. 24.

[6] Taylor's Ev. § 679; citing Phillips *v.* Clagett, 11 M. & W. 84; Rawstone *v.* Gandell, 15 M. & W. 304.

[7] Supra, §§ 1083–4.

[8] Supra, § 1088.

[9] Very *v.* Watkins, 23 How. 469.

§ 1204. A plaintiff, unless there be proof of confederacy on the part of the defendants, cannot use the admission of one defendant against the other.[1] It is otherwise in cases of confederacy, or in cases, as we have had occasion to see, where the declarant was the agent of the party against whom the declaration is used.[2] Such statements as are part of the *res gestae* are of course receivable.[3] Hence, though the declarations of co-trespassers, when a narrative of past events, are inadmissible against each other, such declarations, during the execution of the trespass, are admissible as part of the *res gestae*.[4] But in a suit against two or more co-defendants, admissions made by one of them cannot be excluded on motion of the others, their only remedy being to request a charge limiting the effect of the evidence.[5]

Co-defendants' admissions not reciprocally applicable, but otherwise when concert is proved.

§ 1205. Wherever conspiracy is shown (which is usually inductively from circumstances), the declarations of one co-conspirator, in furtherance of the common design, as long as the conspiracy continues, are admissible against his associates, though made in the absence of the latter.[6]

Admission of co-conspirators receivable against each other.

[1] Daniels *v.* Potter, M. & M. 501; Morse *v.* Royal, 12 Ves. 362. See as to imputability of admissions of grantor or assignor to grantee or assignee, when collusion is shown, supra, § 1166.

[2] Lincoln *v.* Claflin, 7 Wall. 132; Jacobs *v.* Shorey, 48 N. H. 100; State *v.* Larkin, 49 N. H. 139; Jenne *v.* Joslyn, 41 Vt. 478; Bridge *v.* Eggleston, 14 Mass. 250; Wiggins *v.* Day, 9 Gray, 97; Com. *v.* Ratcliffe, 130 Mass. 30; Dart *v.* Walker, 3 Daly, 138; Scott *v.* Baker, 37 Penn. St. 330; McCabe *v.* Burns, 66 Penn. St. 356; Claytor *v.* Anthony, 6 Rand. 285; Ellis *v.* Dempsey, 4 W. Va. 126; Snyder *v.* Laframboise, Breese, 268; Miller *v.* Sweitzer, 22 Mich. 391; Raisler *v.* Springer, 38 Ala. 703; Street *v.* State, 43 Miss. 1; Harrison *v.* Wisdom, 7 Heisk. 99; Gray *v.* Nations, 1 Ark. 557; People *v.* Trim, 39 Cal. 75. Supra, §§ 1174, 1176. See as to criminal cases, Whart. Cr. Ev. § 698.

[3] Supra, § 258.

[4] North *v.* Miles, 1 Camp. 389; Bowsher *v.* Calley, 1 Camp. 391; R. *v.* Hardwick, 11 East, 585; Powell *v.* Hodgetts, 2 C. & P. 432. See Wright *v.* Comb, 2 C. & P. 232; Daniels *v.* Potter, M. & M. 503.

[5] Lewis *v.* Lee Co., 66 Ala. 460.

[6] R. *v.* Stone, 6 T. R. 528; Nudd *v.* Burrows, 91 U. S. 426; U. S. *v.* McKee, 3 Dill. 546; Lee *v.* Lamprey, 43 N. H. 13; Dole *v.* Woolredge, 142 Miss. 161; Apthrop *v.* Comstock, 2 Paige, 482; Ormsby *v.* People, 53 N. Y. 472; Dewey *v.* Moyers, 72 N. Y. 70; Kimmell *v.* Geeting, 2 Grant (Penn.), 125; Jackson *v.* Summerville, 13 Penn. St. 359; Kelsey *v.* Murphy, 26 Penn. St. 78; Brown *v.* Parkinson, 58 Penn. St. 458; Burns *v.* McCabe, 72 Penn. St. 309; Confer *v.* McNeal, 74 Penn. St. 112; Chicago R. R. *v.* Collins, 56 Ill. 212; Philpot *v.* Taylor, 75 Ill. 309; Riehl *v.* Foundry Ass., 104 Ind. 70; Kenyon *v.* Wood-

"The least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all."[1] But the conspiracy must be first shown.[2]

But not after conspiracy closed.

§ 1206. But here, as in other previous modifications of the rule before us, we must keep in mind the underlying distinction between admissions in furtherance of a conspiracy and admissions after its close. An admission of a co-conspirator, in any way coincident with and explanatory of a conspiracy during its continuance, is admissible; a narrative, after the conspiracy, so far as concerns the subject-matter of the declaration, is terminated, is inadmissible.[3] Thus, where the defendant was charged with conspiring with T. and others to defraud the revenue, it was shown by the prosecution that the defendant was a landing waiter, and T. an agent for importers, at the custom-house; it being their duty each to make entries of the contents of cases imported, so as to check the other. On thirteen occasions they made false entries, entering packages at less than their real bulk. T.'s check-book was offered by the prosecution, for the purpose of showing by the counterfoil that the defendant received from him part of the money of which the government had been defrauded by their opera-

ruff, 33 Mich. 310; Tucker *v.* Finch, 66 Wis. 17; Carskadon *v.* Williams, 7 W. Va. 1; Bryce *v.* Butler, 70 N. C. 585; Phœnix Ins. Co. *v.* Moog, 78 Ala. 284; Bushell *v.* Bank, 20 La. An. 464; Gundry *v.* Lyons, 29 La. An. 4. For criminal cases see Whart. Cr. Ev. § 698.

"The declarations of each defendant, relating to the transaction under consideration, were evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs. The court placed their admissibility on that ground, and instructed the jury that if they were made after the consummation of the enterprise, they should not be regarded." Field, J., Lincoln *v.* Claflin, 7 Wall. 138, 139.

[1] Gibson, C. J., Rogers *v.* Hall, 4 Watts, 361; aff. by Rogers, J., in Gibbs *v.* Neely, 7 Watts, 307; and by Agnew, J., in Confer *v.* McNeal, 74 Penn. St. 115. See, to same effect, McDowell *v.* Risell, 37 Penn. St. 164; Deakers *v.* Temple, 41 Penn. St. 234; McKinley *v.* McGregor, 3 Whart. R. 397; Bredin *v.* Bredin, 3 Barr, 81; State *v.* Anderson, 92 N. C. 747, where the text is adopted. See, also, R. *v.* O'Connell, Arm. & T. 475.

[2] Ibid.; Wolfe *v.* Pugh, 10 Ind. 294.

[3] See supra, §§ 171–5, 1180; R. *v.* Hardy, 24 How. St. Tr. 451; U. S. *v.* White, 5 Cranch C. C. 38; State *v.* Pike, 51 N. H. 105; Benford *v.* Sanner, 40 Penn. St. 9; Lynes *v.* State, 36 Miss. 617; Strady *v.* State, 5 Cold. 300; Beeler *v.* Webb, 113 Ill. 436; Owens *v.* State, 16 Lea, 1; State *v.* Fredericks, 85 Mo. 145; Clinton *v.* Estes, 20 Arkansas, 216.

tions; but this was rejected by the court, on the ground that the statement was made after the plot was consummated, and related only to the distributing of plunder.[1]

To entitle the declarations of a co-conspirator to admission, the conspiracy must be first proved *aliunde*.[2]

VIII. ADMISSIONS BY TRUSTEES, OFFICERS, AND PRINCIPALS.

Admissions of nominal party cannot prejudice real party.

§ 1207. Where a party to a suit is a mere trustee, or one whose name is used only for purposes of form, it has been argued that the admissions of such a party are to be received at common law for what they are worth, when offered on trial by the opposing interest.[3] But where a court of common law applies chancery remedies, the meddling of such nominal party will be prohibited,[4] and evidence of admissions by him may be rejected by the court, when it is in derogation of the rights of the party beneficially interested, supposing the declarant to have no interest in the suit; or when it is in fraud of the rights of such beneficiary.[5] Under such circumstances courts have stricken off pleas in bar setting up as estoppels releases by the

[1] R. *v.* Blake, 6 Q. B. 126. To the same general effect see R. *v.* O'Connell, Arm. & T. 257; Solomon *v.* Kirkwood, 55 Mich. 256.

[2] See supra, 1183; and see Com. *v.* Crowninshield, 10 Pick. 497; Com. *v.* Ingraham, 7 Gray, 46; Benford *v.* Sanner, 40 Penn. St. 9; Helser *v.* McGrath, 58 Penn. St. 458; Clawson *v.* State, 14 Ohio St. 234; State *v.* Daubert, 42 Mo. 239; Reid *v.* Lottery Co., 29 La. An. 388; Owens *v.* State, 16 Lea, 1.

[3] Banerman *v.* Radenius, 7 T. R. 663; 2 Esp. 653; Alner *v.* George, 1 Camp. 392; Gibson *v.* Winter, 5 B. & Ad. 96; Franklin Bank *v.* Cooper, 36 Me. 180; Beatty *v.* Davis, 9 Gill, 211; Helm *v.* Steele, 3 Humph. 472; Hogan *v.* Sherman, 5 Mich. 60; Jones *v.* Norris, 2 Ala. 526; Sally *v.* Gooden, 5 Ala. 78. See Lee *v.* R. R. L. R., 6 Ch. Ap. 527. In Moriarty *v.* R. R., L. R. 5 Q. B. 320, Blackburn, J., said, "What the plaintiff on the record has said is always evidence against him, its weight being more or less. Even if the plaintiff is merely a nominal plaintiff, a bare trustee for another, though slight in such a case, it would be admissible."

As to judgments, see supra, § 767.

[4] Welsh *v.* Mandeville, 1 Wheat. 233.

[5] Butler *v.* Millett, 47 Me. 492; Sargeant *v.* Sargeant, 18 Vt. 371; Dazey *v.* Mills, 10 Ill. 67; Graham *v.* Lockhart, 8 Ala. 9; Chisholm *v.* Newton, 1 Ala. 371; Sykes *v.* Lewis, 17 Ala. 261; Thompson *v.* Drake, 32 Ala. 98. See Rawstone *v.* Gandell, 15 M. & W. 304.

In Robinson *v.* Hutchinson, 31 Vt. 443, admissions of a party who was executor and legatee under a will were admitted to show the testator's insanity.

nominal party in fraud of the rights of the real party.[1] In any view, the termination of the nominal party's interest in the suit, prior to such release, deprives the release of all validity.[2] Even though receipts or other acknowledgments by the nominal party be admitted in evidence, it is competent for the real party to show that such acknowledgments were illusory and false, either in whole or part.[3] It should at the same time be remembered that the actual party may bind himself to the declarations of the nominal party by silent acquiescence or by actual authorization ;[4] and that admissions by an assignor, made before the assignment, the assignor being the nominal party to the suit, are receivable against the assignee.[5]

But the statements of a trustee cannot be held to be admissions of his *cestui*, unless made by his authority in the performance of the trust.[6]

§ 1208. A guardian, or *prochein amy*, is a mere officer of the court, appointed to protect an infant's interests; and hence it has been held, that although the name of a functionary of this class appears on the record, his prior admissions cannot be received to prejudice his ward's case.[7] But an admission made *bonâ fide*, in order to facilitate a trial, will be received in the same way as the admission of the attorney in the cause.[8] Clearly an admission by a guardian in one suit cannot be used against the infant in another suit.[9] Nor can a parent's admissions as to general liability be received to prejudice an infant child.[10]

Guardian's admissions not receivable against ward.

§ 1209. A public officer may be vested with such authority by his constituents as to bind them by the admissions he makes.

[1] Payne *v.* Rogers, 1 Dougl. 407 ; Innell *v.* Newman, 4 B. & Ald. 419 ; Manning *v.* Cox, 7 Moore, 617 ; Johnson *v.* Holdsworth, 4 Dowl. 63.

[2] Supra, §§ 1165–8.

[3] Supra, §§ 1083, 1168 ; Wallace *v.* Kelsall, 7 M. & W. 273 ; Farrar *v.* Hutchinson, 9 A. & E. 641.

[4] Carr *v.* Casey, 20 Ill. 637.

[5] Moriarty *v.* R. R. L. R., 5 Q. B. 320.

[6] Eitelgeorge *v.* Mut. House Building Assoc., 69 Mo. 52.

[7] 1 Dan. Ch. Pr. 169 ; Cowling *v.* Ely, 2 Stark. 366 ; Morgan *v.* Thorne, 7 M. & W. 408 ; Sinclair *v.* Sinclair, 13 M. & W. 460 ; Eccles *v.* Harrison, 6 Ec. & Mar. Cas. 204 ; Mertz *v.* Detweiler, 8 Watts & S. 376 ; Matthews *v.* Owling, 54 Ala. 202. See supra, § 767 ; and see, as qualifying above, Tenney *v.* Evans, 14 N. H. 343.

[8] Taylor's Ev. §§ 673, 700.

[9] Eccleston *v.* Speke, 3 Mod. 258 ; Hawkins *v.* Luscombe, 2 Swanst. 392.

[10] Balt. City R. R. *v.* McDonnell, 43 Md. 534.

Public officer's admissions may bind constituent.

Wherever he is authorized to contract, there his declarations, when part of the negotiation (there being no conflicting statute), are as admissible as would be, under the same circumstances, the admissions of a private agent.[1] It is necessary, however, to impose liability on the constituent, that these declarations should be within the apparent scope of the officer's authority.[2] Admissions made by a public officer, after the closing of a transaction, as to its character, if against his interest, might, if he be deceased, be admitted on the ground that the self-disserving admissions of a deceased person may be received.[3] But if the officer be still living, such evidence would be inadmissible, as hearsay.[4] He must be called as a witness, if he has relevant evidence to give.[5] When so called, his testimony is subject to the rule which forbids the contradiction of records by parol.[6]

Admission of representative, before clothed with representative authority, does not bind constituent.

§ 1210. Not until a representative (*e. g.*, guardian, executor, or trustee) fairly assumes the representative character, can his admissions be regarded as considerate or intelligent or self-disserving; and hence such admissions, if made before acceptance of such office, cannot bind the constituent.[7] So far as such admissions are incidental to the proper arrangement of the estate they bind the estate, but otherwise not.[8]

Nor do such admissions after leaving office.

§ 1211. So the admissions of an executor or trustee, after leaving office, cannot be used against his constituents.[9]

[1] Supra, § 1170; Sharon *v.* Salisbury, 29 Conn. 113.

[2] Mitchell *v.* Rockland, 41 Me. 363; Walker *v.* Dunspaugh, 20 N. Y. 170; Green *v.* North Buffalo, 56 Penn. St. 110. See Burgess *v.* Wareham, 7 Gray, 345. See supra, §§ 1170–5.

[3] Blackmore *v.* Boardman, 28 Mo. 420. Supra, § 226.

[4] Morrell *v.* Dixfield, 30 Me. 157; Brighton *v.* St. Albans, 77 Me. 177.

[5] Corinna *v.* Exeter, 13 Me. 321.

[6] See supra, § 920.

[7] Fenwick *v.* Thornton, M. & M. 51; Legge *v.* Edmonds, 25 L. J. Ch. 125; although we have an intimation extending the liability by Tindal, C. J., in Smith *v.* Morgan, 7 M. & Rob. 257; Moore *v.* Butler, 48 N. H. 161. See Hanson *v.* Parker, 1 Wils. 257. See supra, § 766; and see Waterman *v.* Wallace, 13 Blatch. 128.

[8] See supra, § 771; Lobb *v.* Lobb, 26 Penn. St. 327; Magill *v.* Kauffman, 4 S. & R. 314.

[9] Hueston *v.* Hueston, 2 Ohio St. 488. Supra, § 1180.

§ 1212. When a surety is sued for the debt on which he is surety, and when the principal's conduct is involved in the merits of the suit, then the principal's self-disserving admissions, when part of the *res gestae*, are evidence against the surety;[1] though it is otherwise when they were made after the transaction closed, or before it began,[2] unless it should appear that the admissions were made by the principal as the surety's agent in the particular matter.[3] Thus, the admissions of the principal (in cases of official or other bonds), as to the amount received by him, such admissions consisting of contemporaneous

Principal's admissions receivable against surety.

[1] Perchard *v.* Tindall, 1 Esp. 394; Goss *v.* Worthington, 3 B. & B. 132; Middleton *v.* Melton, 10 B. & C. 317; Ingle *v.* Collard, 1 Cranch C. C. 134; Hinckley *v.* Davis, 6 N. H. 210; Bayley *v.* Bryant, 24 Pick. 198; Amherst Bank *v.* Root, 2 Met. (Mass.) 522; Bank *v.* Smith, 12 Allen, 243; Meade *v.* McDowell, 5 Binn. 195; Parker *v.* State, 8 Blackf. 292. See Mahaska *v.* Ingalls, 16 Iowa, 81.

As to distinction between contractual and non-contractual admissions, see supra, § 1083.

[2] Pitman on Princ. & Surety, 129; citing Evans *v.* Beattie, 5 Esp. 26; Bacon *v.* Chesney, 1 Stark. 192; Hart *v.* Horn, 2 Camp. 92; Ward *v.* Suffield, 5 Bing. N. C. 381; Taylor *v.* Williams, 2 B. & Ad. 845; Chelmsford Co. *v.* Demarest, 7 Gray, 1; Hatch *v.* Elvins, 65 N. Y. 489; Rae *v.* Beach, 76 N. Y. 174; Pollard *v.* R. R., 7 Bush, 597; White *v.* Bank, 9 Heisk. 475; and see discussion in Agricultural Co. *v.* Keeler, 44 Conn. 165.

"In these cases the main inquiry is, 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 gestae*. If so, they are admissible; otherwise they are not." Taylor's Ev. § 710.

In Williamsburg Ins. Co. *v.* Frothingham, 122 Mass. 391, which was an action on a bond, one condition of the bond being that the obligor should keep true and correct books, a book kept by him, containing entries relating to the business of the company, was held competent evidence against him and his sureties of the amount of premiums collected by him. Citing Whitnash *v* George, 8 R. & C. 556; *S. C.*, 3 M. & Ry. 46; 1 Taylor on Ev. § 710.

That surety's admissions are, when connected with transactions, admissible against principal, see Chapel *v.* Washburn, 11 Ind. 393.

[3] Supra, §§ 1173 *et seq.*; Hinckley *v.* Davis, 6 N. H. 210; Richardson *v.* Hitchcock, 28 Vt. 757; Davis *v.* Whitehead, 1 Allen, 276; Fenner *v.* Lewis, 10 Johns. 38; Meade *v.* McDowell, 5 Binn. 195; Com. *v.* Kendig, 2 Penn. St. 448; Bondurant *v.* Bank, 7 Ala. 830; State *v.* Grupe, 36 Mo. 365; Union Savings Co. *v.* Edwards, 47 Mo. 445.

In Fenner *v.* Lewis, 10 Johns. 38, this admissibility was extended to admissions, by a principal, of receipt of goods whose price was sued for. But *quaere* under statutes enabling principal to be called.

That a judgment against the principal may under the same limitations be admissible against the surety, see supra, § 770.

entries on his books, or of like self-disserving declarations, are receivable against the surety;[1] though the official reports of a principal are at the best only *primâ facie* evidence against the surety in an action on the bond.[2] And the principal's admissions, made after the relation of suretyship is closed, cannot be received to affect the surety.[3] Nor are the principal's admissions, made before the creation of the debt, evidence against the surety.[4]

The effect of judgments against principal as against surety is elsewhere considered.[5]

Cestui que trust's admissions bind trustee.

§ 1213. Admissions by a *cestui que trust*, or party beneficially interested, may be received against the trustee, or other nominal representative;[6] and those of the indemnifying creditor in a suit against the sheriff for process executed under the creditor's direction.[7] But in such cases, the

[1] Supra, § 1197; Perchard *v.* Tyndall, 1 Esp. 594; Whitnash *v.* George, 8 B. & C. 556; *S. C.*, 3 Man. & R. 42; Drummond *v.* Prestman, 12 Wheat. 515; U. S. *v.* Gaussen, 19 Wall. 198; Williamsburg Ins. Co. *v.* Frothingham, 122 Mass. 391; McKim *v.* Blake, 139 Mass. 593; Agricultural Co. *v.* Keeler, 44 Conn. 161. As to principal's book entries, see supra, § 1133.

[2] Bissell *v.* Saxton, 66 N. Y. 55.

[3] Evans *v.* Beattie, 5 Esp. 26; Bacon *v.* Chesney, 1 Stark. R. 192; Smith *v.* Whittingham, 6 C. & P. 78; Caermarthen R. R. *v.* Manchester R. R., L. R. 8 C. P. 685; Chelmsford *v.* Demarest, 7 Gray, 1; Cassity *v.* Robinson, 8 B. Mon. 279; Hatch *v.* Elkins, 65 N. Y. 489; Longenecker *v.* Hyde, 6 Binn. 1; Beal *v.* Beck, 3 Har. & McH. 242; Hotchkiss *v.* Lynn, 2 Blackf. 222; Blair *v.* Ins. Co., 10 Mo. 559. See Griffith *v.* Turner, 4 Gill, 111; Stetson *v.* Bank, 2 Ohio St. 167; and supra, § 770.

And so as to admissions of the principal's personal representatives. Harrison *v.* Heflin, 54 Ala. 553.

As to judgments see supra, § 770.

[4] Dawes *v.* Shed, 15 Mass. 6; Cheltenham *v.* Cook, 44 Mo. 29; Longenecker *v.* Hyde, 6 Binn. 1.

[5] Supra, §§ 623, 770.

[6] Hanson *v.* Parker, 1 Wils. 257; R. *v.* Hardwick, 11 East, 579; May *v.* Taylor, 6 M. & Gr. 261, 266; Hart *v.* Horn, 2 Camp. 92; Bell *v.* Ansley, 16 East, 143; Richardson *v.* Field, 6 Greenl. 305; Kendall *v.* Lawrence, 22 Pick. 540. See Reed *v.* Pelletier, 28 Mo. 173.

"The declarations and admissions of the real party in interest, though his name does not appear as the party of record, are competent evidence against him, the law giving them the same rights as though he were a party to the record." 1 Greenleaf on Evidence, § 180; 2 Starkie on Evidence (Metcalf's ed.), 40, 41.

"This rule is recognized in Richardson *v.* Field, 6 Greenl. 305; May *v.* Cheeseman *v.* Taylor, 6 Man. & Gr. 261 (46 E. C. L. R. 259); and Kendall *v.* Lawrence, 22 Pick. 540." Barrows, J., Bigelow *v.* Foss, 59 Me. 164.

[7] Dowden *v.* Fowle, 4 Camp. 38; Young *v.* Smith, 6 Esp. 121; Harwood *v.* Keys, 1 M. & Rob. 204. See Deming *v.* Lull, 17 Vt. 398; and see supra, § 1212.

interest of the beneficial party, whose admissions are put in evidence, must cover the whole of the claim represented by the nominal party. If the nominal party represents two or more beneficiaries, then the admissions of one of the latter cannot, with the limitations expressed elsewhere, be received to prejudice the suit, unless such admitting party was expressly or impliedly the representative of the others.[1] And the trusteeship must be proved *aliunde*.[2]

IX. ADMISSIONS OF HUSBAND AND WIFE.

When husband's declarations against his interests admissible.

§ 1214. That a particular article of property belonged separately to the wife may be proved, after a husband's death, by his declarations when self-disserving;[3] and such declarations, on the above distinctions, will be admissible as against his successors, to prove the separate property of his wife,[4] though not when in collusion or in fraud of creditors.[5] The husband's admissions, also, that certain money was lent by his wife to him, as against himself, before any claims of creditors existed, may be always received;[6] but it is otherwise when such declarations lose their self-disserving quality, and their object

[1] Doe *v.* Wainwright, 8 A. & E. 691; May *v.* Taylor, 6 M. & Gr. 261; Pope *v.* Devereux, 5 Gray, 409; Prewett *v.* Land, 36 Miss. 495.

[2] Com. *v.* Kreager, 78 Penn. St. 477. Supra, § 1101.

[3] Cassell *v.* Hill, 47 N. H. 407; Bennett *v.* Camp, 54 Vt. 36; Gackenback *v.* Brouse, 4 Watts & S. 546; McKee *v.* Jones, 6 Penn. St. 425; Moyer's Appeal, 77 Penn. St. 482; Crain *v.* Wright, 46 Ill. 107; though see Parvin *v.* Capewell, 45 Penn. St. 89.

"Declarations made by the husband at the time of receiving the wife's money or *choses in action*, or afterwards, clearly evincive of the intent at the moment of reduction to possession, are sufficient to repel the presumption of personal acquisition by him, and establish the relation of trustee for the wife. Johnston *v.* Johnston's Executors, 7 Casey, 450; Gicker's Adm'rs *v.* Martin, 14 Wright, 138. Now by the evidence of the husband himself the intent with which he received can be most satisfactorily established." Mercur, J., Moyer's Appeal, *ut supra*.

[4] Supra, § 238; Day *v.* Wilder, 47 Vt. 584; Sharp *v.* Maxwell, 30 Miss. 589; Cook *v.* Burton, 5 Bush. 64; Walker *v.* Elledges, 65 Ala. 51. A husband's declarations that he owned land claimed by his wife are not admissible against her; Bremmerman *v.* Jennings, 101 Ind. 253. See State *v.* Bank, 10 Mo. Ap. 482; Wormouth *v.* Johnson, 58 Cal. 621; Brunon *v.* Books, 68 Ala. 248.

[5] Kline's Appeal, 39 Penn. St. 463; Deakers *v.* Temple, 41 Penn. St. 234. See Parvin *v.* Capewell, 45 Penn. St. 89; Brooks *v.* Dent, 1 Md. Ch. 523.

[6] Townsend *v.* Maynard, 45 Penn. St. 198; Backman *v.* Killinger, 55 Penn. St. 414.

appears to have been family support against creditors;[1] or the support in any way of his wife's interests;[2] or when the admissions were made after his interest in the property has ceased.[3] It has also been held that in an action by a married woman for an indecent assault upon her, defendant may properly put in evidence statements made by plaintiff's husband, tending to show that the action was brought to carry out a scheme contrived by plaintiff for extorting money.[4]

Husband's agency must be proved *aliunde*.

§ 1215. When the effort is to charge the wife by declarations of her husband as her agent, his agency cannot be proved by his admissions.[5] Nor can the wife's title ordinarily be prejudiced by the husband's declarations in her absence, or without proof that he was her agent.[6]

Wife when entitled to act juridically may admit.

§ 1216. So far as a married woman is entitled by law to do business on her own account, so far is she able to bind herself by admissions.[7] But the admissions of a woman made *before* marriage cannot bind her husband to pay her antenuptial debts;[8] though such admissions, when self-disserving, can be received to show, as against husband and wife, that certain property, claimed by the latter, belonged to third parties.[9]

§ 1217. A man may constitute his wife his agent, and if so he is bound by her admissions in the scope of the agency.[10] The agency,

[1] Kline's Appeal, 39 Penn. St. 463; Brooks *v.* Dent, 1 Md. Ch. 523; Bagley *v.* Birmingham, 23 Tex. 452. See Smith *v.* Scudder, 11 S. & R. 325.

[2] Thomas *v.* Madden, 50 Penn. St. 261. See Hanson *v.* Millett, 55 Me. 184.

[3] Gillespie *v.* Walker, 56 Barb. 185.

[4] Mawick *v.* Elsey, 47 Mich. 10.

[5] Second Bank *v.* Miller, 2 Thomp. & C. (N. Y.) 104; Rose *v.* Chapman, 44 Mich. 312; Whitescarver *v.* Bonney, 9 Iowa, 480.

[6] Deck *v.* Johnson, 1 Abb. (N. Y.) App. 497; Pierce *v.* Hasbrouck, 49 Ill. 23; Campbell *v.* Quackenbush, 33 Mich. 287; Livesley *v.* Lasolette, 28 Wis. 38; Kirkman *v.* Bank, 77 N. C. 394. See Holly *v.* Flournoy, 54 Ala. 99.

[7] Morrell *v.* Cawley, 17 Abb. (N. Y.) Pr. 76; McLean *v.* Jagger, 13 How. (N. Y.) Pr. 494; Hackman *v.* Flory, 16 Penn. St. 196; Winter *v.* Walter, 37 Penn. St. 155; Liggett's Appeal, 1 Weekly Notes, 353; Lasselle *v.* Brown, 8 Blackf. 221. See supra, § 768; Bergman *v.* Roberts, 61 Penn. St. 497; Dewey *v.* Goodenough, 56 Barb. 54; Snydacker *v.* Brosse, 51 Ill. 357.

[8] Ross *v.* Winners, 1 Halst. (N. J.) 366. See Shepherd *v.* Starke, 3 Munf. 29; Churchill *v.* Smith, 16 Vt. 560.

[9] Hollinshead *v.* Allen, 17 Penn. St. 275; Clausen *v.* La Franz, 1 Iowa, 226. See Taylor *v.* Brown, 65 Md. 367.

[10] Carey *v.* Adkins, 4 Camp. 92; Meredith *v.* Footner, 11 M. & W. 202; Clifford *v.* Burton, 1 Bing. 199; Emerson *v.* Blonden, 1 Esp. 142; Pickering

however, must be established before the admissions can come in, though it can be inferred from circumstances indicating that he authorized her to act for him.[1] Her admissions, also, must be within the range of the delegated authority, as otherwise they are inadmissible.[2] Accordingly, where a wife was carrying on business at a distance from her husband, it was held that her admission as to the amount of rent, and the terms of tenancy, was not evidence of the facts against him, in replevin by him against his landlord. "A wife," Alderson, B., said, "cannot bind her husband by her admissions, unless they fall within the scope of the authority which she may be reasonably presumed to have derived from him; and where she is carrying on a trade, if it be necessary for that purpose that she should have such a power, she may be his agent to make admissions with respect to matters connected with the trade. . . . . Here it could not be necessary, for the purpose of carrying on the business of the shop, that she should make admissions of an antecedent contract for the hire of the shop."[3] And a wife's incidental admissions (*e. g.*, as to domicil) cannot bind her husband, when she is not authorized by him to represent him.[4]

Her admissions bind her husband when she is authorized to act for him.

v. Pickering, 6 N. H. 124; Chamberlain *v.* Davis, 33 N. H. 121; Felker *v.* Emerson, 16 Vt. 653; Riley *v.* Suydam, 4 Barb. 222; Ripley *v.* Mason, Hill & Denio Sup. 66; McKinley *v.* McGregor, 3 Whart. R. 369; Murphy *v.* Hubert, 16 Penn. St. 50; Peck *v.* Ward, 18 Penn. St. 506; Barr *v.* Greenawalt, 62 Penn. St. 172; Stall *v.* Meek, 70 Penn. St. 181; Colgan *v.* Philips, 7 Rich. 359; Rochelle *v.* Harrison, 8 Port. 351; Lang *v.* Waters, 47 Ala. 624; Cantrell *v.* Colwell, 3 Head. 471. See Gebhart *v.* Burkett, 57 Ind. 378; Wheeler *v.* Tinsley, 75 Mo. 458.

[1] Alban *v.* Pritchett, 6 T. R. 680; Denn *v.* White, 7 T. R. 112; Clifford *v.* Burton, 8 Moore, 16; Gregory *v.* Parker, 1 Camp. 394; Plimmer *v.* Sells, 3 N. & M. 422; Gilson *v.* Gilson, 16 Vt. 464; Butler *v.* Price, 115 Mass. 578; Second Bank *v.* Miller, 2 Thomp. & C. 104; Benford *v.* Zanner, 40 Penn. St. 9; Continental Ins. Co. *v.* Delpeuch, 82 Penn. St. 225; Southern Ins. Co. *v.* Wilkinson, 53 Ga. 535; Whitescarver *v.* Bonney, 9 Iowa, 480; Fisher *v.* Conway, 21 Kan. 18. As to the wife as a witness on the question of agency, see supra, § 4230 *a*.

[2] Meredith *v.* Footner, 11 M. & W. 202; White *v.* Holman, 12 Me. 157; Lunay *v.* Vantyne, 40 Vt. 501; Goodrich *v.* Tracy, 43 Vt. 314; McGregor *v.* Wait, 10 Gray, 72; Turner *v.* Coe, 5 Conn. 93; Logue *v.* Link, 4 E. D. Smith, 63; Peck *v.* Ward, 18 Penn. St. 506; Sheppard *v.* Starke, 3 Munf. 29; Hunt *v.* Straw, 33 Mich. 85; May *v.* Little, 3 Ired. L. 27; Hussey *v.* Elrod, 2 Ala. 339; Jordan *v.* Hubbard, 26 Ala. 433; Queener *v.* Morrow, 1 Coldw. 123; Burnett *v.* Burkhead, 21 Ark. 77.

[3] Meredith *v.* Footner, 11 M. & W. 202.

[4] Parsons *v.* Bangor, 61 Me. 457. When she is competent to act through

Her admissions receivable against her trustees.

§ 1218. On the principle heretofore stated, that a *cestui que trust's* admissions bind his trustee, a married woman's declarations, when she is *capax negotii*, can be put in evidence against her trustees in suits in which they are the parties.[1]

After her death, her admissions against her interest bind her representatives.

§ 1219. In conformity with the rule already stated, as to the admissibility of the self-disserving admissions of a predecessor in title, the declarations of a wife, as to an antenuptial agreement, by which her chattels were to pass to her husband, may bind her representatives after her death.[2]

Admissions of adultery closely scrutinized.

§ 1220. So far as concerns divorce cases, the policy of the law precludes the granting of a divorce on the mere admissions by either party of adultery when there are no corroborative facts, unless the admissions are in writing, and are free from all suspicion of falsity.[3] The House of Lords has gone so far as to absolutely exclude such evi-

an attorney, she is bound by his admissions; Wilson *v.* Spring, 64 Ill. 18, quoted supra, § 1184.

[1] See supra, § 1213. McLemore *v.* Nuckolls, I Ala. (Sel.) Cas. 591.

[2] See supra, §§ 1156 *et seq.*; Crane *v.* Gough, 4 Md. 316.

[3] Supra, §§ 283, 1077; Cloncurry's case, Macq. Pr. in H. of L. 606; Washburn *v.* Washburn, 5 N. H. 195; White *v.* White, 45 N. H. 121; Baxter *v.* Baxter, 1 Mass. 346; Lyon *v.* Lyon, 62 Barb. 138; Devanbagh *v.* Devanbagh, 5 Paige, 554; Madge *v.* Madge, 42 Hun, 552; Prince *v.* Prince, 25 N. J. Eq. 310; Scott *v.* Scott, 17 Ind. 309; Sawyer *v.* Sawyer, Walk. (Mich.) 48; Haggard *v.* Haggard, 62 Iowa, 82; Savoie *v.* Ignogoso, 7 La. R. 281; Evans *v.* Evans, 41 Cal. 107; Craig *v.* Craig, 31 Tex. 203; Mathews *v.* Mathews, 41 Tex. 331. See 2 Bishop Marr. & Div., §§ 240, 251.

In Madge *v.* Madge, *ut supra*, we have the following from Davis, J.:—

"The rule in such case is well stated by Gibson, C. J., in Matchin *v.* Matchin, 6 Penn. 332, in these words: 'It is a rule of policy, however, not to found a sentence of divorce on confession alone. Yet where it is full, confidential, reluctant, free from suspicion of collusion, and corroborated by circumstances, it is ranked with the safest proof.'

"There are a number of cases in the books in which confessions have been taken as sufficient evidence, 'where,' as said by Bishop (2 Mar. & Div., § 248), 'the circumstances are such as to repel all suspicion of collusion, and leave in the hands of the court no doubt of the truth of the confessions.'

"In Billings *v.* Billings, 11 Pick. 461, there was no other evidence but a letter written by the husband, who had been living for fourteen years in another state, to his wife, which stated that he had lived with another woman, by whom he had children, but expressing penitence, and a desire to be reconciled to his wife. The court held that the circumstances repelled collu-

dence in divorce cases; though letters written by the wife to third parties have been admitted in evidence when it was first shown that they were written uninfluenced by fear or promise, and that the writer was then living apart from her husband.[1] It has been also intimated that the wife's oral confession of guilt to a third party may be received as cumulative proof.[2] But by the House of Lords, also, as a general rule, all letters written by the wife after her separation, either to the husband or to the adulterer, are excluded, unless connected with some particular fact otherwise in proof,[3] or coming simply cumulatively.[4] But where a wife deserted her husband, who held a situation at Malta, and resided in England for several years, during which time she had resided with a paramour and had borne him four children, the lords admitted a series of letters from the wife to her husband, which were tendered as accounting for the circumstances of her not going out to rejoin him, and as showing that she had practised upon him the grossest deceit.[5] The ecclesiastical courts applied less stringent tests. It is true that by a canon passed in 1603, a mere confession, unaccompanied by other circumstances, was insufficient, even under the most solemn sanctions, to support a prayer for a separation *a mensa et thoro*;[6] yet, where there was strong corroborative evidence, such admissions were received as basis of a decree; and in a leading case letters from the wife to the supposed paramour, taken in conjunction with other suspicious circumstances, were, in the absence of direct proof, considered sufficient to establish her guilt, though they were intercepted before reaching the party addressed, and though their avowal of adultery was only indirect.[7] The court of divorce has gone so

sion, and granted the decree on the confession of the letter alone.

"In Tucker *v.* Tucker, 11 Jur. 893, the confession of the wife was confirmed by letters received by her from her paramour, and by declarations made by her at a subsequent period. Dr. Lushington held the proof of guilt sufficient, and granted the decree. Williams *v.* Williams, L. R. 1 P. & D. 29; Le Marchant *v.* Le Marchant, 45 L. J., P. & D. 43, are strong cases showing under what circumstances admissions or confessions in writing may be sufficient."

[1] Ld. Cloncurry's case, Macq. Pr. in H. of L. 606.

[2] Lord Ellenborough's case, Ibid. 655. But see Wiseman's case, Ibid. 631.

[3] Dundas's case, Ibid. 610.

[4] Boydell's case, Ibid. 651.

[5] Miller's case, Ibid. 620–623; Taylor's Ev. § 696.

[6] Mortimer *v.* Mortimer, 2 Hagg. Const. 316; Taylor's Ev. § 696.

[7] Grant *v.* Grant, 2 Curt. 16; Caton *v.* Caton, 7 Ec. & Mar. Cas. 15; Faussett *v.* Faussett, 7 Ec. & Mar. Cas. 88;

far as to hold that a decree for the dissolution of marriage can be rested, where there is no collusion, on unsupported admissions of adultery.[1] But the better opinion is that the wife's admissions of adultery cannot be used against her when there is any ground to suppose they were made under the husband's influence.[2]

Matchin *v.* Matchin, 6 Barr, 332. See Betts *v.* Betts, 1 Johns. Ch. 197; Hansley *v.* Hansley, 10 Ired. 506.

[1] Robinson *v.* Robinson, Sw. & Tr. 362; Williams *v.* Williams, L. R. 1 P. & D. 29. See Vance *v.* Vance, 3 Greenl. 132; Com. *v.* Holt, 121 Mass. 81.

[2] Summevill *v.* Summevill, 37 N. J. Eq. 603. As to corroboration, see supra, § 225; State *v.* Colby, 51 Vt. 291. Mere corroboration by a woman of loose character is insufficient. Brown *v.* Brown, 5 Mass. 320; Turney *v.* Turney, 4 Edw. Ch. 566. The evidence of a mere detective employed to make up a case is to be taken with many allowances. Sopwith *v.* Sopwith, 4 Sw. & T. 243. As to evidence of *particeps criminis*, see supra, § 414.

CHAPTER XIV.

PRESUMPTIONS.

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I. GENERAL CONSIDERATIONS.

§ 1226. A PRESUMPTION of law is a juridical postulate that a particular predicate is universally assignable to a particular subject.[1] A presumption of fact is a logical argument from a fact to a fact; or, as the distinction is sometimes put, it is an argument which infers a fact otherwise doubtful, from a fact which is proved.[2] Hence, a presumption of fact, to be valid, must rest on a fact in proof.[3] Presumptions, therefore, in this sense are to be regarded rather as among the effects of proof than as proof itself.

Presumption of law is a juridical postulate; presumption of fact is an argument from fact to fact.

[1] See this illustrated infra, § 1237.

[2] Windscheid's Pandekt. i. § 138.

[3] "No inference of fact or of law," says a learned judge of the Supreme Court of the United States, "is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Stark. on Evid. p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Evid. 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open or visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. Douglass *v.* Mitchell, 35 Penn. St. 440." . . . Strong, J., U. S. *v.* Ross, 92 U. S. 284; S. P. Manning *v.* Hancock, 100 U. S. 603. In R. *v.* Burdett, 4 B. & Ald. 161, Abbott, C. J., said: "A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment." . . . See Harrisburg's Appeal, 107 Penn. St. 102.

Hence to prove a contested issue it is not necessary to prove every fact or conclusion on which the issue depends. From every fact proved legitimate and reasonable inferences may be drawn. Parfitt *v.* Lawless, 2 L. R. P. 68; 27 L. T. 215; 21 W. R. 200. Thus, where it is testified that one "will be twenty-one years old the first day of August next," a finding that at a day in the past he was a minor is justified (overruling Meyer *v.* State, 50 Ind. 18). Dolke *v.* State, 99 Ind. 229.

That presumptions must rest on established facts, see Richmond *v.* Aiken,

§ 1227. Presumptions are usually classified as follows:—

Prevalent classification.

1. Irrebuttable or absolute presumptions of law, *praesumtiones juris et de jure;*

2. Rebuttable or provisional presumptions of law, *praesumtiones juris;*

3. Presumptions of fact, *praesumtiones hominis;* which presumptions are always rebuttable, and are determinable by free logic.[1]

Presumptions of law unknown to classical Romans.

§ 1228. The classical Roman law recognized only two kinds of evidence: (1.) persons (*testes*), and (2.) things (*instrumenta*). A witness called in a court of justice deposes to certain things from which inferences are to be drawn; or these things are brought into court without the agency of a witness, and from the things as thus produced inferences can in like manner be drawn. Thus, Paulus tells us: "Instrumentorum nomine ea omnia accipienda sunt, quibus causa instrui potest: et ideo tam testimonia quam personae instrumentorum loco habentur."[2] *Testes* are placed on the same basis with *instrumenta*—*instrumenta* including everything from which a conclusion is to be inferred. Both *testes* and *instrumenta* are to be weighed by the rules of logic, applied to the case as it comes up,

25 Vt. 324; Tanner *v.* Hughes, 53 Penn. St. 289; McAleer *v.* McMurray, 58 Penn. St. 126; O'Gara *v.* Eisenlohr, 38 N. Y. 296; People *v.* Hessing, 28 Ill. 410; Hamilton *v.* People, 29 Mich. 193; Frost *v.* Brown, 2 Bay S. C. 133; Bach *v.* Cohn, 3 La. An. 103; Pennington *v.* Yell, 11 Ark. 212; Lawhorn *v.* Carter, 11 Bush. 7. To the same effect is Bonnier, Traité des Preuves, ii. 387, 420. Compare remarks of Lord Cairns in Belhaven Peerage, L. R. 1 App. Cas. 278. And see Appleton, in re, 29 Ch. D. 873.

"The foundation of all human knowledge must be laid in the examination of particular objects and particular facts; *and it is only so far as our general principles are resolvable into these primary elements that they possess either truth or utility.*" Dugald Stewart on the Human Mind, ch. iv. § 157.

"As proof of a fact the law permits inferences from other facts proved, but does not allow presumptions of fact from presumptions. A fact being established, other facts may be and often are ascertained by just inferences. Not so with a mere presumption of a fact. No presumption can safely be drawn from a presumption; there being no fixed or ascertained fact from which an inference of fact might be drawn, none is drawn." Thompson, J., Douglass *v.* Mitchell, 35 Penn. St. 443; aff. in Phil. City Pass. Co. *v.* Henrice, 92 Pa. St. 431.

[1] See, as to last form of presumption, Mead *v.* Parker, 115 Mass. 413; Hamilton *v.* People, 29 Mich. 193.

[2] L. i. D. xxii. 4.

and not by those of technical jurisprudence, announced before the case is heard. In the whole of the Corpus Juris we meet with no such expression as *praesumtio juris*. The idea that it is for the court to say that certain conclusions are to be uniformly inferred from certain facts, never entered into the classical mind. Presumptions, indeed, are discussed at large in the Digest, and to them a distinct chapter is in part devoted.[1] But the presumptions there noticed deal, not with the effect of evidence, but the mode of determining the burden of proof.

In Roman law *praesumtiones* were modes of determining burden of proof.

§ 1229. The Roman rule with regard to the burden of proof has been already set forth. As a general proposition, as we have seen,[2] the actor is required to prove the case he advances; yet there are obvious qualifications to this rule which it was the business of the jurist to define. An actor, for instance, cannot be required to prove a negative when the matter is wholly within the knowledge of his opponent.[3] So it is often a matter of doubt whether a particular fact is technically part of the actor's case or the excipient's; and this doubt the law must determine. In proceedings *in rem*, to take another illustration, each party is an *actor;* and the law has to settle in advance which party has to begin and how much each party has to prove, in order to make out a *primâ facie* case. Questions of this kind, relating exclusively to the burden of proof, have to be settled by positive rules; and the positive rules the jurists announce for this purpose, in answer to questions put to them, they call *praesumtiones*. *Praesumtiones*, therefore, in the classical sense, denote rules for determining the burden of proof before its reception, but not for determining what is to be the weight of proof when received.[4] Nothing prevents the judge, if required by his convictions to do so, from deciding *in concreto*, against the *praesumtio* that a short time before was so important to him in determining the burden of proof. Not merely evidence, in its strict sense, but argument, as a logical process, is available to lead him to such conclusions. Every case, when the evidence is in, is to be determined by a preponderance of proof. As making up proof,

[1] Tit. xxii. 3, *De probationibus et praesumtionibus.*

[2] Supra, § 357.

[3] Supra, § 367. See L. 25, D. xxii.

[4] Endemann's Beweislehre, § 24, p. 86,—a work which I have freely used in the preparation of this chapter. Gell. Noct. art. iii. c. 16.

reason and evidence are indeed regarded as coördinate factors,[1] and reason is to be largely influenced by what we call presumptions of fact. But of arbitrary presumptions of law, assigning to evidence when admitted, an unreasonable and untruthful meaning, the jurists give no instance.[2] The only contingency in which, on a *primâ facie* case for the actor being made out, the classical *praesumtiones* (*i. e.*, rules for determining the burden of proof) influence the issue, is where the evidence is in equilibrium, in which case judgment is against the *actor*.[3]

§ 1230. Hence, by the classical Roman law, what we now call presumptions were at the highest only assumptions of practical reason. The power of inference was to be logically exercised in each case in the concrete.[4] The question of the force of such presumptions, as we would call them, was exclusively for the logician; and though they are noticed frequently by the jurists, they are styled, not *praesumtiones*, but *signa*, *argumenta*, or *exempla*.[5]

What we call presumptions of facts were regarded as logical inferences.

§ 1231. Such was the classical Roman doctrine. The Middle Ages inaugurated a new era. Business, in the old sense, was extinct; and courts no longer met to hear arguments on the application of principles to a concrete case. Wrong, indeed, existed in abundance; but it was not put on trial by a competent court. Unsuccessful wrong, or what appeared to be such, was punished by fine or by killing, without the trouble of what we would now call a trial; successful wrong was not punished at all. Of course, among the active minds who, in the seclusion of the cloister, speculated on everything, there were some who speculated on jurisprudence; but the jurisprudence they dealt with was based on an imaginary, and not on an actual humanity. They made ideas realities, and they made men unrealities.[6] Not

Prevalent classification of scholastic origin.

[1] Supra, §§ 1–6; and see particularly supra, § 278.

[2] Endemann, *ut supra*, § 24, p. 87.

Sir J. Stephen (Ev. p. 2) defines a "presumption" "as a rule of law that courts and judges (juries?) shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved." This excludes presumptions *juris et de jure*. Bonnier (Traité des Preuves, ii. 418) throws overboard the scholastic terms in a body, styling them "ces expressions barbares."

[3] See fully supra, § 457.

[4] See Durant, I. c. nr. 19; Endemann, Beweislehre, § 19.

[5] See Quinct. V. c. 8.

[6] See the topic in the text expanded in an article in the Forum, 1875, pp. 201 *et seq.*

recollecting that it is impossible to predict even what any one person will do under particular circumstances, they attempted to establish rules which would be applicable only if all men who should afterwards exist should do what was predicted. Certain maxims they conceived to be right, or to fit in with some preconceived system of ethics, and these maxims they declared to be either *primâ facie* or absolutely true, even in concrete cases, where such maxims were *primâ facie* or absolutely false. And in place of the real man as he might happen to appear on trial, they set up an ideal man, who was to be always presumed, no matter what be the evidence, to have specific unvarying attributes.[1] In like manner, to every act

[1] See infra, § 1262.

It was here that the realistic philosophy came into play, and exercised an influence which it is important to particularly examine.

Have general ideas a real existence? When we speak of man, is there such a real thing as a generic man, with no such *differentiae* as distinguish one individual man from another? When we speak of an abstract homicide, is there such a real thing as such a homicide, which is marked by none of the *differentiae* which distinguish one particular homicide from another? The foreshadowing of the mediæval speculations on this point we find in a passage in Porphyry's Introduction to the Categories of Aristotle: "Mox de generibus et speciebus illud quidem sive subsistant sive in solis nudiis intellectibus posita sint, sive subsistentia corporalia sint an incorporalia et utrum separata a sensilibus an insensilibus posita et circa haec consistentia, dicere recusabo: altissimum enim est negotium hujusmodi et majoris indigens inquisitionis." Herzog's Ency. 13, 668. The question is here, therefore, thrown out, whether general ideas have a reality independent of their subjective existeuce, or whether they are exclusively the fictions of the subjective consciousness. By Boethius the discussion of this question was introduced in the spheres both of theology and jurisprudence. See Cousin's observations in his Ouvrages inédits d'Abelard, Par. 1836; Köhler, in his Realismus, &c., Gotha, 1858; and Mill's Logic, ii. 441. Three solutions were proposed: *universalia* were either *ante rem*, or *in re*, or *post rem*. By the first theory, the general conception really exists before the particular; has its own real attributes, and is the only absolute existence, the particulars emanating from it being conditioned, limited, and imperfect. By the second view the general exists only in actual concrete existences, as something that is common and essential to them; yet it (the general) is not a pure subjective creation of consciousness, but is inherent necessarily in the particulars. By the third view (the distinctively nominalistic), the general has no objective reality: that is to say, it corresponds to nothing in the particular things themselves, but it exists only through the induction of the understanding, which, comparing the particulars, draws from them certain general characteristics, which, in a particular aspect, they hold in common.

The realistic theory took immediate hold of the jurists of the Middle

which might be the object of litigation they declared certain incidents to belong arbitrarily. Every man was presumed to act from the motive which the law attached beforehand to the act.

§ 1232. The term *praesumtio juris et de jure*, which was introduced by the glossators of the twelfth and thirteenth centuries, was originally intended to express an intense presumption: *praesumtio juris imperativi* or *superlativi*.[1] Much difficulty had been felt in finding suitable limits for such "superlative" presumptions; "disputant doctores sed non convenit inter eos, quid nomine praesumtionis juris et de jure veniat; est enim illud a doctoribus confictum, veluti barbarum, certam significationem non habet."[2] At last it was concluded to get rid of all doubt as to their force by making them irrebuttable; and it was announced that presumptions *juris et de jure* were presumptions which did not admit of juridical disproof. Finally, all irrebuttable presumptions became presumptions *juris et de jure*, and all presumptions *juris et de jure* became irrebuttable. Hence it necessarily resulted that not only fictions were regarded as identical with presumptions *juris et de jure*, but all indisputable propositions were admitted into the same category; and therefore con-

Scholastic derivation of *praesumtiones juris et de jure.*

Ages, and this for several reasons. The jurists were mostly ecclesiastics, and dogmatic ecclesiasticism then accepted realism as a divine verity. The jurists had no concrete cases to decide, for their opinion was not then asked by the rude courts who disposed of property and life. The jurists also, in penal inquiries, held the canon law to be authoritative; and the canon law, for the purposes of the confessional, constructed an elaborate theory of presumptive proof based upon realism. The sacerdotal judgment had to be guided so as to determine rightly all the probable cases that might arise. Hence, books of casuistry were published, in which all the current forms of guilt were generalized; specific qualities assigned to each; and the announcement made that, for certain general overt acts, certain motives were to be imperatively presumed. It is remarkable that Lord Coke's classification of presumptions was taken from the canon lawyers, whose authority in other respects he so vehemently denounced. And it is still more remarkable that the realistic hypothesis, derived from theology and metaphysics, should linger even to the present day in our courts of law. We are still constantly told of an "abstract killing," to which certain invariable accidents are necessarily attached; and we are informed that whenever an abstract killing is proved, then these accidents (one of which is malice) are to be assigned to it as *praesumtiones juris*. See article in Forum for 1875, p. 201, from which the above is reduced.

[1] Globig, Theorie der Wahrscheinlichkeit, ii. 56.

[2] Cocceius, Diss. de prob. dir. neg. § 17, cited by Burckhard, 370.

clusions which rested on supposed invariable natural laws were thus classified. It is a *praesumtio juris et de jure* that information known only at London this morning cannot be known at Rome this afternoon. It is a *praesumtio juris et de jure* that a man who was at London seven days ago cannot to-day be at Rome. And then, as a reasonable being intends what he does, it is a *praesumtio juris*, if not *de jure*, that before a case is tried, the intent, even when intent is in litigation, is to be assumed.

§ 1233. Such are the speculations of the scholastic civilians from whom the conclusions of our own text-writers have been mainly derived. It is remarkable, for instance, that the commentators on the Roman law on whom Mr. Best relies are Alciat (1492–1550), Menoch (1532–1609), Mascardus (1550–1600), Matthaeus (1601–1654), and Huber (1636–1694), all of them exponents of the scholastic jurisprudence, adopting more or less fully its tendency to absorb in jurisprudence all other sciences, and to merge the regulative element in the speculative; all of them, so far as concerns the distinction between *praesumtiones juris* and *praesumtiones juris et de jure*, following the Italian glossarists, by whom this distinction was created, and thus abandoning the Roman standards which restricted the term *praesumtio* to such postulates as the law establishes for the purpose of relieving a party from the burden of a particular proof.

Gradual reduction of *praesumtiones juris et de jure.*

§ 1234. The assignment of irrebuttability to presumptions, however, is as repugnant to the practical jurisprudence of business life, as it is to the philosophical jurisprudence of Rome. Practical jurisprudence soon discovers that a presumption that is irrebuttable in an age of ignorance is rebuttable in an age of civilization.[1] That a man cannot be, in the same week, in Rome and in London, was an irrebuttable presumption in the twelfth century; it is no presumption at all in the nineteenth. That information cannot be passed instantaneously from one business centre to another was, in the twelfth century, irrebuttably presumed; in the nineteenth century most of our business contracts are affected by information so received. That an appropriate intent is assignable to an ideal man doing an ideal act may be speculatively true; that such an intent is to be assumed in

[1] See Mill's Logic, i. 389.

advance of a trial cannot be practically accepted by courts having to do with real men, put on trial for acts, many of which are without motive (*e. g.*, in issues of negligence), and many of which are done suddenly, in heedlessness, in passion, in self-defence, or through necessity. Hence it is that the old presumptions *juris et de jure* are gradually disappearing. This, indeed, is admitted by Mr. Best,[1] when he tells us that certain presumptions, which in earlier times were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among *praesumtiones juris tantum*, or considered as presumptions of facts to be made at the discretion of a jury.[2] The consequence is that our courts, even while holding to the old phraseology, are so far contracting the range of presumptions *juris et de jure* that while the class is still said to exist, no perfect individuals of the class can be found. The unimpeachability of records is one of the last survivors of these presumptions, and the unimpeachability of records is still spoken of as a presumption *juris et de jure;* but whatever may be the name given to this presumption, it vanishes when it is confronted by proof of fraud or coercion.[3]

§ 1235. While in our own law *praesumtiones juris et de jure* preserve an existence which is now merely titular, in the modern Roman law, as taught by its most authoritative commentators, even this titular recognition is refused. The scholastic *praesumtiones juris et de jure*, it is held by the best French and German commentators on this particular topic,[4] are resolvable into the following classes :—

In modern Roman law distinction is denied.

1. Conclusions from natural laws, the disproval of which is impossible.

2. Processual rules, enacted to facilitate litigation that in the long run is just, or to check litigation that in the long run is vexatious.

3. Fictions, which, though false, are assumed by the policy of the law.

[1] Best Ev. § 307.

[2] He cites to this Ph. & Am. Ev. 460; 1 Ph. Ev. 10th ed.

[3] See striking illustrations of this in Windsor *v.* McVeigh, 93 U. S. 274, and other cases cited supra, §§ 795–7.

[4] See Endemann's Beweislehre, 85–94; Burckhard, Civilistische Praesumtionen, 369 *et seq.;* 11 Vierteljahrschrift für Gesetzgebung, 601; Bonnier, Traité des Preuves, ii. 387–414 *et seq.*

4. Statutory presumptions, such as those introduced, by way of limitation, to quiet titles, or (as in the case of the statute of frauds) to exclude inferior and unreliable proof.[1]

In our own law unnecessary.

§ 1236. The modification just noticed, of the old classification of presumptions, avoids what is evil in that classification, and retains what is good. By getting rid of the term irrebuttable presumptions we not only remove a series of presumptions, really rebuttable, from a category to which they do not belong, but we relieve the practical administration of justice from the embarrassments which are produced from judges applying, in their charges to juries, the term irrebuttable to presumptions which are open to disproof. On the other hand, we retain, restoring them to their proper place, those leading axioms of law (*e. g.*, the postulates that all persons are cognizant of the law to which they are subject, and that all sane persons are responsible for their acts) which were once called presumptions *de juris et de jure*, but which are really among the necessary principles from which jurisprudence starts.

§ 1237. Dropping, therefore, the term *praesumtiones juris et de jure*, as unnecessary if not unphilosophical, we proceed to discuss, as the subject of the present chapter, presumptions of law, in their general sense, and presumptions of fact. Our first duty will be to inquire in what these presumptions differ. And on examination, the points of difference will be found to be as follows:—

Presumptions of law distinguishable from presumptions of fact.

1. A presumption of law derives its force from *jurisprudence* as distinguished from *logic*. A statute, for instance, may say, that a person not heard of for ten years is to be counted as dead. This is a presumption of law, and is arbitrarily to be applied to all cases where parties have been absent for such period without being heard from. If there be no such statute, then logic, acting inductively, will have to establish a rule to be drawn from all the circumstances of a particular case. Or a statute may prescribe that all persons wearing concealed weapons are to be presumed to wear them with an evil intent. This would be a presumption of law, with which logic would have nothing to do.[2] On the other hand, whether a

[1] See this point discussed supra, §§ 851–53.

[2] See § 1239 *a*.

particular person, who carries a concealed weapon, there being no statute, does so with an evil intent, is a question of logic (*i. e.*, probable reasoning, acting on all the circumstances of the case), with which technical jurisprudence has no concern. It is not necessary, however, to a presumption of law, that it should be established by statute, in our popular sense of that term. Statute, in its broad sense, includes juridical maxims established by the courts as well as juridical maxims established by the legislature. To make, however, a maxim established by the courts in this sense a statute, it must be not only definitely promulgated by judicial authority, but finally accepted; such maxims being, to adopt Blackstone's metaphor, statutes worn out by time, the maxim remaining, though the formal part of the statute has disappeared. The chief maxims of this kind are the presumption of innocence, the presumption of knowledge of law, and the presumption of sanity. Presumptions of law, therefore, are uniform and constant rules, applicable only generically. Presumptions of fact, on the other hand, are conclusions drawn by free logic, applicable only specifically.[1]

2. To a presumption of law probability is not necessary; but probability is necessary to a presumption of fact. Knowledge of law is in all cases presumed, though in no case it perfectly exists, and in multitudes of cases does not exist at all in the concrete. So we can conceive of cases in which it is highly improbable that an accused person is innocent of the crime with which he is charged; yet probable or improbable as guilt may antecedently appear, he is presumed to be innocent until he is proved to be guilty. On the other hand, without probability, there can be no presumption of fact. A man is not presumed to have intended an act, for instance, unless it is probable, upon all the facts of the case, he intended it.

3. Presumptions of law relieve either provisionally or absolutely the party invoking them from producing evidence; presumptions of fact require the production of evidence as a preliminary. The presumption of innocence, for instance, makes it provisionally unnecessary for me to adduce evidence of my innocence. On the other hand, until I am proved to have done a thing, there can be no presumption against me of intent. Evidence, therefore, which is the

[1] See Hamilton *v.* People, 29 Mich. 193.

necessary antecedent to presumptions of fact, is attached to presumptions of law only as a consequent. Until the evidence is adduced there can be no presumption of fact; there is no presumption of law that is not applicable before the evidence is adduced.

4. The conditions to which are attached presumptions of law are fixed and uniform; those which give rise to presumptions of fact are inconstant and fluctuating. For instance: all persons charged with crime are presumed to be innocent. Here the condition is fixed and uniform; it involves but a single, incomplex, unvarying feature, *charged with crime;* it is true as to all persons embraced in the category. On the other hand, the presumption of fact, that *doing* presumes *intending*, varies with each particular case, and there are no two cases which present the same features. Persons charged with crime may be sane or insane; may be adults or infants; may be at liberty or under coercion: in each case, so far as concerns the presumption of law, they are persons charged with crime, and the presumption applies equally to each. But whether a person doing an act is sane or insane; is an adult or an infant; is at liberty or under coercion; is essential in determining intent. Presumptions of fact, in other words, relate to unique conditions, peculiar to each case, incapable of exact reproduction in other cases; and a presumption of fact applicable to one case, therefore, is inapplicable, in the same force and intensity, to any other case. But a presumption of law relates to whole categories of cases, to each one of which it is uniformly and equally applicable, in anticipation of the facts developed on trial. Thus, for instance, all children born in wedlock are presumed by law to be legitimate until the contrary be proved; and this presumption applies to all children so born, no matter who they may be. On the other hand, whether a bastard is born of a particular father, is determinable usually by presumptions of fact attachable to conditions as to which no two cases present precisely the same type.

Presumptions of fact may be by statute made presumptions of law.

§ 1238. It must be kept in mind, at the same time, as we have already incidentally seen, that the law-making power may attach to any particular fact or chain of facts certain legal consequences, and in this way turn a presumption of fact into a presumption of law. Of presumptions either established or destroyed by statute, our own legis-

lation gives numerous instances.[1] The presumption of death derived from absence has been introduced into the codes of most of our states. The presumption of fact, by which a debt, unrecognized for a series of years, is supposed to have been paid, is made a rule of law by our statutes of limitation. In most of our states we have declared by statute that the presumption of guilt arising from silence when accused shall not extend to cases where a defendant declines to testify in his own behalf. In all our states we have statutes limiting the effect of parol proof.[2]

Fallacy arising from ambiguity of terms "law," "legal," and "presumption."

§ 1239. The difficulties we have just noticed are largely owing, the reader must have already noticed, to the ambiguity of the terms employed. The ambiguity in the term "presumption" is thus noticed by Mr. Mill:[3] "To be acquainted with the guilty is a *presumption* of guilt; this man is so acquainted, therefore we may *presume* that he is guilty; this argument proceeds on the supposition of an exact correspondence between *presume* and *presumption*, which does not really exist; for 'presumption' is commonly used to express a kind of *slight suspicion*, whereas 'to presume' amounts to absolute belief." Whether Mr. Mill is right in his definition of "presume" and "presumption" need not now be considered. It is enough for the present purpose to say that the words, even if not distinguishable in the way Mr. Mill states, go to a jury, if left without explanation, open to meanings from which conclusions diametrically opposite can be drawn. The term "law" may be used, in connection with presumptions, in three senses: (1) A presumption of law, in its technical sense, is, as we have seen, a presumption which jurisprudence itself applies, aside from the concrete case, to certain general conditions whenever they arise. (2) But a presumption of law may be also a presumption of fact which jurisprudence permits; and it is the practice of judges to say that a presumption of fact is "legal," *i. e.*, that it is one the law will sustain. (3) "Law," as we have already seen, may be used as including the laws of nature and of philosophy, as well as those of formal

[1] Statutes declaring that certain certificates, or other acts, should be *primâ facie* proof are constitutional. See elaborate review by C. J. Gray, Holmes *v.* Hunt, 122 Mass. 505. And see supra, §§ 850, 1237.

[2] As to the statute of frauds, see supra, §§ 851–53.

[3] Mill's Logic, ii. 442.

jurisprudence. Juries are constantly told, for instance, that certain conclusions of mental or physical science are presumptions of law; and in this way they are led to suppose that such conclusions bind, as absolute rules of jurisprudence, the particular case, no matter what may be the phases the evidence may assume. This error, which tends to subordinate justice to arbitrary form,[1] can be best corrected by an analysis, in this relation, of the presumptions which come most frequently before the courts. This analysis we now undertake.

Statutory presumptions are constitutional.

§ 1239 *a*. It is within the power of the legislature to establish rules of evidence, either by excluding certain evidence admissible at common law, or by admitting certain evidence excluded at common law, or by declaring that particular evidence shall be *primâ facie* or absolute proof. Under the first head falls evidence excluded by the statute of frauds and by stamp acts. Under the second head may be classed, in addition to the cases mentioned in the last section, statutes providing that certain official copies shall have the same effect as originals; that matters not denied by affidavit shall be regarded as admitted; that the records of certain courts shall have certain probative effect; that absence for a certain time shall be regarded as a presumption of death; that recognition and cohabitation should be *primâ facie* proof of matrimony.[2]

II. PSYCHOLOGICAL PRESUMPTIONS.

§ 1240. "Psychological facts," says Mr. Best,[3] "are those which have their seat in an inanimate being by virtue of the qualities by which it is animate; . . . . as, for instance, the sensations or recollections of which he (an intelligent agent) is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his animus or intention in doing particular acts, etc. Psychological facts are obviously incapable of direct proof by the testimony of witnesses; their existence can only be ascertained either by confession of the party whose mind is their seat, index animo sermo,—or by presumptive inference from physical ones." Among psychological presumptions may be enumerated the following:—

[1] See supra, § 852.

[2] See supra, § 852. As to criminal law, see Wh. Cr. Ev. § 716 *a*. As to statutory discrimination of evidence, see supra, § 69.

[3] Evidence, § 12.

All persons subject to a law are irrebuttably presumed to know what it is;[1] though this, as we have seen, is an axiom of law rather than a presumption.[2] That the axiom contains an untruth is conceded. No man, in a civilized community, knows the law either intensively or extensively; there is no thinker, no matter how profound, who has not left some depths unfathomed; no reader, no matter how omnivorous, who has not left some details untouched. To predicate that of the ignorant which cannot be predicated of the learned specialist is absurd;[3] but predicated it is both of ignorant and learned, so far

Law presumed to be known by all subjects.

[1] 1 Hale, 42; R. *v.* Price, 3 P. & D. 421; *S. C.* 11 Ad. & E. 727; Middleton *v.* Croft, Str. 1056; Stewart *v.* Stewart, 6 Cl. & F. 966; Kelley *v.* Solari, 9 M. & W. 54; Rogers *v.* Ingham, L. R. 3 Ch. D. 351; R. *v.* Esop, 7 C. & P. 456; R. *v.* Good, 1 C. & K. 185; Stokes *v.* Salomons, 9 Hare, 79; R. *v.* Hoatson, 2 C. & K. 777; R. *v.* Bailey, R. & R. 1; Stockdale *v.* Hansard, 9 A. & E. 131; R. *v.* Coote, 4 L. R. P. C. 599; 9 Moore, P. C. C. N. S. 463, cited supra, § 535; Barronet's case, 1 E. & B. 1; Pearce & D. 51; Hunt *v.* Rousmanier, 8 Wheat. 174; Morgan *v.* U. S., 113 U. S. 477; U. S. *v.* Learned, 11 Int. Rev. Rep. 149; The Ann, 1 Gallis. 62; U. S. *v.* Anthony, 11 Blatch. 200; Cambioso *v.* Maffett, 2 Wash. C. C. 98; Freeman *v.* Curtis, 51 Me. 140; Pinkham *v.* Gear, 3 N. H. 163; Com. *v.* Bagley, 7 Pick. 279; Wheaton *v.* Wheaton, 9 Conn. 96; Shotwell *v.* Murray, 1 Johns. Ch. 512; Champlin *v.* Layton, 18 Wend. 407; Clarke *v.* Dutcher, 9 Cord. 674; Hampton *v.* Nicholson, 8 C. E. Green, 427; Menges *v.* Oyster, 4 W. & S. 20; Good *v.* Herr, 7 W. & S. 353; Carpenter *v.* Jones, 44 Md. 625; Goltra *v.* Sanasank, 53 Ill. 456; Winehart *v.* State, 6 Ind. 30; Black *v.* Ward, 27 Mich. 191; Whitton *v.* State, 37 Miss. 379. As a very strong case in which this presumption was applied may be noticed Muir *v.* Glasgow Bank, cited infra, § 1249.

[2] Supra, § 1236.

[3] "Besides," objects Mr. Livingston, in his report on the Louisiana Penal Code, "is it not a mockery to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for the book that contained it, he would smile at my ignorance, and, pointing to about five hundred volumes on his shelves, would tell me those contained a small part of it; that the rest was either unwritten, or might be found in books that were in London or New York, or that it was shut up in the breasts of the judges at Westminster Hall. If I should ask him to examine his books and give me the information which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many years could not be gratuitously imparted. Your law, therefore, I repeat, is absurd in its consequences if taken literally, and mocks us by a reference to an inaccessible source for an explanation of its obscurities."

See, also, Martindale *v.* Falkner, 2 C. B. R. 720, Maule, J.; R. *v.* Mayer, L. R. 3 Q. B. 629; Cutter *v.* State, 36 N. J. L. 125. Supra, § 1029.

as to establish the conclusion that no one is allowed to set up ignorance of law as an excuse for wrong. For this several reasons are given. Mr. Austin inclines to think that the law refuses to recognize ignorance of the law as a defence because the law has no tests by which ignorance of law can be measured. Who can tell whether, in any given case, such ignorance exists? Who can tell whether such ignorance is inevitable?[1] Pascal argues that society would be destroyed if such an excuse were held good. Discussing the alleged Jesuit dogma that ignorance relieves from responsibility, he says, with fine satire, that till he heard this, he had supposed that the most depraved were the most culpable, but that now he finds that the more stolid the brutishness, or the more reckless the levity of the criminal, the more blameless he becomes; and to illustrate his criticism he appeals to Aristotle's observation, that "All wicked men are ignorant of what they ought to do, and what they ought to avoid; and it is this very ignorance which makes them wicked and vicious."[2] To this it may be added, that government would come to a stand-still if this principle were not enforced. Few people would read tax laws, few would read municipal ordinances, if ignorance in the first case would excuse paying taxes; in the second case, would excuse obedience to police regulations; and the more reckless crime becomes, the more sullen and resolute would be the ignorance it would cultivate. The presumption, however, does not apply to foreign law.[3] Hence there is no presumption that a non-resident knows the laws or public acts or records of a State, and where it is necessary to charge him with knowledge, the fact of knowledge must be proved.[4] But, as will be hereafter seen, foreign law is presumed to be the same as domestic, except as to peculiar idiosyncrasies of the latter.[5]

But knowledge by non-specialist of special law

§ 1241. It must be remembered at the same time, that the knowledge of law which is here assumed is simply practical knowledge commensurate with the duties whose non-discharge the law, in the concrete case, condemns. A sane person who commits a public wrong, for instance, is bound

[1] Austin's Lectures, 2d ed. i. 498. This is adopted by Hunt, J., in Upton *v.* Tribilcock, 91 U. S. 45. See South Ottawa *v.* Perkins, cited supra, § 289.

[2] Pascal, 4th Prov. Letter.

[3] Supra, § 300; Norton *v.* Marden, 15 Me. 45; Haven *v.* Foster, 9 Pick. 112; King *v.* Doolittle, 1 Head, 77.

[4] Stedman *v.* Davis, 93 N. Y. 32.

[5] Infra, § 1292.

to know that the wrong is subject to penal consequences: if it is *malum in se*, his natural consciousness points to this, and it would be fatal to government to allow want of such natural consciousness to be a defence; if it is *malum prohibitum*, it should be known by him, for it is his duty, when he undertakes to abide in a community, to know what it prohibits, since otherwise no police laws could be enforced. But, when questions of construction of documents come up, then, as we will hereafter see more fully, a party cannot be always held liable civilly for adopting a probable construction which the courts may ultimately hold to be erroneous.[1] There are also different grades of requisite knowledge proportionate to the duties assumed. Thus, a person not claiming to be a legal specialist is liable, when the question comes up in a civil issue, only for a lack of that knowledge of law common to non-specialists of his class.[2] Thus, a person travelling on a railroad is not presumed to know all the rules of the railroad company, even though it be his duty to inform himself beforehand as to such rules.[3] On the other hand, a person claiming to be a specialist in the law is liable for a lack of the knowledge common to good practitioners of his school.[4] So a knowledge of the legal bearings of the rules of their respective associations is imputed to the members of a stock exchange,[5] and to the members of a club;[6] and parties taking under a lease are presumed to know the title which they accept;[7] and those executing instruments to know what such instruments mean.[8] But, whatever be the degree of knowledge of the law the law presumes the individual to have, he is presumed to have absolutely. The presumption, if it is to be called such (it being, as we have noticed, more properly an axiom of jurisprudence), is irrebuttable, unless in cases of fraud.

not required.

[1] Beauchamp *v.* Winn, L. R. 6 H. L. 223; Ireland *v.* Livingston, L. R. 5 Eng. App. 395; Brent *v.* State, 43 Ala. 297; Kostenbader *v.* Spotts, 80 Penn. St. 430. Infra, § 1242.

[2] Wharton on Neg. §§ 414, 510, 520, 749; Miller *v.* Proctor, 20 Ohio St. 442.

[3] Trunkey, J., Lake Shore, etc. R. R. *v.* Rosenzway, 113 Penn. St. 538.

[4] See cases cited at large in Wharton on Agency, §§ 596 *et seq.*

[5] Stewart *v.* Canty, 8 M. & W. 160; Mitchell *v.* Newhall, 15 M. & W. 389.

[6] Raggett *v.* Musgrave, 2 C. & P. 556.

[7] Butler *v.* Portarlington, 1 Conn. & L. 24.

[8] Lewis *v.* R. R., 5 H. & N. 867; Androscoggin Bk. *v.* Kimball, 10 Cush. 373; Clem *v.* R. R., 9 Ind. 488. Infra, § 1243.

§ 1241 *a*. It is luminously shown by Savigny[1] that, while knowledge of law is by the Roman law presumed as far as concerns the general principles of law, this presumption does not extend to the classification (subsumption) under general rules of law of certain complex conditions of fact. And Mr. Pollock[2] declares that "ignorance of law means only ignorance of a *general rule* of law, not ignorance of a right depending on questions of mixed law and fact, or on the true construction of a particular instrument."[3] And the position that knowledge will not be presumed of the legal meaning of an ambiguous document, or of the legal category into which complicated conditions of fact will be ultimately adjudged to fall, is sustained by many rulings of American courts.[4]

Nor is knowledge presumed of law in the concrete.

[1] Röm. Recht, III. 340.

[2] Contracts, 436.

[3] To this he cites Lord Westbury in Cooper *v.* Phibbs, L. R. 2 H. L. at p. 170, "to which the dicta in the later case of Earl Beauchamp *v.* Winn, L. R. 6 H. L. 223, really add little or nothing."

[4] Whart. on Contracts, §§ 198, 199, and cases there cited; Freeman *v.* Curtis, 51 Me. 140; May *v.* Coffin, 4 Mass. 346; Warden *v.* Tucker, 7 Mass. 449; Northrop *v.* Graves, 19 Conn. 548; Champlin *v.* Layton, 18 Wend. 407; Mayer *v.* Ebers, 38 N. Y. 305; Logan *v.* Matthews, 6 Barr, 417; Kostenbader *v.* Spotts, 80 Penn. St. 430; McNaughton *v.* Partridge, 11 Ohio, 223; Ledyard *v.* Phillips, 32 Mich. 13; Fitzgerald *v.* Peck, 4 Litt. 125; Underwood *v.* Brockman, 4 Dana, 309; Gratz *v.* Redd, 4 B. Mour. 178; Garner *v.* Garner, 1 Dessaus. 437; Lowndes *v.* Chisolin, 2 McCord Ch. 455; Hopkins *v.* Mazyde, 1 Hill Ch. 242; Harden *v.* Ware, 15 Ala. 149; Brent *v.* State, 43 Ala. 297; Moreland *v.* Atchison, 19 Tex. 303.

"It has been already noticed that error on the question, whether a particular case is subject to a particular law, is in this relation a question of fact, not of law. The subsumption, as the process of classification is called by the Roman jurists, may sometimes be so simple that it may be difficult to see how it could be induced by error. On the other hand, cases constantly occur which are so complicated that counsel of eminence and skill may widely differ as to the particular rule of law under which they fall. It would, so argues Savigny, be great injustice to charge those experts, whose opinion in such cases is ultimately disapproved, not only with mistake, but with negligence. . . . In our practice this distinction, though not accepted in terms, is practically recognized. When the question is whether a particular combination of facts falls within a particular legal rule then error in this respect may entitle a party to relief in a case where, if the question were purely one of fact, equity would interfere. This distinction applies to the construction of documents; and when an agreement is so framed as not to correctly express the intentions of the parties, equity will not be precluded from relieving by the fact that the mistake was one of law. . . . But what litigated case is there

1242. It should also be kept in mind that there are cases in which *communis error facit jus*, and in which, therefore, the courts will sustain a prevalent construction, which is erroneous, rather than disturb titles which have been

Communis error facit jus.

as to which we can say in advance that it depends upon a pure question of law? After the facts are settled, and the testimony in the case closed, this may be said in cases where the facts are not proved in ambiguous terms; but before the settling of the facts and the closing of the case there are always contingencies possible that may take a case out of one category of law and place it in another. Even in the case already cited, where a supposed grandson compromised a litigation with an uncle on the supposition that the uncle, a younger brother of the grandson's father, was entitled to take as heir-at-law of a third brother deceased, the question was not a pure question of law. Who could tell, especially under marriage laws so complicated as those of England, that there might not be charged against the particular marriage under which the plaintiff claimed some flaw that might raise a question of fact? Who can tell whether there might not be a conveyance from the plaintiff which, by its own force, might raise at least a shadow of a title in some other person? Who can say in reference to any particular litigated case, no matter how clearly it may appear to fall under some established principle, that some extraordinary casualty might not occur which will bring the case out of the range of such principle? And if so, a mistake as to whether a particular case falls within a particular rule is a mistake, which, if common to the parties, will justify the intervention of a court of equity decreeing rectification. Mr. Pollock declares it to be 'the true rule, affirmed for the Roman law by Savigny, and in a slightly different form for English law by Lord Westbury,' 'that ignorance of law means only ignorance of a *general* rule of law, not ignorance of a right depending on questions of mixed law and fact, or on the true construction of a particular instrument.' Mr. Pollock further says: 'A. and B. make an agreement and instruct C. to put it into legal form. C. does this so as not to express the real intention, either by misapprehension of the instructions or by ignorance of law. It is obvious that relief should be given in either case. In neither is there any reason for holding the parties to a contract they did not really make.' But in place of terms the parties selected as the expression of their views other terms giving a different sense cannot be substituted. In other words, it may be shown that the document is not one the parties intended to execute, and the meaning of ambiguous terms may be cleared; but unambiguous terms cannot be stricken out and others substituted by parol. . . . In conclusion we must remember that if there can be no relief for mistakes of fact involving error of law, there can be no mistake of fact for which relief can be granted, since there is no mistake of fact in which some mistake of law is not involved. A mistake as to identity of a person, for instance, involves a mistake of law as to his legal relations; a mistake as to the substance of a thing would be of no moment did it not involve a mistake as to the thing's legal incidents. The term 'law,' in the rule that mistake of law is no excuse, is to be restricted to juridical law as a rule of action, and is not to be ex-

settled under such construction.[1] But this exception cannot be recognized, so it is said by Lord Denman, "unless it (the error) can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."[2] By Lord Ellenborough a less stringent and more reasonable distinction is taken: to enable the maxim to operate, the error must not be "floating," but "must have been made the groundwork and substratum of practice."[3] In addition to what has been stated, it is to be observed that when a contract is good by the law to which it is subject as expounded at the time it was made, it does not become bad on a subsequent change of judicial opinion.[4]

Knowledge of fact a presumption of fact.

§ 1243. That a person knows what he does is also sometimes called a presumption of law. If we take presumption of law to mean something that the law declares to be universally true until rebutted, then that all persons know what they are about is not a presumption of law, for there are many persons (*e. g.*, persons influenced by fraud or coercion) as to whom the law declares just the contrary. But that a person who is *capax negotii* should set up ignorance of facts as ground of exculpation or of defence would be against the policy of the law; and hence, where there is no fraud or coercion, the law treats him as if he were cognizant of what he did. He is not supposed to have known facts of which it appears he was ignorant; but, if his ignorance is negligent or culpable, then the law declares that it cannot protect him.[5] Apart from this liability, we have a right to infer, as a presumption of fact based upon our experience of business, that an intelligent person who does a thing in his par-

tended to law as a compound of law and fact. There are therefore two extremes in this vexed issue to be avoided. On the one side, when we say that mistake of law does not give ground for relief, we must restrict ourselves to such mistake of law as does not involve a mistake of fact. On the other side, when we say that mistake of fact gives ground for relief, we must remember that such mistake must go to some past or existing thing, and not relate to mere opinion of the law. When it does go to a past or existing thing, it does not cease to be ground for relief because it involves a mistake of law." Whart. on Cont. § 199.

[1] See Kostenbader *v.* Spotts, 80 Penn. St. 430.

[2] Lord Denman, C. J., O'Connell *v.* R. Leahy's Rep. 28.

[3] Isherwood *v.* Oldknow, 3 M & S. 396; and see Broom's Max. (5th ed. 139); R. *v.* Justices, 2 B. & S. 680; Jones *v.* Tapling, 12 C. B. (N. S.) 846; Phipps *v.* Ackers, 9 Cl. & F. 598.

[4] Whart. on Cont. § 367.

[5] See cases cited in Wharton's Criminal Law, §§ 125 *et seq.*, 1581 *et seq.*

ticular line of business knows what he is about.[1] An underwriter, for instance, in cases where he is not misled by the insured, is assumed to be familiar with Lloyd's Shipping List.[2] A merchant, also, dealing in a particular market, is taken to be acquainted with the custom of that market.[3] And a party is assumed to have read the contents of an instrument executed by him; nor is evidence, when an instrument is offered against him, that he did not read it, admissible unless coupled with proof of fraud.[4] To wills this inference has been frequently applied;[5] though the inference may be rebutted by proof of facts indicating fraud, coercion, or undue influence.[6] But a party buying a railway ticket will not be assumed to have notice of conditions printed on its back in small type.[7]

Party signing document assumed to have read it.

[1] Doe *v.* Turford, 3 B. & Ad. 890, 895; Champneys *v.* Peck, 1 Stark. R. 404; Pritt *v.* Fairclough, 3 Camp. 305; Young *v.* Turing, 2 M. & Gr. 603, per Ld. Abinger; 2 Scott N. R. 752, *S. C.*; Burton *v.* Blin, 23 Vt. 151; Grace *v.* Adams, 100 Mass. 505; Moore *v.* Des Arts, 2 Barb. Ch. 636; Woodruff *v.* Woodruff, 52 N. Y. 53; Mears *v.* Graham, 8 Blackf. 144; Burritt *v.* Dickson, 8 California, 113. Supra, § 1029; infra, § 1259. Otherwise in case of an ignorant seaman. The Tarquin, 2 Low, 358.

[2] Mackintosh *v.* Marshall, 11 M. & W. 116.

[3] Bayliffe *v.* Butterworth, 1 Ex. R. 429, per Alderson, B.; Pollock *v.* Stables, 12 Q. B. 765; Greaves *v.* Legg, 11 Ex. R. 642; 2 H. & N. 210; *S. C.*, in Ex. Ch. *nom.* Graves *v.* Legg; Buckle *v.* Knoop, 36 L. J. Ex. 49; *S. C.* aff. in Ex. Ch. Ibid. 223; Duncan *v.* Hill, 6 L. R. Ex. 25. See, also, Noble *v.* Kennoway, 2 Doug. 513; Da Costa *v.* Edmunds, 2 Camp. 143, cited supra, § 962; Bayley *v.* Wilkins, 7 Com. B. 880; Taylor *v.* Stray, 2 Com. B. N. S. 175; Hodgkinson *v.* Kelly, per Lord Romilly, M. R., 6 Law Rep. Eq. 496; Coles *v.* Bristowe, 4 Law Rep. Ch. Ap. 3; Bowring *v.* Shepherd, 49 L. J. Q. B. 129; Grissell *v.* Bristowe, 4 L. R. C. P. 36.

[4] McKenzie *v.* Hesketh, L. R. 7 Ch. D. 675; Templin *v.* James, L. R. 15 Ch. D. 25; Androscoggin Bk. *v.* Kimball, 10 Cush. 373; Lee *v.* Ins. Co., 3 Gray, 583; Ryan *v.* Ins. Co., 41 Conn. 168; Germania Ins. Co. *v.* R. R., 72 N. Y. 90; Turner *v.* Lucas, 13 Grat. 705; Woodward *v.* Foster, 18 Grat. 200; South. Ins. Co. *v.* Yates, 28 Grat. 585; Hartford Ins. Co. *v.* Gray, 80 Ill. 28; Glen *v.* Station, 42 Iowa, 110. This has been applied to cases of signature by mark. Doran *v.* Mullen, 78 Ill. 342. See Hunter *v.* Walters, cited supra, § 932; Harris *v.* Story, 2 E. D. Smith, 363; Clem *v.* R. R., 8 Ind. 488; and cases cited supra, § 940.

[5] Supra, § 1008; Browning *v.* Budd, 6 Moo. P. C. 430; Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109.

[6] Duane, in re, 2 Sw. & Tr. 590; Mitchell *v.* Thomas, 6 Moore P. C. 137; Scowler *v.* Plowright, 10 Moore P. C. 440; Fulton *v.* Andrew, L. R. 7 H. L. 461. See Hastilow *v.* Stobie, L. R. 1 P. & D. 64.

[7] Malone *v.* R. R., 12 Gray, 388; Parker *v.* R. R., 25 W. R. 97. See Georgia R. R. *v.* Rhodes, 56 Ga. 168.

Presumption of innocence.

§ 1244. In criminal issues, that the defendant should be presumed to be innocent until the contrary be proved beyond reasonable doubt is unquestionably a presumption of law. The presumption, in such case, is to be treated as weighing so far in favor of the defendant as to require, in connection with reasonable doubt of guilt, an acquittal. In other words, reasonable doubt of guilt, in criminal trials, is ground for acquittal in cases where, if we subtracted the probative force of the presumption of innocence, there might be a conviction.[1]

In civil issues preponderance decides.

§ 1245. In civil issues, however, the presumption of innocence, in cases where it is applicable, is not technically evidential, but is of value only so far as it affects the burden of proof. A railroad company, for instance, is sued for damages incurred through the negligence of one of its subalterns. The subaltern is so far presumed to be innocent that the company is not put on the defence until a *primâ facie* case of negligence is made out by the plaintiff.[2] Yet, when such a case is made out, courts do not tell juries, "If there is reasonable doubt as to negligence, you must find for the defendant;" but they say, "You must find in conformity with the preponderance of proof." There is no general presumption of non-peccability in civil issues. The wrong, when a wrong is sued for, must be proved at least *primâ facie* by the plaintiff; and then the presumption of good character is simply one of inference, variable with the particular case. In civil issues, character is always presumed to be so far good as to throw the burden of proof on those assailing it;[3] but its effect on the decision of the issue is to be determined by the concrete proof. To meet the burden of proof thrown under such circumstances upon the *actor*, it is sufficient if he prove a *primâ facie* case. If the proofs of exculpation are in the hands of the opposite side, and the latter does not produce them, the presumption is that they do not exist.[4] Where, however, there is an equipoise of evidence, then the judg-

[1] See Whart. Crim. Ev. §§ 718 *et seq.* As to effect of such presumption, see People *v.* Squires, 49 Mich. 487.

[2] See supra, § 359.

[3] Williams *v.* E. I. Co., 3 East, 192; Rodwell *v.* Redge, 1 C. & P. 220; Ross *v.* Hunter, 4 T. R. 33; Leete *v.* Ins. Co., 15 Jurist, 1161; Goggans *v.* Monroe, 31 Ga. 331; Pratt *v.* Andrews, 4 Comst. 493.

[4] See infra, § 1265.

ment must be against the party attacking. The burden was on him to prove *culpa* or *dolus*, and he has failed to make good his case.[1]

§ 1246. It has just been said that the doctrine, that a reasonable doubt of guilt is to work an acquittal, does not apply to civil issues. If it did, in the numerous cases in which fraud or negligence is charged on both sides there might be a dead lock, since in such cases, if there be reasonable doubt on both sides, there could be no verdict at all.[2] But be this as it may, the doctrine that reasonable doubt should produce an acquittal sprang from the hardship of a system which inflicted capital punishment on all felonies; and is in any view defensible only on the ground that where penal judgments are to be inflicted, and where the state with all its power prosecutes, there proof of guilt should be strong. It is otherwise where the suit is between two private citizens, to each of whom character is supposed to be dear, and each of whom has the same opportunities of vindication by local process. Hence, the better view is, that in civil issues the result should follow the preponderance of evidence, even though the result imputes crime. Of course, as a factor in such a calculation is to be considered the presumption of innocence attachable to good character when character is unassailed.[3]

[1] Supra, §§ 357–8; Ross *v.* Hunter, 4 T. R. 33; Ireland *v.* Livingstone, L. R. 5 Eng. Ap. 575; Timson *v.* Moulton, 3 Cush. 269; Hewlett *v.* Hewlett, 4 Edw. (N. Y.) Ch. 7; Pollock *v.* Pollock, 71 N. Y. 137; Horan *v.* Weiler, 41 Penn. St. 470.

That the presumption of innocence is invoked only in behalf of persons put on trial for a criminal offence is shown by the fact that while, in a prosecution for seduction, the defendant is presumed to be innocent until proved to be guilty, the woman seduced has to prove, either by inference from the whole case or by her reputation, her prior chastity, as required by the statute, there being no such chastity arbitrarily presumed. 2 Whart. Cr. Law, § 1757.

[2] Thus, if contributory negligence, or contributory fraud, be set up by the defendant in such suits, and there is reasonable doubt as to this, and reasonable doubt as to the defendant's culpability, there could be no verdict.

[3] Cooper *v.* Slade, 6 H. of L. Cas. 772; Magee *v.* Mark, 11 Ir. R. (N. S.) 449; Huchberger *v.* Ins. Co., 4 Biss. 265; Scott *v.* Ins. Co., 1 Dillon, 105; Payne *v.* Solomon, 14 Bk. Reg. 162; Knowles *v.* Scribner, 57 Me. 497 (though see Thayer *v.* Boyle, 30 Me. 475); Ellis *v.* Buzzell, 60 Me. 209; Matthews *v.* Huntley, 9 N. H. 150; Folsom *v.* Brown, 5 Foster, 222; Bradish *v.* Bliss, 35 Vt. 326; Weston *v.* Gravlin, 49 Vt. 507; Welch *v.* Jugenheimer, 56 Iowa, 11; Schmidt *v.* Ins. Co., 1 Gray, 529; Gordou *v.* Parmelee, 15 Gray, 413; Munzon *v.* Atwood, 30 Conn. 102; Allen *v.* Allen, 101 N. Y. 658; Robbins *v.* Smith, 47 Coun. 182; Meed *v.* Husted, 52 Conn. 53; Kane *v.* Ins. Co., 38 N. J. L., 10 Vroom, 696; unanimously reversing *S. C.* 9 Vroom,

§ 1247. Love of life may be assumed when necessary to determine the burden of proof. Thus, in a case decided by the Supreme Court of Pennsylvania in 1876, it was held that when the evidence is in equilibrium, on an issue of

Love of life presumed.

441; Young *v.* Edwards, 72 Penn. St. 267; Somerset Ins. Co. *v.* Usaw, 112 Penn. St. 80; Jones *v.* Greaves, 26 Ohio St. 2; Lyon *v.* Fleahman, 34 Ohio St. 17; Simmons *v.* Ins. Co., 8 W. Va. 474; Darling *v.* Banks, 14 Ill. 46; McConnell *v.* Ins. Co., 18 Ill. 228; Hall *v.* Barnes, 82 Ill. 228; Lewis *v.* People, 82 Ill. 104 (though see McConnell *v.* Ins. Co., 18 Ill. 228); Byrket *v.* Monohon, 7 Blackf. 83; Bissell *v.* West, 35 Ind. 54; Contin. Ins. Co. *v.* Jachmeken, S. C. Ind. 1887; Elliott *v.* Van Buren, 33 Mich. 99; Washington Ins. Co. *v.* Wilson, 7 Wis. 169; Blaese *v.* Ins. Co., 37 Wis. 31; Pryce *v.* Ins. Co., 29 Wis. 270; Poertner *v.* Poertner, 66 Wis. 644; Ætna Ins. Co. *v.* Johnson, 11 Bush, 587; Hills *v.* Goodyear, 4 Lea, 233; Stovell *v.* State, 3 Law & Eq. Rep. 490; Kincade *v.* Bradshaw, 3 Hawks, 63; Schell *v.* Toomer, 56 Ga. 168; Ware *v.* Jones, 61 Ala. 288; Rothschild *v.* Ins. Co., 62 Mo. 356; Wightman *v.* Ins. Co., 8 Robt. (La.) 442; Hoffman *v.* Ins. Co., 1 La. An. 216; Sparks *v.* Dawson, 47 Tex. 138; March *v.* Walker, 48 Tex. 372; Smith *v.* Smith, 5 Oregon, 186; Burr *v.* Wilson, 22 Minn. 206. See May on Insurance, § 583. See, *contra*, Thayer *v.* Boyle, 30 Me. 475; Butman *v.* Hobbs, 35 Me. 328; Clark *v.* Dibble, 16 Wend. 604; Woodbeck *v.* Keller, 6 Cow. 118; Coulter *v.* Stewart, 2 Yerger, 225; Lanter *v.* McEwen, 8 Blackf. 495; Tucker *v.* Call, 45 Ind. 31; McConnell *v.* Ins. Co., 18 Ill. 228; Bradley *v.* Kennedy, 2 Greene (Iowa), 231; Forshee *v.* Abrams, 2 Iowa, 571; Ellis *v.* Lindley, 38 Iowa, 461; Barton *v.* Thompson, 46 Iowa, 31 (overruled in Welch *v.* Jugenheimer, 56 Iowa, 11; Wood *v.* Porter, Ibid. 161; Lewis *v.* Garretson, Ibid. 278; State *v.* McGlothlen, Ibid. 544); Polston *v.* See, 54 Mo. 291 (though see Rothschild *v.* Ins. Co., 62 Mo. 356). See, also, Chalmers *v.* Shackell, 6 C. & P. 475; Thurtell *v.* Beaumont, 1 Bing. 339; Willmet *v.* Harmer, 8 C. & P. 695; Neeley *v.* Lock, 8 C. & P. 532; Lavender *v.* Hudgers, 32 Ark. 763; and a judicious criticism in 10 Am. Law Rev. 642.

In bastardy proceedings, for instance, when the proceedings are to enforce civil liability, then preponderance of proof decides; where the object is to subject to criminal penalty, the offence must be made out beyond reasonable doubt. Robbins *v.* State, 47 Conn. 442; Semon *v.* People, 42 Mich. 141.

In Kane *v.* Ins. Co., 38 N. J. L. 441, it was held that where the defence to an action on an insurance policy is burning by design, the defendant is bound to establish the defence beyond reasonable doubt. Woodhull, J., in an elaborate and able opinion, to which reference may be made as exhibiting the view opposed to that in the text, cites, as authorities for this conclusion, Thurtell *v.* Beaumont, 1 Bing. 339; Butman *v.* Hobbs, 35 Me. 227; Shultz *v.* Ins. Co., 2 Ins. L. J. 495. This ruling, however, was reversed in 10 Vroom, 696.

To establish adultery in a divorce proceeding it need not be proved beyond reasonable doubt. Berckman *v.* Berckman, 17 N. J. Eq. 454; Chestnut *v.* Chestnut, 88 Ill. 548; Poertner *v.* Poertner, 66 Wis. 646, qualifying Freeman *v.* Freeman, 31 Wis. 235. See supra, § 225.

The conclusions given in the text are

suicide, it will be inferred that suicide is not established. "The desire of self-preservation," it was said by Mercur, J., giving the opinion of the court, "is firmly imbedded in human nature;" and the ruling of the court below, that the burden was on the party setting up suicide, was affirmed.[1] To sustain suicide, intention must be proved.[2] But the mere fact of suicide will not support the hypothesis of insanity, though it is otherwise when other facts are adduced, of which, taking them in the aggregate, insanity is the most probable explanation.[3]

§ 1248. Good faith in a contracting party has been frequently declared to be a rebuttable presumption of law.[4] So far, however, as concerns the direct application of the maxim to civil issues, we must regard it, in the same way as we regard the presumption of innocence, as an assumption of the law made for the determination of the burden of proof, and

Good faith presumed.

vindicated by Barrows, J., in a case decided in Maine, in 1875, where it was held that in an action of slander for charging one with adultery, a preponderance of testimony will support a plea of justification. Ellis *v.* Buzzell, 60 Me. 209. To the same effect is a learned opinion of Seevers, J., in Welch *v.* Jugenheimer, 56 Iowa, 11. See, also, note (*a*) to Willmet *v.* Harmer, 8 Car. & P. 695, in E. C. L. R. vol. 34, p. 590, and cases there cited. As agreeing with text, see Cooley on Torts, 208; Proffatt on Jury Trials, § 635; *contra*, Bishop on Marriage and Div. § 644.

In Knowles *v.* Scribner, 57 Me. 497, it was held, that the complainant in a bastardy process against a married man is not bound to furnish the same amount of proof of the defendant's guilt as would be necessary to convict him if he were on trial for adultery, in order to entitle herself to a verdict and contribution from the father of her bastard child. And see Russell *v.* Baptist Sem., 73 Ill. 337.

[1] Continental Insurance Co. *v.* Delpeuch, 82 Penn. St. 225; Guardian, etc. Life Ins. Co. *v.* Hogan, 80 Ill. 35; Way *v.* R. R., 40 Iowa, 341. See Terry *v.* Ins. Co., cited infra, § 1252, note; Morrison *v.* R. R., 63 N. Y. 643.

[2] Shank *v.* Aid Soc., 84 Penn. St. 385.

[3] Terry *v.* Ins. Co., 15 Wall. 580; Coverston *v.* Ins. Co., 4 Big. Ins. Rep. 169; McClure *v.* Ins. Co., Ibid. 320; Brooks *v.* Barrett, 7 Pick. 94; Wolff *v.* Ins. Co., 8 Ins. L. J. 97. See Sadler *v.* Sadler, 3 C. B. (N. S.) 87; People *v.* Messersmith, 61 Cal. 246; infra, § 1252.

[4] See Best's Evidence, §§ 346-7; Whart. on Contracts, §§ 654 *et seq.*; Hall *v.* Otis, 77 Me. 122; Cook *v.* Lowry, 95 N. Y. 103; Lake Superior Co. *v.* Drexel, 90 N. Y. 87; Turner *v.* Kouvenhoven, 100 N. Y. 115; Larkin *v.* Misland, Ibid. 212; Whitfield *v.* Stiles, 57 Mich. 410; Garber *v.* State, 94 Ind. 219; Greenwood *v.* Lowe, 7 La. An. 197; Mandall *v.* Mandall, 28 La. An. 556; Richards *v.* Kountze, 4 Neb. 200; Bumpus *v.* Fisher, 21 Tex. 561; Manchaca *v.* Field, 62 Tex. 135; Beesman *v.* Tester, 62 Tex. 431. Supra, §§ 358, 366.

not for the adjudication of the merits. A person who is sued is charged with bad faith, and the burden is on the plaintiff to prove the charge; or the defendant sets up bad faith in the plaintiff, and the burden is on the defendant to make this defence good.[1] But when the actor, in either relation, establishes a *primâ facie* case, and this is met by evidence sustaining good faith on the other side, then the case must be decided on the merits.[2] It should be remembered, at the same time, that when an act which is *primâ facie* illegal is shown, then the burden as to good faith is shifted. Thus, when an agent, by the character of his office, is precluded from buying from, or selling to his principal unless the latter is fully advised of the agent's relation to the transaction and is capable of forming an intelligent and responsible judgment, then, when a sale to or a purchase from the principal is traced to the agent, the burden is on the agent to prove good faith.[3]

Ambiguous instrument to be construed in a

§ 1249. In one conspicuous relation the doctrine that the law will not impute bad faith has a practical weight in determining the issue. When an instrument is susceptible of two conflicting probable constructions, the court

[1] Jones *v.* Simpson, 116 U. S. 609; Mead *v.* Conroe, 113 Penn. St. 220; Greenwood *v.* Lowe, 7 La. An. 197. See supra, § 366.

[2] See fully supra, § 366; Marksbury *v.* Taylor, 10 Bush, 519; Young *v.* Edwards, 72 Penn. St. 267; Vanbibber *v.* Beirne, 6 W. Va. 168. As to evidence of character in such cases, see supra, §§ 47 *et seq.* That the presumption is rebuttable, see Lincoln *v.* French, 105 U. S. 614.

[3] See supra, § 356, for cases. In Hunter *v.* Atkyns, 3 M. & K. 135 (cf. Gibson *v.* Jeyes, 6 Ves. 277), Lord Brougham said: "There are certain relations known to the law as attorney, guardian, trustee; if a person standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation must, before he can take a gift or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation." In the case of Rhodes *v.* Bate, L. R. 1 Ch. App. 258, Lord Justice Turner expressed an opinion that in cases of trifling benefits, the court would not interfere to set them aside upon the mere proof of influence derived from a confidential relationship, but would require proof of *mala fides*, or of undue or unfair exercise of the influence. Powell's Evidence, 4th ed. 75.

will adopt that construction which is most consistent with good faith, and will hold that such construction was intended by the parties.[1] And this rule of construction

sense consistent with good faith.

[1] Atkyns *v.* Horde, 1 Burr. 106; Lewis *v.* Davison, 4 M. & W. 654; Haigh *v.* Brooks, 10 A. & E. 309; Richards *v.* Bluck, 6 C. B. 441; Ireland *v.* Livingstone, L. R. 5 Eng. Ap. 395; Marsh *v.* Whitmore, 21 Wall. 178; Tucker *v.* Meeks, 2 Sweeny, 736; Mechanics' Bank *v.* Merchants' Bank, 6 Met. 13; Foster *v.* Rockwell, 104 Mass. 167; St. Louis Gas Co. *v.* St. Louis, 46 Mo. 121; Goosey *v.* Goosey, 48 Miss. 210; Greenwood *v.* Lowe, 7 La. An. 197; Bessent *v.* Harris, 63 N. C. 542; Long *v.* Pool, 68 N. C. 479; Whart. on Agency, § 248.

"It is a branch of this rule, that ambiguous instruments or acts shall, if possible, be construed so as to have a lawful meaning. Co. Litt. 42 *a* & *b*; Finch, Law, 57; Lewis *v.* Davison, 4 M. & W. 654. Thus, where a deed or other instrument is susceptible of two constructions, one of which the law would carry into effect, while the other would be in contravention of some legal principle or statutory provision, the parties will always be presumed to have intended the former. 'In facto quod se habet ad bonum et malum, magis de bono, quàm de malo, lex intendit.' Co. Litt. 78 *b*." Best's Ev. § 347. See Whart. on Contracts, § 654. To same effect is the Roman Law, L. 80, D. 44, 1. "Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi, quo res, qua de agitur, in tuto sit." L. 80 D. 44, 1. See to this effect remarks of Adams, C. J., in Wing *v.* Glick, 56 Iowa, 47.

Where one of two contemporaneous documents is ambiguous in its terms, and the other is clear, force is to be given to the document whose terms are clear, so as to construe the one containing ambiguous terms. Phœnix Bessemer Steel Co., in re, 44 L. J. Ch. 683; 32 L. T. 854. Supra, § 1103.

The rule in the text was applied by the House of Lords, in April, 1879, to determine a litigation remarkable for the immensity of the interests involved. (Muir *v.* Glasgow Bank, 4 L. R. H. L. 337; London Law Times, Ap. 11, 1879.) Lord Chancellor Cairns, in pronouncing judgment, said: "The first question, whether in Scotland or in England, must be, 'What is the contract which the parties have entered into?' and that must be accompanied by another question, 'What is the contract which the parties were competent to enter into?' *For if words have been used of any ambiguity, or the object of which may be open to any doubt, that construction must, according to the well-known rules of law, be given which will make the contract a legitimate and valid one, and not that construction by which the contract will be destroyed.* Now, it is to be observed that the directors of the bank were a body with limited and clearly defined powers and acting in the execution of delegated and limited authority. The appellants must be taken, as must all persons who deal with the directors of a company, and especially those who deal with the directors for admission into the company, to have known the nature and extent of the authority of the directors and the character of the contract which they were empowered to enter into. With regard to the directors also, it is to be borne in mind that if they exceeded the powers committed to them by the deed of partnership; if they placed the stock and capital of the bank in the power of persons brought upon the register upon terms less favor-

applies to cases where an act or fact is fairly susceptible of two interpretations, one lawful and the other unlawful.[1] So, when it is doubtful which of two deeds of the same date was first executed, priority will be imputed to the instrument which, by having precedence, will best support the intention of the parties.[2]

Contract presumed to have been made in view of a law under which it is valid.

§ 1250. Suppose a contract is good by the *lex solutionis*, and bad by the *lex loci contractus*, or the converse; which law is to apply? This question may be illustrated by cases in which a contract by the one law is void for usury, and by the other law is valid; and by cases in which an obligor is *capax negotii* by the one law, but is a minor by the other law. It has been argued that, in such cases, the courts must arbitrarily apply the law to which the obligation, on abstract principles, is subject.[3] It has been answered however, and with good reason, that parties who enter into a contract are to be presumed to do so *bonâ fide*, intending the contract to be performed; and that they are supposed, if two systems of law are before them, by one of which the contract would be good, by the other of which it would be bad, to incorporate in the contract the law which would make the contract operative.[4] And, on the same

able to the other shareholders than the deed authorized, the directors would incur a liability to their constituents for so doing, and it is not to be supposed that they intended to incur this liability." With the application of this presumption the question of hardship has nothing to do. "It is difficult," so Lord Cairns concludes, "to use words which will adequately express the sympathy I feel for all those who have been overwhelmed in the disaster of the City of Glasgow Bank, and that sympathy is peculiarly due to those who, without any possibility of benefit to themselves and probably without any trust estate behind sufficient to indemnify them, have become subject to loss or ruin by entering for the advantage of others into a partnership attended with risks of which they probably were forgetful, or which they did not fully realize. The duty of your lordships is, however, to declare the law, and of the law applicable to this case your lordships can, I think, entertain no doubt."

[1] Kenton County Court *v.* Bank Lick Co., 10 Bush, 529; Johnson *v.* Wood, 84 Ill. 489. "When a contract is capable of two constructions, the one making it valid and the other void, it is clear law the first ought to be adopted." Erle, J., Mayor *v.* R. R., 4 E. & B. 397.

[2] Taylor *v.* Horde, 1 Burr. 107.

[3] See Story's Confl. of Laws, § 76.

[4] Whart. Confl. of L. §§ 112, 115, 429, 501; Hellman, in re, L. R. 2 Eq. 363; Cutler *v.* Wright, 22 N. Y. 472; Kilgore *v.* Dempsey, 25 Ohio St. 413; Kenyon *v.* Smith, 24 Ind. 11; Smith *v.* Whittaker, 23 Ill. 367; Arnold *v.* Potter, 22 Iowa, 194; Talcott *v.* Despatch Co., 41 Iowa, 249; Baldwin *v.* Gray,

principle, it has been held that where a party undertakes to perform a contract in a particular place, he will be presumed to intend that the contract should be construed according to the usages and laws of such place.[1]

Genuineness as presumption of truth.

§ 1251. It has been sometimes said that when a document is shown to be genuine, the law presumes that it is true. But genuineness and truthfulness are so far from being convertible, that documents prepared to effect any political, social, or ecclesiastical end are from their nature *ex parte*, and are to be received only subject to such qualifications as may be supplied by a knowledge of the character and aims of their authors. It is true that if we could conceive an ideal genuine document, without any distinctive *differentia* of its own, we might speak of an ideal presumption of law that such a document is true. But there is no ideal genuine document; as soon as genuineness is established it brings with it a series of incidents peculiar to itself, by which the inference of veracity is moulded. The English and French proclamations, for instance, during the Napoleonic wars, are genuine documents; yet, as to the truth of these, the only inference that is admissible is that no conclusion can be reached without taking into account the bias and purposes of the parties speaking, and the accuracy of their information. In all cases, where documents are produced to affect third parties, we must consider, also, in determining veracity, the degree of recognition the document has received, and the depository from which it is taken.[2] The Roman authorities on this point speak unhesitatingly. Truth and genuineness, they insist, are not equivalent, though genuineness or spuriousness affords inferences of truth or falsehood. But this conclusion is a *praesumtio hominis*, or logical conclusion, as distinguished from a *praesumtio legis*, or arbitrary legal conclusion.[3]

16 Mart. 192; Saul *v.* His Creditors, 17 Mart. 596; Depau *v.* Humphreys, 20 Mart. 1; Brown *v.* Freeland, 34 Miss. 181. See supra, § 314.

[1] Bayliffe *v.* Butterworth, 1 Ex. R. 429; Pollock *v.* Stables, 12 Q. B. 705; Buckle *v.* Knoop, 36 L. J. Ex. 223; Greaves *v.* Legg, 2 H. & N. 210.

[2] See supra, §§ 194–5.

[3] See Quinct. V. 5; L. 4, D. xxii. 4; L. 26, § 2, D. xvi. 3; Endemann, 258. As to distinction between genuineness and veracity, see Paley's Evidences, Introd. Chap.

Sanity generally presumed.

§ 1252. All persons who have reached years of discretion are regarded *primâ facie*, by a rebuttable presumption of law (*praesumtio juris*), to be sane.[1] Hence the burden of proof, when the issue is on a contract, is on the party disputing sanity.[2] In respect to testamentary capacity, it has been held in some states that the burden of proving capacity is on the party setting up the will;[3] though this burden is removed by incidental and implied proof of capacity at time of signing.[4] The distinction between the two classes of cases, if the distinction is to be allowed, may be found in the circumstance, that contracts are the usual incidents of business, and according to our ordinary notions, imply business capacity; while a will is an exceptional act, often executed in periods of extreme debility and exhaustion, and therefore does not necessarily assume business capacity. In several jurisdictions, also, the decisions rest on the statutory requisition that a testator should be of sound mind. It should be added that on a feigned issue from chancery, based on a *primâ facie* case of insanity, the burden is on the actor in the suit.[5] And the better

[1] Harris *v.* Ingledees, 3 P. Wms. 91; Dyce Sombre *v.* Tronp, 1 Deane Ec. R. 38; Stevens *v.* Vancleve, 4 Wash. C. C. 262; Jackson *v.* Van Dusen, 5 Johns. R. 158; Jackson *v.* King, 4 Cow. 207; Bogardus *v.* Clark, 4 Paige, 623; Trumbull *v.* Gibbons, 2 Zab. 117; Turner *v.* Cheesman, 15 N. J. Ch. 243; Reese *v.* Stille, 38 Penn. St. 138; Egbert *v.* Egbert, 78 Penn. St. 326; Werstler *v.* Custer, 46 Penn. St. 502; Thompson *v.* Kyner, 65 Penn. St. 368; Anderson *v.* Cranmer, 11 W. Va. 502; Jarrett *v.* Jarrett, 11 W. Va. 584; Runyan *v.* Price, 15 Ohio St. 1; Lilly *v.* Waggoner, 27 Ill. 395; Porter *v.* Campbell, 58 Tenn. 81; Saxon *v.* Whitaker, 30 Ala. 237; Cotton *v.* Ulmer, 45 Ala. 378; Farrell *v.* Brennan, 32 Mo. 328; State *v.* Smith, 53 Mo. 267. For criminal cases see Whart. Cr. L. §§ 832 *et seq.*

[2] See cases last cited, and see supra, §§ 3, 356, note, 372; Sutton *v.* Sadler, 3 C. B. (N. S.) 87; Dyce Sombre *v.* Tronp, 1 Deane Ec. R. 38, 49; Phelps *v.* Hartwell, 1 Mass. 71; Howe *v.* Howe, 99 Mass. 88; Swayze *v.* Swayze, 37 N. J. L. 180; Burton *v.* Scott, 3 Rand. Va. 399; Myatt *v.* Walker, 44 Ill. 485. In Terry *v.* Ins. Co., 1 Dillon, 403; aff. 15 Wall. 580, it was held that as to whether suicide was the product of insanity, there is no presumption on either side; and in Sadler *v.* Sadler, 3 C. B. (N. S.) 87, it was held that the presumption is one of fact, not to operate when evidence conflicts. See other cases supra, § 1247. For burden of proof see supra, § 356.

[3] Crowninshield *v.* Crowninshield, 2 Gray, 524; Comstock *v.* Hadlyme, 8 Conn. 261; Delafield *v.* Parish, 25 N. Y. 10; Ean *v.* Snyder, 46 Barb. 230; Taff *v.* Hosmer, 14 Mich. 309.

[4] Davis *v.* Rogers, 1 Houst. 44.

[5] Frank *v.* Frank, 2 M. & Rob. 314; quoted supra, § 356, note.

opinion that when a party sues on a will the sanity of the testator is presumed, so far as to throw the burden of disputing it on the other side,[1] unless in cases where there had been an inquisition of lunacy.[2]

§ 1253. It has frequently been said to be a presumption of law that chronic insanity is continuous;[3] but that such presumption does not exist as to fitful and exceptional attacks.[4] This, however, is a mere *petitio principii;* it being tantamount to saying that chronic insanity is chronic and transient insanity is transient. The presumption as to the continuance of insanity, such is the more correct statement, is one of fact, varying with the particular case.[5] In insanity of a permanent type, however, the inference is that of continuance.[6]

Insanity presumed to continue.

[1] Jarman on Wills, Rand. & Talc. ed. note 1 to chap. iii.; Davis *v.* Davis, 123 Mass. 590; Howard *v.* Moot, 64 N. Y. 447; Egbert *v.* Egbert, 78 Penn. St. 326; Grubbs *v.* McDonald, 91 Penn. St. 236.

[2] Infra, § 1254; Halley *v.* Webster, 21 Me. 461; Clark *v.* Fisher, 1 Paige, 171; Morrison *v.* Smith, 3 Bradf. 209; Harden *v.* Hays, 9 Penn. St. 151; Higgins *v.* Carlton, 28 Md. 115; Breed *v.* Pratt, 18 Pick. 115.

[3] R. *v.* Layton, 4 Cox C. C. 149; R. *v.* Stokes, 3 C. & K. 188; Cartwright *v.* Cartwright, 1 Phillimore, 100; Atty.-Gen. *v.* Parnther, 3 Bro. C. C. 441; White *v.* Wilson, 13 Ves. 88; Princep *v.* Dyce Sombre, 10 Moo. P. C. 232; Nichols *v.* Binns, 1 Sw. & Tr. 243; Smith *v.* Tebbitt, L. R. 1 P. & D. 398; Hoge *v.* Fisher, 1 Pet. C. C. R. 163; Breed *v.* Pratt, 18 Pick. 115; Hix *v.* Whittemore, 4 Met. 545; Sprague *v.* Duel, 1 Clarke N. Y. 190; Crouse *v.* Holman, 19 Ind. 30; Titlow *v.* Titlow, 54 Penn. St. 216; State *v.* Spencer, 1 Zab. 196; Carpenter *v.* Carpenter, 8 Bush, 283; Ballew *v.* Clark, 2 Ired. L. 23; State *v.* Brinyea, 5 Ala. 244; Saxon *v.* Whittaker, 30 Ala. 237; Ripley *v.* Babcock, 13 Wis. 425; State *v.* Reddick, 7 Kans. 143.

[4] Hall *v.* Warren, 9 Ves. 605; White *v.* Wilson, 13 Ves. 87; Lewis *v.* Baird, 3 McLean, 56; Hix *v.* Whittemore, 4 Met. 545; State *v.* Reddick, 7 Kans. 143; People *v.* Francis, 38 Cal. 183.

[5] Thornton *v.* Appleton, 29 Me. 298; Sadler *v.* Sadler, 3 C. B. (N. S.) 87; Smith *v.* Tebbitt, L. R. 1 P. & D. 434; Anderson *v.* Gill, 3 McQueen, S. C. Cas. 197.

When a will is sensible, its character may be appealed to to rebut proof of insanity. Cartwright *v.* Cartwright, 1 Phill. 90; Scruby *v.* Fordham, 1 Addams, 74. In Kingsbury *v.* Whitaker, 32 La. An. 1055, it was held that when a sensible will is shown to be the free act of a person apparently insane, it will be presumed to have been executed in a lucid interval. In Whitaker's Estate, 30 Ala. 237, it was said that when a will is executed by a per-

[6] Attorney-Gen. *v.* Parnther, 3 Bro. C. C. 443; Staples *v.* Wellington, 58 Me. 454; Rush *v.* Magee, 36 Ind. 69; McCormick *v.* Little, 85 Ill. 62; State *v.* Wilner, 40 Wis. 304.

§ 1254. An inquisition of lunacy is, as to strangers, at the most only *primâ facie* proof of business incompetency,[1] though it may conclude parties.[2] Hearsay in the neighborhood is inadmissible to prove insanity.[3] The issue of insanity is to be determined by the facts proved in the particular case;[4] though, in arriving at a conclusion, the opinions of persons who have observed the alleged lunatic, whether such persons be experts or non-experts, are to be considered.[5] Letters addressed to the alleged lunatic are inadmissible unless acted on by

Insanity may be inferred from circumstances.

son shown to be subject to insanity, it is incumbent on the party setting up the will to prove that it was executed in a lucid interval; and to same effect see Titlow *v.* Titlow, 54 Penn. St. 216; Carpenter *v.* Carpenter, 8 Bush, 283; Ripley *v.* Babcock, 13 Wis. 425. But, as we have seen, the good sense of a will shown to have been freely executed by the testator is strong proof that it was executed in a lucid interval.

Where the issue was whether A. was insane on a certain day, evidence of his mental condition eight months afterwards was held rightly excluded; and it was further held that where the plaintiff proves that A. was insane at an earlier time, and that the insanity was not of a temporary character, the burden of proof is not on the defendant to show that A. was sane on the day in question. Wright *v.* Wright, 139 Mass. 177.

[1] Faulder *v.* Silk, 3 Camp. 126, per Ld. Ellenborough; Dane *v.* Kirkwall, 8 C. & P. 683, per Patteson, J.; Frank *v.* Frank, 2 M. & Rob. 315, 316, n.; Sargeson *v.* Sealy, 2 Atk. 412; Bannatyne *v.* Bannatyne, 2 Robert. 475–477; Hume *v.* Burton, 1 Ridg. P. C. 204. See Prinsep & E. India Co. *v.* Dyce Sombre, 16 Moo. P. C. 232, 239, 244–247; Hamilton *v.* Hamilton, 10 R. I. 538; Hart *v.* Deamer, 6 Wend. 497; Hoyt *v.* Adee, 3 Lansing, 173; Hicks *v.* Marshall, 8 Hun, 327; Hutchinson *v.* Sandt, 4 Rawle, 234; Gangwere's Est., 14 Penn. St. 417; McGinnis *v.* Com., 74 Penn. St. 245; Lancaster Bank *v.* Moore, 78 Penn. St. 407. Such an inquisition is admissible for the defendant in a criminal issue. R. *v.* Bowler, 3 Stark. Ev. 1704*; Wheeler *v.* State, 34 Ohio St. . . *Aliter*, it is said, when the question is the validity of a deed. Leggate *v.* Clark, 111 Mass. 308. Inquisitions in drunkenness are also *primâ facie* proof of incompetency. Klohs *v.* Klohs, 61 Penn. St. 245.

[2] Supra, § 812.

[3] Wright *v.* Tatham, 1 Ad. & El. 313; 7 Ad. & El. 313; 4 Bing. N. C. 489; Lancaster Bank *v.* Moore, 78 Penn. St. 407; overruling Rogers *v* Walker, 6 Barr, 371; Choice *v.* State, 31 Ga. 424; supra, § 812; Ashcraft *v.* De Armond, 44 Iowa, 229.

In criminal issues, evidence of the defendant's subsequent acts or conduct is not admissible to prove insanity at the time of the offence, except when so connected with evidence of a previous state of mental disorder as to strengthen the inference of its continuance at the time of the murder, or when they indicate permanent unsoundness. Commonwealth *v.* Pomeroy, 117 Mass. 143.

[4] See Mill's Appeal, 44 Conn. 484; Ashcraft *v.* De Armond, 44 Iowa, 229; Ross *v.* McQuiston, 45 Iowa, 185.

[5] Supra, §§ 451 *et seq.*

him.[1] As facts from which insanity may be inferred it is admissible to prove epileptic tendencies;[2] cerebral peculiarities, and anomalies of sensibility, pulse, and secretion;[3] and such facts as would indicate insane tendencies in the family of which the party in question is a member.[4] Thus, insanity of uncles has been admitted in evidence;[5] and even of collateral descendants from common ancestors three generations back.[6]

Prudence in avoiding danger will be presumed.

§ 1255. It will be inferred that a person of ordinary intelligence, on being advised of danger, will take ordinary care for self-preservation.[7] Thus, it has been held in Pennsylvania,[8] that in the absence of evidence to the contrary, a person who has been killed by a train, at a railway crossing, will be so far presumed to have observed the requisite precautions, that the burden of proof is on the railway company to show the contrary.[9] It is scarcely necessary to add that presumptions of this class are presumptions of fact, varying in intensity with the capacity of the subject. To an infant, but a slight degree of prudence is imputed; the degree imputed increases with years and opportunities.[10]

[1] Wright *v.* Tatem, cited § 175.

[2] 1 Wh. & S. Med. Jur. § 470; Laros *v.* Com., 84 Penn. St. 200; Carpenter *v.* Carpenter, 8 Bush, 287.

[3] 1 Wh. & S. Med. Jur. § 347.

[4] R. *v.* Tucket, 1 Cox C. C. 103; R. *v.* Orford, 9 C. & P. 525; Smith *v.* Cramer, 1 Am. Law Reg. 353; Bradley *v.* State, 31 Ind. 492; People *v.* Garbutt, 17 Mich. 9; State *v.* Felter, 25 Iowa, 67.

[5] Bexter *v.* Abbott, 7 Gray, 71.

[6] Com. *v.* Andrews, cited 1 Wh. & St. Med. Jur. § 375; Edmund's case, Ibid.

[7] Clinton *v.* Root, 58 Mich. 152.

[8] Pennsylvania Railroad Co. *v.* Weber, 76 Penn. St. 157.

[9] Though see, *contra*, Wilcox *v.* Rome, etc. Railroad Co., 39 N. Y. 358. In Weiss *v.* R. R., 2 Weekly Notes, 214; *S. C.*, 79 Penn. St. 387, the court said: "When the plaintiffs below closed their evidence, they had a perfect *primâ facie* case to go to the jury. They had given evidence of the negligence of the defendants, and no contributory negligence of the deceased appeared. The presumption of law (?) was that he had done all that a prudent man would do under the circumstances to preserve his own life, and that he had stopped, and looked, and listened." See Whitford *v.* Southbridge, 119 Mass. 564.

[10] See Whart. Neg. §§ 310, 315, 322.

In Nagle *v.* R. R., 6 Weekly Notes, 510, it was held that *after* fourteen years an infant is chargeable with contributory negligence as a matter of law, but not so *before* fourteen. "At fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years."

Supremacy of husband presumed.

§ 1256. Where, in the commission of a crime (excepting, it is said, treason and murder), the husband and wife are present, and coöperating in the criminal act, it is a presumption of law, capable of being rebutted by proof, that the wife is acting under coercion.[1] In civil action for torts the same *primâ facie* presumption exists in the wife's favor; though this may be rebutted by proof that she instigated the tort, or by other circumstances showing her independent and free concurrence.[2] Such presumption does not apply to acts done in the husband's absence.[3] So, in their marital relations, the supremacy of the husband will be presumed. Thus, a deed of gift to a married woman will be *primâ facie* presumed to be in her husband's custody.[4]

Wife in housekeeping inferred to be her husband's agent.

§ 1257. Where a wife has charge of her husband's household, domestic articles, bought by her for the family, are inferred to have been ordered by his authority,[5] if she is not herself of independent means, regarded by the local law as *capax negotii*.[6] Where there is ground to infer agency, this agency makes the husband liable; otherwise not.[7] If she leaves his house voluntarily and causelessly, this presumption

Paxson, J. But there is no reason why we should in this case depart from the rule which refuses to add to the number of presumptions of law. Whether an infant is to be defeated in a suit on the ground of contributory negligence, depends upon two questions, both of fact. The first is, did he recklessly, judging him according to his lights, run into the danger. If he did not, then comes the question whether the defendant, with due prudence, could have avoided doing the harm. The defendant would have a right to infer that a person, apparently capable of self-preservation, would avoid the collision. But this is a presumption, not of law, but of fact.

[1] See 1 Hale, 46, 47; R. *v.* Manning, 2 C. & K. 887, and cases cited in Whart. Cr. Law, §§ 78, 933.

[2] Marshall *v.* Oakes, 51 Me. 308.

[3] Com. *v.* Butler, 1 Allen, 4.

[4] McLain *v.* Smith, 17 Mo. 49. In Russell *v.* Baptist Sem., 73 Ill. 337, the presumption of supremacy was pushed to an extreme.

[5] Lane *v.* Ironmonger, 13 M. & W. 368; Freestone *v.* Butcher, 9 C. & P. 647; Morgan *v.* Chetwynd, 4 Fost. & F. 451; Philipson *v.* Hayter, L. R. 6 C. P. 38; Pickering *v.* Pickering, 6 N. H. 124; Felker *v.* Emerson, 16 Vt. 653; Stall *v.* Meek, 70 Penn. St. 181. Supra, § 1217. And see Roscoe's Nisi Prius Ev., 13th ed., pp. 534–5.

[6] That there is no presumption, where the husband and wife live together on the wife's real estate, that the husband is liable for the expenses of housekeeping and the wife is not, see Lovell *v.* Williams, 125 Mass. 439, and compare Jolly *v.* Rees, 15 C. B. (N. S.) 628.

[7] Lane *v.* Ironmonger, *ut supra;* Montague *v.* Benedict, 3 B. & C. 631; Reid *v.* Teakle, 13 C. B. 627; Philipson *v.* Hayter, L. R. 6 C. P. 38.

ceases.[1] If without cause she has been expelled from his house, she is by law presumed to have authority to bind him for necessaries.[2]

Probable consequences intended.

§ 1258. That a man intends the probable consequences of what he does is sometimes styled a presumption of law. This, however, is an error, if by presumption of law is meant a presumption to be imposed by the courts as universally applicable. It is not universally true that a man intends the probable consequences of his act. A manufacturer of pistols, for instance, knows that it is probable that some of the pistols he makes may be used to kill; but the killing that results he does not in the eye of the law intend. Probable consequences may result from acts as to which the law, by pronouncing them to be negligent, expressly negatives intent. We are unable, therefore, to say of all the probable consequences of acts, that they were intended by the authors of such acts. The most we can say is, that most of such probable consequences were intended; and that, judging from analogy, or imperfect induction,[3] such is the case with the particular consequences we have to discuss. In this sense we may speak of such consequences being presumedly intended.[4] In all departments of jurisprudence this line of reasoning is applied. The owners of a vessel, for instance, that attempts to run a blockade, are presumed to be privy to the intent of their agents; though they may be relieved by showing that at the time of the shipment they did not know that the blockade existed.[5] He who publishes a libel is presumed to do so intentionally, though the presumption may be rebutted by proof of coercion or fraud on part of the plaintiff.[6] We *infer*, under such circumstances, intent; but we infer it (even when a party is examined as to his motives)[7] from the facts of the par-

[1] Johnston *v.* Sumner, 3 H. & N. 261; Biffin *v.* Bignell, 7 H. & N. 877.

[2] Bazeley *v.* Forder, L. R. 3 Q. B. 562; Wilson *v.* Ford, L. R. 3 Exc. 63.

[3] See supra, §§ 6–12, 482, 954.

[4] The Atalanta, 6 Rob. Adm. 440; Foster *v.* Charles, 6 Bing. 396; 7 Bing. 105; Pontifex *v.* Bignold, 3 M. & Gr. 63; Craven, ex parte, L. R. 10 Eq. 648; Cheeseborough, in re, L. R. 12 Eq. 358; Wood, in re, L. R. 7 Ch. 302; Knapp *v.* White, 23 Conn. 529; Quinebaug Bk. *v.* Brewster, 30 Conn. 559; Jones *v.* Ricketts, 7 Md. 108; Hart *v.* Roper, 6 Ired. Eq. 349; Butler *v.* Livingstone, 15 Ga. 565; Gauldin *v.* Shehee, 20 Ga. 531; Mears *v.* Graham, 8 Blackf. 144.

[5] Baltazzi *v.* Ryder, 12 Moo. P. C. 168.

[5] See Pontifex *v.* Bignold, 3 M. & Gr. 63.

[7] Supra, §§ 482, 954.

ticular case. The process is induction from facts, not deduction from arbitrary law.[1]

A business transaction is supposed to have its ordinary object.

§ 1259. Akin to the last presumption is that of adequate purpose imputed *primâ facie* to business men in business operations. Business transactions, when proved, are assumed to have been performed with the ordinary object of such transactions. Thus, when an old lease expires, and rent is afterwards received, the landlord is presumed to continue the tenancy from year to year;[2] though this presumption may be rebutted by proving that the payment was made under circumstances inconsistent with it; as, for example, under the impression that the old lease was still subsisting.[3] In actions of trover, also, the jury will be advised to presume a conversion from unexplained evidence of a demand and refusal.[4] And where a complex business deception is proved, an intention to defraud will be inferred.[5]

Passing a new statute presumes an alteration of prior law.

§ 1260. The same inference applies to corporate and legislative action. Thus, when a statute is passed (whether such statute be a constitutional amendment, an act of legislature, federal or state, a municipal by-law, a rule of court, or an ecclesiastical order), such statute presumes a change of the prior law. But this is a mere presumption of fact, to be measured as to its force by the concrete case.[6] In some cases, *e. g.*, where a code is adopted in place of the common law, or in consolidation of prior statutes, the presumption vanishes.[7] Nor will it be presumed that a legislature intended a construction in conflict with reason,[8] or public duty.[9]

[1] Infra, § 1261.

[2] Bishop *v.* Howard, 2 B. & C. 100; Doe *v.* Taniere, 12 Q. B. 998; Eccles. Commiss. *v.* Merral, Law Rep. 4 Ex. 162. In these last two cases the lessors were a corporation.

[3] Doe *v.* Crago, 6 Com. B. 90. See Trent *v.* Hunt, 9 Ex. R. 24, per Alderson, B.

[4] Caunce *v.* Spanton, 7 M. & Gr. 903; Stancliffe *v.* Hardwick, 2 C., M. & R. 1, 12; Thompson *v.* Trail, 2 C. & P. 334; 6 B. & C. 36; 9 D. & R. 31, *S. C.*; Thompson *v.* Small, 1 Com. B. 328; Davies *v.* Nicholas, 7 C. & P. 339; Clendon *v.* Dinneford, 5 C. & P. 13; 3 Stark. Ev. 1160, 1161; Taylor's Ev. § 144. See Towne *v.* Lewis, 7 Com. B. 608.

[5] Doeblin *v.* Duncan, N. Y. Ct. of App. Nov. 1876; Beam *v.* Macomber, 33 Mich. 127. Supra, §§ 366, 1248.

[6] See Sedgwick Stat. Law, 228, n.; Potter's Dwarris on Stat. 156; Cooley's Const. Lim. 168, 172–7. Supra, § 980 *a*.

[7] Nunnally *v.* White, 3 Meto. (Ky.) 584.

[8] Farnum *v.* Blackstone, 1 Sumn. 46; Wickham *v.* Page, 49 Mo. 526; Neenan *v.* Smith, 50 Mo. 525. Supra, § 980 *a*; infra, 1309.

[9] Bennett *v.* McWhorter, 2 W. Va. 441.

§ 1261. The presumption of malice is subject to the same considerations as that of intent. That such presumption is a presumption of fact in criminal issues has been shown at length in another work.[1] We are told that it is a presumption of law that intentional hurt done to another is malicious.[2] Now this is either a vicious circle, averring that something is malicious because it is malicious, or the argument rests on the major premise, that all hurts are malicious, which is untrue in fact. The only legitimate presumption we can draw in such cases is a presumption of fact, viz., that it is probable, from the circumstances of the case, that malice existed.

Malice a presumption of fact.

The fallacy of turning an inference of fact, in respect to intent, into a presumption of law, may be thus illustrated: "All men who kill, do so maliciously. A. has killed B.: Therefore he has done so maliciously." This is the argument as to intent put syllogistically. But this may be indefinitely varied; and of these variations we may take the following, some of which have been sanctioned by the courts: "Men who fly when accused are guilty. A. flies when accused: Therefore," etc. Or, "Accused parties who fabricate evidence are guilty of the offence they thus attempt to cover. A. has done this: Therefore," etc. Or, "He who has a motive to commit a crime commits it. A. had a motive to commit a particular crime: Therefore A.," etc. Or, "He who was in the neighborhood at the time of the crime committed it. A. was in such neighborhood: Therefore A.," etc.[3] Now, no one doubts that it is admissible, as part of a series of facts, from which guilt may be inferred, to prove that the defendant had a motive to commit the crime, and that he was in the neighborhood at the time the crime was committed; nor can it be disputed that the inference of guilt in the latter case is the same in kind as the inference of guilty intent from the mere fact of firing a shot. We must therefore either treat all presumptions of fact as presumptions of law; or we must remand the presumptions of malice and of intent to their proper place among presumptions of fact.[4] Our office, in other words, in all questions of motive and purpose, is, as has

Question one of logical inference.

[1] Whart. Cr. Ev. § 738.

[2] See State *v.* Hessenkamp, 17 Iowa, 25.

[3] See supra, §§ 851, 1231, as to the scholastic origin of the fallacy now discussed.

[4] See supra, § 1237. This view is now almost uniformly accepted by the

been said, not deduction, but induction. Our reasoning is not, "All acts of class A. have a specific intent, and this act being of class A., consequently has such intent;" but it is, "The circumstances of the case before us make it probable that the act was done intentionally." The process is one of inference from fact, not of predetermination by law.[1]

Same rule exists in civil as in criminal issues.

§ 1262. The fallacy which has just been noticed pervades the civil as well as the criminal side of our law. Thus, we are told by an authoritative writer, that "the *deliberate* publication of a calumny, *which the publisher knows to be false*, raises, under the plea of 'Not guilty' to an action for libel, a conclusive presumption of malice."[2] Now here again is either a mere *petitio principii*, being equivalent to saying, "A falsehood uttered deliberately and knowingly is a falsehood uttered deliberately and knowingly," or we have exhibited to us, not a "conclusive," but a probable presumption of malice. Undoubtedly the fact that a document attacking the character of another, is published by a mere volunteer, is ground from which malice may be inferred. But this fact is not always enough to make out malice; for, when the publication is privileged, then, in order to show malice, facts inconsistent with good faith must be proved.[3] Whether there is malice, therefore, even by force of the very line of cases before us, is a question of fact, determined by the evidence in the particular case.—Another illustration of the same error may be noticed in an English ruling, that fraud is to be inferred wherever one man tells an untruth to another for the purpose of obtaining the

courts, there being very few cases in which presumptions of intent are held irrebuttable, except when made so by statute. Supra, §§ 482, 508, 955. See, however, as opposing this view, Lineweaver *v.* Single, 64 Md. 465.

[1] Supra, §§ 1–15. See Mill's Logic, chap. xxiii. For a fuller exposition of the above argument the reader is referred to the article already noticed in the Forum for 1875.

[2] Taylor's Evidence, § 71; citing Haire *v.* Wilson, 9 B. & C. 643; R. *v.* Shipley, 4 Doug. 73, 177; Fisher *v.* Clement, 10 B. & C. 475; Baylis *v.* Lawrence, 10 A. & E. 925.

[3] Bromage *v.* Prosser, 4 B. & C. 247; Spill *v.* Maule, L. R. 4 Ex. 232; Whitefield *v.* R. R., 1 E., B. & E. 115; Taylor *v.* Hawkins, 16 Q. B. 308; Cooke *v.* Wildes, 5 E. & B. 328; Toogood *v.* Spyring, 1 C., M. & R. 181, 193; 4 Tyr. 582, *S. C.*; Coxhead *v.* Richards, 2 Com. B. 569; Wright *v.* Woodgate, 2 C., M. & R. 573; Tyr. & Gr. 12, *S. C.*; Gilpin *v.* Fowler, 9 Ex. R. 615; Somerville *v.* Hawkins, 10 Com. B. 583; Harris *v.* Thompson, 13 Com. B. 333; R. *v.* Wallace, 3 Ir. L. R. (N. S.) 38.

latter's goods.[1] Here, again, we have the same dilemma. Either the ruling, if it means that he who intends to cheat has the intention of cheating, is a bare *petitio principii;* or it rests on a false premise, namely, that a man who, by means of an untruth, obtains another's goods, intends to cheat, in teeth of the fact that there are innumerable cases in which untruths are uttered unconsciously, or as mere brag, or as matters of opinion, in which cases it is held that the intention to cheat is not proved.[2] In this case, also, we have the process of deduction erroneously substituted for induction, by which alone, as we have seen, conclusions as to intent can be reached.

§ 1263. Negligence, it has been said, is a presumption which judges will direct jurors to make "from the mere happening of an accident."[3] No doubt by statute this may be done, as in those states in which legislatures have provided that railroad companies shall be liable in all cases of firing. But if the question be whether negligence (*i. e.*, a want of due diligence in a particular case) is to be inferred logically from facts which do not indicate negligence, the question answers itself. We have in all cases of injury in which negligence is charged, two hypotheses. The first is, that the facts do not show negligence, in which case negligence cannot be inferred. The second is, that the facts show negligence, in which case the position before us is again a mere *petitio principii.* It is equivalent to saying that negligence is to be inferred because negligence is shown.

Negligence is a presumption of fact.

§ 1264. We now proceed to another line of rulings, in which flexible logical inferences have been too often spoken of as inflexible presumptions of law. Where a document is shown to have been fraudulently altered, defaced, or destroyed, we may properly infer that this was done in the interest of the party to be benefited by the spoliation; and should he attempt to make use of the instrument in its corrupted state, or to offer parol evidence of its contents when it has been so destroyed, not only will he be precluded from taking advantage of his fraud, but among the several probable interpretations of the in-

Presumption against spoliation.

[1] Tapp *v.* Lee, 3 Bos. & Pul. 371. See Pontifex *v.* Bignold, 3 M. & Gr. 63.

[2] See these cases enumerated in detail in Whart Cr. Law, §§ 1155 *et seq.*

[3] Taylor's Ev. 7th ed. § 188, and cases cited.

strument, that which was most unfavorable to him will be adopted.[1] So a spoliation of papers, by a neutral vessel when captured, has been held to give a strong inference of hostile purpose.[2] Again: as will be presently more fully seen, where the finder of a lost jewel refuses to produce it, the inference is that it is a jewel of the highest probable value ;[3] though this presumption will not be applied to cases where a party, responsible for goods, loses them merely negligently, or is prevented from producing them by causes in no way implying dishonesty.[4] And generally, even in respect to spoliation, the presumption is not universal and inelastic, but special, varying in force with the concrete case.[5]

Against party mutilating or tampering with evidence.

§ 1265. Yet when testimony has been shown to be mutilated, the party so mutilating, if he would make use of it, must show that the original character of the testimony was not thereby affected.[6] Thus, where, shortly after the commission of an offence, the agents of the prosecution made some changes in the *indiciae* remaining on the site of the offence, it was held incumbent on the prosecution to show the character of these changes.[7] So proof of the forgery of false testimony is admissible against the party by whom the fabrication is

[1] Haldane *v.* Harvey, 4 Burr. 2484; R. *v.* Arundel, Hob. 109; White *v.* Lincoln, 8 Ves. 363; Atty.-Gen. *v.* Windsor, 24 Beav. 679; The Tillie, 7 Ben. 382; Ville du Havre, 7 Ben. 328; McDonough *v.* O'Niel, 113 Mass. 92; Merwin *v.* Ward, 15 Conn. 377; Little *v.* Marsh, 2 Ired. Eq. 18; Henderson *v.* Hoke, 1 Dev. & B. Eq. 119; Halyburton *v.* Kershaw, 3 Desau. (S. C.) 105; State *v.* Chamberlain, 89 Mo. 129.

But the maxim is not to be resorted to where there is evidence of the contents of an instrument destroyed. Bott *v.* Wood, 56 Miss. 136.

In such a case slight evidence of the contents of the destroyed paper will usually be sufficient to prove it. Jones *v.* Knauss, 31 N. J. Eq. 609.

As to interlineations and erasures, see supra, §§ 621 *et seq.*; Thompson *v.* Thompson, 9 Ind. 323; State *v.* Grant, 74 Mo. 33.

[2] The Hunter, 1 Dods. Adm. 480; The Pizarro, 2 Wheat. 227.

[3] Armory *v.* Delamirie, 1 Str. 505; 1 Smith's L. C. 301; Mortimer *v.* Craddock, 7 Jurist, 45.

[4] Claunes *v.* Perrey, 1 Camp. 8.

[5] Alterations and interlineations in the public record of a deed are presumed, unless the indications point otherwise, to be made by authority. Hommel *v.* Devinney, 39 Mich. 522.

[6] Edmund's case, 1 Whart. & S. Med. Jur. § 167; Joannes *v.* Bennett, 5 Allen, 169; Gardner *v.* People, 6 Parker C. R. 156; Blake *v.* Fash, 44 Ill. 302; Sheils *v.* West, 17 Cal. 324. See supra, §§ 132, 622, *et seq.*; and see Price *v.* Tallman, 1 Coxe N. J. 447.

[7] State *v.* Knapp, 45 N. H. 148.

made.[1] The same presumption of disfavor is drawn where an infant heir to an estate is kidnapped and sent abroad,[2] and against all forms of attempted suppression of or tampering with evidence or subornation of witnesses.[3] Thus, if an accounting party parts with or destroys his books, the strongest inferences, consistent with the rest of the case, will be made against him.[4] But these inferences, also, vary with the case.[5]

§ 1266. The holding back of evidence may be used as a presumption of fact against the party who holds back such evidence in all cases in which it could be produced.[6] Thus, where the plaintiff's identity is disputed, it has

So against withholding of material facts.

[1] See Com. *v.* Webster, 5 Cush. 316. The guards to be put on this species of presumption are discussed fully in Whart. Cr. Ev. § 742.

[2] Annesley *v.* Anglesea, 17 How. St. Tr. 1140.

[3] Leeds *v.* Cook, 4 Esp. 256; Gray *v.* Haig, 20 Beav. 219; Moriarty *v.* R. R., L. R. 5 Q. B. 314; Curlewis *v.* Cerfield, 1 Q. B. 814; Owen *v.* Slack, 2 Sim. & St. 606; Bell *v.* Frankis, 4 M. & Gr. 446; Sutton *v.* Davenport, 27 L. J. C. P. 54; Thayer *v.* Stearns, 1 Pick. 109; Grimes *v.* Kimball, 3 Allen, 518; People *v.* Rathbun, 21 Wend. 509; Meyer *v.* Barker, 6 Binn. 228; Reed *v.* Dickey, 1 Watts, 152; Hefflebower *v.* Detrick, 27 W. Va. 16; Chicago, etc. R. R. *v.* McMahon, 103 Ill. 485; Lyons *v.* Lawrence, 12 Ill. Ap. 531; Page *v.* Stephens, 23 Mich. 357; People *v.* Marion, 29 Mich. 31; Snell *v.* Brey, 56 Wis. 156; Winchell *v.* Edwards, 57 Ill. 41; Downing *v.* Plate, 90 Ill. 268; Revell *v.* State, 26 Ga. 275; Blevins *v.* Pope, 7 Ala. 371; Bell *v.* Hearne, 10 La. An. 515; Lucas *v.* Brooks, 23 La. An. 117; Luhrs *v.* Kelly, 67 Cal. 289. See, however, remarks in Baker *v.* Ray, 2 Russell, 73.

[4] Gray *v.* Haig, 20 Beav. 231.

[5] When one party introduces proof which tends to show an improper advance made by the defendant to a witness for the plaintiff, it is within the discretion of the presiding judge to allow the other party to testify in explanation of his conduct. Lynch *v.* Coffin, 131 Mass. 311,; Homer *v.* Everett, 91 N. Y. 641.

[6] See cases cited in last section; supra, § 367, Abbott, C. J., in R. *v.* Burdett, 43 B. & Ald. 161; Wentworth *v.* Lloyd, 10 H. of L. Cases, 589; Durgin *v.* Danville, 47 Vt. 95; Frick *v.* Barbour, 64 Penn. St. 120; Fowler *v.* Sergeant, 1 Grant, 355; Miller *v.* Jones, 32 Ark. 315.

"Lord Mansfield forcibly observed, in Blatch *v.* Archer, that 'it is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.' Cowper, 63, 65." Graves, C. J., Wallace *v.* Harris, 32 Mich. 394.

See Armory *v.* Delamire, 1 Str. 505; R. *v.* Jarvis, Dears. C. C. 552; 7 Cox C. C. 53; Atty.-Gen. *v.* Windsor, 24 Beav. 679; Brown *v.* Turner, 13 C. B. (N. S.) 485; Evans *v.* Botterell, 3 B. & S. 787; Jenkin *v.* King, L. R. 7 Q. B. 468; 20 W. R. 669; Shoenberger *v.* Hackman, 37 Penn. St. 87; Mordecai *v.* Beal, 8 Porter, 529.

been held,[1] that his persistent refusal to appear in person at the trial is a suspicious circumstance, affording an inference against him, to be weighed by the jury. "The question," said Agnew, C. J., "is not upon his right to stay away, but upon the motive which may have caused his absence. A man of ordinary intelligence must know that his failing to appear, when he had a strong motive to appear, would be evidence against him. If he relies upon his ability to disprove the motive imputed, he takes the risk, but he leaves the effect of his conduct, as a matter of evidence for the opposite side, to go to the jury, who must weigh both sides to determine the real motive." And in a case already noticed, where a liquor merchant sued for goods sold and delivered, and the only evidence was that some hampers of full bottles had been delivered to the defendant, but there was no evidence of the contents of the bottles, Lord Ellenborough told the jury to presume that the bottles were filled with the cheapest liquor in which the plaintiff dealt.[2]

So of holding back documents and witnesses.

§ 1267. When, on the unexplained refusal of a party to produce on trial documents which have been called for, the opposite party introduces parol evidence of the contents of the paper,[3] then, if there be doubt, the probable interpretation less favorable to the suppressing party will be adopted.[4] But this is a matter solely of logical inference. "The mere non-production of written evidence," says Sir W. D. Evans,[5] "which is in the power of a party, generally operates as a strong presumption against him. I conceive that has been sometimes carried too far, by being allowed to supersede the necessity of other evidence, instead of being regarded as merely matter of inference,

[1] Brown *v.* Shock, 77 Penn. St. 471.

[2] Clunnes *v.* Pezze, 1 Camp. 8.

On this principle, in admitting evidence of a will proved to have been destroyed by the heir-at-law, the judge of the Irish court of probate said that he should be satisfied with evidence much less cogent than in the case of a lost will. Mahood *v.* Mahood, Ir. R. 8 Eq. 359.

[3] Supra, § 153.

[4] Cooper *v.* Gibbons, 3 Camp. 363; Crisp *v.* Anderson, 1 Stark. 35; Hanson *v.* Eustace, 2 How. (U. S.) 653; Clinton *v.* U. S., 4 How. 242; Barber *v.* Lyon, 22 Barb. 622; Cross *v.* Bell, 34 N. H. 83; Life Ins. Co. *v.* Ins. Co., 7 Wend. 31; Shortz *v.* Unangst, 3 W. & S. 45; Crescent Ice Co. *v.* Erman, 36 La. An. 841; Towne *v.* Milner, 31 Kan. 207. See Davie *v.* Jones, 68 Me. 393.

[5] 2 Ev. Pothier, 337, cited in text in Best's Ev. 414.

in weighing the effect of evidence in its own nature applicable to the subject in dispute." The non-calling of a witness, however, will not justify an arbitrary presumption of suppression.[1] And where a person refused to allow his former solicitor to give evidence of matters connected with the professional relation, it was held in the House of Lords, that there was no arbitrary adverse presumption which could be used as proof against him.[2] Such presumption is not substantive proof.[3] It is otherwise when there is an irreconcilable conflict of testimony, preponderating on neither side, in which case the non-production of a person as a witness who could have so testified as to throw much light on the issue, if unaccounted for, raises a presumption against the party on whom is the burden of proof, and who might have produced the witness.[4]

§ 1268. It follows, therefore, that the presumption arising from mere non-production cannot be used to relieve the opposing party from the burden of proving his case. But when a *primâ facie* case is proved, sufficient by itself to sustain a judgment, then an adverse party who refuses to exhibit books which would, if produced, settle the matter either one way or the other, or to give other explanations, not only prejudices his case on trial,[5] but precludes himself from subsequently objecting that the case of the opposite party, though sufficient for judgment, did not introduce all the facts.[6]

Presumption from non-production is not substantive proof.

§ 1269. Under ordinary circumstances, where there is a fair and just administration of justice, when a party accused of crime flies from trial, this affords an inference of fact, more or less strong, according to the circumstances of the case.[7] It should be at the same time remembered that there are many conditions (*e. g.*, public excitement or political prejudice, in-

Manifestation of fear; bribery.

[1] Scovill *v.* Baldwin, 27 Conn. 316; Cramer *v.* Burlington, 49 Iowa, 213. See Bleecker *v.* Johnston, 69 N. J. 309.

[2] Wentworth *v.* Lloyd, 10 H. of L. Cas. 589.

[3] Chaffee *v.* U. S., 18 Wall. 516. See Clifton *v.* U. S., 4 How. 242. Supra, § 1067.

[4] The Fred. M. Lawrence, 15 Fed. Rep. 635. And see People *v.* Hovey, 92 N. Y. 554; Ried *v.* Com., 102 Penn. St. 408.

[5] See Ruppe *v.* Steinbach, 48 Mich. 465.

[6] Roe *v.* Harvey, 4 Burr. 2484; Bate *v.* Kinsey, 1 C., M. & R. 41; Sutton *v.* Davenport, 27 L. J. C. P. 54; Dysart Peerage Case, 6 App. Ca. 489. See supra, §§ 153 *et seq.*

[7] Whart. Cr. Ev. § 750; People *v.* Rathbun, 21 Wend. 509; Revel *v.* State, 26 Ga. 275; State *v.* Williams, 54 Mo. 170.

terfering with the fairness of a trial) which may make it prudent for a man, conscious of his own innocence, to secure safety by flight.[1] When such is the case, the inference cannot be logically applied. Nor is manifestation of fear admissible unless it be such as to imply a confession of a relevant fact.[2] But when it may be inferred to imply such a confession, it is admissible; and so is the conduct of a witness supposed to be feigning an injury when apparently not observed.[3]

It is admissible to prove an attempt, at a former trial, by one of the parties to a suit, to corrupt a juror by bribery.[4]

III. PHYSICAL PRESUMPTIONS.

Infants presumed incapable of matrimony.

§ 1270. Boys under fourteen, and girls under twelve, are by the English common law presumed incapable of matrimonial consent; and this presumption is irrebuttable.[5] The same limit is prescribed by the Roman law, and by the Council of Trent.[6]

And so of crimes.

§ 1271. Children under seven are presumed irrebuttably to be incapable of crime;[7] between seven and fourteen the presumption is rebuttable by proof that the defendant is *capax doli*.[8] A boy under fourteen is presumed incapable of rape, as principal in the first degree;[9] or of an assault with intent to ravish.[10]

[1] Golden *v.* State, 25 Ga. 527; State *v.* Phillips, 24 Mo. 475. A party cannot introduce evidence to explain flight until such flight is proved against him. Welch *v.* State, 104 Ind. 347.

[2] Beale *v.* Perry, 72 Ala. 323.

[3] Chamberlin *v.* Ossipee, 60 N. H. 212.

[4] Hastings *v.* Stetson, 130 Mass. 76.

[5] Bishop Mar. & Div. § 148; 1 Black. Com. 436.

[6] Whart. Confl. of Laws, § 147.

[7] See authorities in Whart. Cr. Law, §§ 67 *et seq.*; and see also State *v.* Goin, 9 Humph. 175; Godfrey *v.* State, 31 Ala. 323; R. *v.* Owen, 4 C. & P. 236.

[8] Com. *v.* Mead, 10 Allen, 398; 1 Green Cr. R. 402; R. *v.* Smith, 1 Cox C. C. 260.

[9] R. *v.* Phillips, 8 C. & P. 736; R. *v.* Jordan, 9 C. & P. 118; State *v.* Pugh, 7 Jones N. C. L. 61; 1 Green Cr. Rep. 402; Whart. Cr. Law, § 551.

In England this presumption is not affected by the Act of 24 & 25 Vict. c. 100, §§ 48, 50; R. *v.* Groombridge, 7 C. & P. 582, per Gaselee, J., and Ld. Abinger; and it applies to the offence of carnally abusing a girl under ten years of age. R. *v.* Jordan, 9 C. & P. 118, per Williams, J. But if the boy have a mischievous discretion, he may be a principal in the second degree. 1 Hale, 630. The patient may be convicted of an unnatural crime, though the agent be under fourteen. R. *v.* Allen, 1 Den. 364; 2 C. & Kir. 869, *S. C.*

[10] R. *v.* Eldershaw, 3 C. & P. 396, per Vaughan, B.; R. *v.* Phillips, 8 C. & P.

§ 1272. As an infant under seven is not *capax doli*, an action for false imprisonment lies for the arrest of such an infant under charge of felony.[1] An infant of any age may, through his guardian or *prochein ami*, recover damages for a negligent injury.[2] Whether contributory negligence is imputable to an infant has already been discussed.[3] Testamentary capacity, so far as concerns personal property, is by the common law imputed to boys of fourteen years and girls of twelve, provided they have disposing memory;[4] though in many jurisdictions this capacity is further limited by statute. So far as concerns real estate, the right of absolute alienation is by common law refused to infants under twenty-one;[5] and they may avoid such conveyance when of age.[6] It has however been held that an infant lessee, though not liable on the contract of tenancy, is liable in a suit for use and occupation.[7] The contracts of an infant, it is scarcely necessary to add, may be ratified on his attaining majority.[8]

How far competent in civil relations.

§ 1273. In cases where it is proved either directly or inferentially that there are several persons, in the same circle of society, bearing the same name, mere identity of name, by itself, is not sufficient to establish identity of person.[9]

Presumption of identity from name.

736, per Patteson, J.; R. *v.* Groombridge, 7 C. & P. 582; People *v.* Randolph, 2 Parker C. R. 213; State *v.* Sam, Winston, N. C. 300. *Contra*, Com. *v.* Green, 2 Pick, 380.

[1] Marsh *v.* Loader, 14 C. B. N. S. 535.

[2] Whart. on Neg. § 322.

[3] Supra, § 1255.

[4] 1 Will. on Ex. 14–16.

[5] See King *v.* Bellord, 1 Hem. & M. 343.

[6] Tucker *v.* Moreland, 10 Pet. 59; Bool *v.* Mix, 17 Wend. 120; Stafford *v.* Roof, 9 Cow. 626.

[7] Blake *v.* Concannon, Ir. R. 4 C. L. 323.

As to the imputability to an infant of contributory negligence, see supra, § 1255; Whart. on Negligence, §§ 312, 322.

As to how far an infant can act as a trustee, or exercise a power, see King *v.* Bellord, 1 Hem. & M. 343, and authorities there cited; also In re Arnit's Trusts, 5 I. R. Eq. 352; Taylor, 590; 1 Bl. Com. 465, 466; Co. Litt. 78 *b*.

As to admissions by an infant, see supra, § 1124, note.

As to how far infant shareholders are liable to actions for calls, see Newry Ennisk. Rail. Co. *v.* Combe, 5 Rail. Cas. 633; 3 Ex. R. 565, *S. C.*; Leeds & Thirsk. Rail. Co. *v.* Fearnley, 5 Rail. Cas. 644; 4 Ex. R. 26, *S. C.*; Cork & Bandon Rail. Co. *v.* Cazenove, 10 Q. B. 935; North West R. R. *v.* McMichael, 5 Ex. R. 114.

[8] Palis *v.* Dineley, 3 M. & S. 477; Oliver *v.* Houdlet, 13 Mass. 237; Reed *v.* Batchelder, 1 Met. 559; Gillett *v.* Stanley, 1 Hill, 122.

[9] See cases cited supra, § 701; Jones *v.* Jones, 9 M. & W. 75; Mooers *v.*

The inference, however, rises in strength with circumstances indicating the improbability of there being two persons of the same name at the same place at the same time.[1] Names, therefore, with other circumstances, are facts from which identity can be presumed.[2] The inference from variation in the name, however, varies in proportion to the materiality of the variation.[3] Where a father and son bear the same name, the name, if used without any addition, is presumed to indicate the father.[4] But ordinarily, similarity of names will sustain a verdict when no dispute of identity was raised on trial.[5]

Bunker, 29 N. H. 420; Kinney *v.* Flynn, 2 R. I. 319; Bennett *v.* Libhart, 27 Mich. 489; Ellsworth *v.* Moore, 5 Iowa, 486; Moss *v.* Anderson, 7 Mo. 337; Morrissey *v.* Ferry Co., 47 Mo. 521; Nicholas *v.* Lansdale, Litt. (Ky.) Sel. Ca. 21; McMinn *v.* Whelan, 27 Cal. 300; and see Reed *v.* Gage, 33 Mich. 179.

[1] Supra, § 701; Greenshields *v.* Henderson, 9 M. & W. 75; Sewall *v.* Evans, 4 Q. B. 626; Murietta *v.* Wolfhagen, 2 C. & K. 744; Grindle *v.* Stone, 78 Me. 178; Bogue *v.* Bigelow, 29 Vt. 179; Jackson *v.* Goes, 13 Johns. 518; Jackson *v.* Cody, 9 Cow. 140; Hatcher *v.* Rocheleau, 18 N. Y. 86; Burford *v.* McCue, 53 Penn. St. 427; Kelly *v.* Valney, 5 Penn. L. J. Rep. 300; Balbec *v.* Donaldson, 2 Grant (Penn.) 459; Cates *v.* Loftus, 3 A. K. Marsh. 202; Cooper *v.* Poston, 1 Duvall, 92; Brown *v.* Metz, 38 Ill. 339; Graves *v.* Colwell, 90 Ill. 615; Heacock *v.* Lubukee, 108 Ill. 641; Gitt *v.* Watson, 18 Mo. 274; State *v.* Moore, 61 Mo. 276; State *v.* McGuire, 87 Mo. 642; McMinn *v.* Whelan, 27 Cal. 300; Douglass *v.* Dakin, 46 Cal. 49.

Even an entry in a registry of baptism may be sufficient evidence of the identity of a child. Morrissey *v.* Ferry Co., 47 Mo. 521.

[2] Ibid.; State *v.* Bartlett, 55 Me. 200; Jones *v.* Parker, 20 N. H. 31; Dennis *v.* Brewster, 7 Gray, 351; Farmers' Bank *v.* King, 57 Penn. St. 202. See Com. *v.* Costello, 120 Mass. 358; Brotherline *v.* Hammond, 69 Penn. St. 128; Bennett *v.* Libhart, 27 Mich. 489; Brown *v.* Metz, 33 Ill. 339; Hunt *v.* Stewart, 7 Ala. 525.

"In the absence of circumstances to cast doubt upon the fact of identity, the identity of name is enough to raise a presumption of identity of person." Graves, C. J., Goodell *v.* Hibbard, 32 Mich. 48.

[3] Burford *v.* McCue, 53 Penn. St. 427; Bennett *v.* Libhart, 27 Mich. 489; Ellsworth *v.* Moore, 5 Iowa, 486.

[4] Stebbing *v.* Spicer, 8 C. B. 827; Jarmaine *v.* Hooper, 6 M. & G. 827; Stebbins *v.* Spicer, 8 M., G. & S. 827; Sweeting *v.* Fowler, 1 Stark. R. 106; State *v.* Vittum, 9 N. H. 519; Kincaid *v.* Howe, 10 Mass. 205.

In State *v.* Vittum, supra, it was held that this presumption was not rebuttable. *Contra*, R. *v.* Peace, 3 B. & Ald. 579.

As to presumption from indelibility of tattoo marks, see R. *v.* Orton, Cockburn, C. J., Charge II. 760.

As to test from similarity of hair, see Ibid. 53.

[5] Brown *v.* Metz, 33 Ill. 339; Douglass *v.* Dakin, 46 Cal. 49; People *v.* Rolfe, 61 Cal. 540. See Nelson *v.* Whittal, 1 B. & A. 21; 22 Cent. Law J. 227.

§ 1274. By the canon law, no length of absence gives a presumption of law of death; the presumption is one of fact, depending on the concrete case.[1] By the English common law, at the close of a continuous absence abroad[2] of seven years, during which time nothing is heard of the absent person by those who would naturally have heard of him, if alive, death is presumed, as a presumption of law rebuttable by proof or counter presumptions.[3] This view is accepted in most jurisdictions in the United States,[4] and in such the burden is on the party averring continued life to prove it.[5] But, if there is no proof of unexplained absence, the mere lapse of time, even supposing that it would make the party eighty years old, if living,

Death presumed after unexplained absence of seven years.

[1] Wharton's Confl. of Laws, § 133.

[2] Under the term "abroad" has been included, in this country, absence from the state of the absentee's residence prior to disappearance. Newman *v.* Jenkins, 19 Pick. 515; Innis *v.* Campbell, 1 Rawle, 373. See Fulweiler *v.* Baugher, 15 S. & R. 45. Infra, § 1275.

[3] Stephen's Ev. ch. 14, art. 99; Doe *v.* Jesson, 6 East, 85; Doe *v.* Deakin, 4 B. & A. 43; Hopewell *v.* De Pinna, 2 Camp. 113; Rust *v.* Baker, 8 Sim. 443. That six years' absence is not enough, see Park *v.* Canton, 130 Mass. 505.

[4] Davie *v.* Briggs, 97 U. S. 628; Moffit *v.* Varden, 5 Cranch C. C. 658; Montgomery *v.* Bevans, 1 Sawyer, 653; Stevens *v.* McNamara, 36 Me. 176; Stinchfield *v.* Emerson, 52 Me. 465; Smith *v.* Knowlton, 11 N. H. 191; Winship *v.* Conner, 42 N. H. 341; Flynn *v.* Coffee, 12 Allen, 133; Loring *v.* Steineman, 1 Met. 204; Sheldon *v.* Ferris, 45 Barb. 124; Osborn *v.* Allen, 26 N. J. L. 388; Burr *v.* Sim, 4 Whart. R. 150; Bradley *v.* Bradley, 4 Whart. R. 173; Whiteside's Appeal, 23 Penn. St. 114; Holmes *v.* Johnson, 42 Penn. St. 159; Crawford *v.* Elliott, 1 Houst. 465; Tilly *v.* Tilly, 2 Bland, 436; Whiting *v.* Nicholl, 46 Ill. 230; Spurr *v.* Trimble, 1 A. K. Marsh. 278; Foulks *v.* Rhea, 7 Bush, 568; Shown *v.* McMakin, 9 Lea, 601; Cofer *v.* Thurmond, 1 Ga. 538; Adams *v.* Jones, 39 Ga. 479; Smith *v.* Smith, 49 Ala. 156; Learned *v.* Corley, 43 Miss. 687; Primm *v.* Stewart, 7 Tex. 178. See Bowden *v.* Henderson, 2 Sm. & Giff. 360, as to rebuttal by counter presumptions.

As maintaining that in this country life is presumed to continue until death is proved, or until the rule of law applies by which death is presumed to have occurred—that is, at the end of seven years—see opinion of Field, J., in Sensenderfer *v.* R. R., 19 Fed. Rep. 68.

Whether a person is alive at a given date is a question for the jury, and "his existence at an antecedent period may or may not afford a reasonable inference that he was living at a subsequent date." Per Giffard, L. J., In re Phene's Trusts, L. R. 5 Ch. 150.

[5] Ibid.; Hoyt *v.* Newbold, 45 N. J. L. 219. And see O'Kelly *v.* Felker, 71 Ga. 775; Thomes *v.* Thomes, 16 Neb. 553. To the effect that the proof that the party had not been heard from must be satisfactory, see supra, § 223.

is not by itself enough to prove death.[1] It is otherwise when the party would have reached the limits beyond which life, according to ordinary observation, is improbable,[2] though even when one hundred years is reached, the conclusion is not absolute.[3] With other circumstances[4] (*e. g.*, non-claimer of rights, or exposure to peculiar sickness or other calamity, or advanced years), death at a far earlier period may be inferred.[5]

The presumption before us, it should be remembered, when not governed by statute, is one of experience, varying logically with the circumstances of the particular case.[6] Thus, when the object

[1] Weale *v.* Lower, Pollex. 67; Napper *v.* Landers, Hutt. 119; Hall, in re, 1 Wall. Jr. 85; Sensenderfer *v.* R. R., 19 Fed. Rep. 68; Letts *v.* Brooks, Hill & Denio, Supp. (N. Y.) 36; McCartee *v.* Camel, 1 Barb. (N. Y.) Ch. 455; Duke of Cumberland *v.* Graves, 9 Barb. 595; Keller *v.* Shick, 4 Redf. 294; Martinez *v.* Vives, 32 La. An. 395.

[2] Jones *v.* Waller, 1 Price, 229; R. *v.* Lumley, L. R. 1 C. C. 196; Doe *v.* Michael, 17 Q. B. 276; Allen *v.* Lyons, 2 Wash. C. C. 475; Ackerman, in re, 2 Redf. (N. Y.) 521; Sprigg *v.* Moale, 28 Md. 497. See Montgomery *v.* Bevans, 1 Sawyer, 653; Manby *v.* Curtis, 1 Price, 225.

[3] Beverly *v.* Beverly, 2 Vern. 131; Doe *v.* Andrews, 15 Q. B. 756; Burney *v.* Ball, 24 Ga. 505.

Where a trust is declared by deed in favor of a named person, such person must, until the contrary be shown, be taken to have been in existence at the date of the deed; and the onus of proving his death before that date is on the representatives of the settlor. Corbishley's Trusts, in re, 14 Ch. D. 846.

[4] See infra, § 1277.

[5] R. *v.* Harborne, 2 A. & E. 544; *S. C.* 4 Nev. & Man. 344; Beasney's Trusts, in re, L. R. 7 Eq. 498; Sellick *v.* Booth, 1 Y. & C. 117; Main, in re, 1 Sw. & Tr. 11; R. *v.* Wiltshire, 6 Q. B. D. 366; 14 Cox C. C. 544; Allen *v.* Lyons, 2 Wash. C. C. 475; White *v.* Mann, 26 Me. 361; Wentworth *v.* Wentworth, 71 Me. 72; Bowditch *v.* Jordan, 113 Mass. 321; Hyde Park *v.* Canton, 130 Mass. 505; Merritt *v.* Thompson, 1 Hilt (N. Y.), 550; Smith *v.* Smith, 5 N. J. Eq. 484; Clarke *v.* Canfield, 15 N. J. Eq. 119; Osborn *v.* Allen, 26 N. J. L. 388; Johnson *v.* Johnson, 114 Ill. 611; Cooper *v.* Cooper, 86 Ind. 75; Gibbes *v.* Vincent, 11 Rich. (S. C.) 323; Spears *v.* Burton, 31 Miss. 547; Hancock *v.* Ins. Co., 62 Mo. 26; Lancaster *v.* Ins. Co., 62 Mo. 121; Ross *v.* Clore, 3 Dana, 189. See charge of Cockburn, C. J., in R. *v.* Orton, and Breadalbane case, L. R. 1 H. L. Sc. 182. In Prudential Insur. Co. *v.* Edmonds, L. R. 2 App. Cas. 487, the House of Lords was equally divided upon the question how far a statement of a witness, to the effect that she saw the alleged deceased (her uncle), as she believed, in Melbourne, seven years after his supposed disappearance, coupled with proof that there had not been diligent inquiry for him at Melbourne, would justify a judge in telling a jury that the presumption of death was overcome.

[6] Tindall, in re, 30 Beav. 151; Doe *v.* Walley, 8 B. & C. 22; R. *v.* Lumley, L. R. 1 C. C. 196; Lapsley *v.* Grierson, 1 H. of L. Cas. 498; Clarke *v.* Cummiugs,

was to prove the business entries of a person alleged to be deceased, the court permitted such entries to be read on the bare proof that they were fifty-four years old.[1] Where feoffments, also, for terms varying from ninety-nine to eighty years have been made to particular tenants, the practice has been to overlook the possibility of their surviving the expiration of the terms in determining the nature of the remainders.[2] But the deposition of a witness, taken sixty years before a trial, has been rejected in the absence of proof of search for the witness.[3] So where a term was for sixty years, the court took into consideration the possibility of the termor living after its expiration.[4] On the other hand, in an action of ejectment, where the lessor of the plaintiff, to prove his title, put in a settlement 130 years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were permitted to infer that all these persons were dead, but that they died unmarried.[5]

When not regulated by statute question one of experience.

§ 1275. The presumption of continuance of life, which exists in cases where a person living a short time since is inferred to be living now, is therefore necessarily variable, increasing or diminishing in intensity with the facts of the case. It is a mere inference of fact and not a presumption of law,[6] and hence readily succumbs to the inference already noticed arising from the expiration of a period beyond which the continuance of life is improbable.[7] And the presumption of innocence may be

Continuance of life.

5 Barb. (N. Y.) 339; Ringhouse *v.* Keever, 49 Ill. 470; Hancock *v.* Ins. Co., 62 Mo. 26.

"In Doe *v.* Deakin, 4 B. & Ald. 433, it was held that persons in the neighborhood, not of the family, might testify that the absent person had not been heard of by them. And if the demandant's husband had been heard of as living within seven years, though by persons not members of his family, it would certainly affect the presumption upon which she relied." Hoar, J., Flynn *v.* Coffee, 12 Allen, 133.

[1] Doe *v.* Michael, 17 Q. B. 276. See Jones *v.* Waller, 1 Price, 229; Doe *v.* Davies, 10 Q. B. 314. See supra, § 238.

[2] Weale *v.* Lower, Pollex. 67, per Ld. Hale; Napper *v.* Sanders, Hutt. 119; Ld. Derby's case, Lit. R. 370.

[3] Benson *v.* Olive, 2 Str. 920; Wanby *v.* Curtis, 1 Price, 225.

[4] Beverley *v.* Beverley, 2 Vern. 131; Doe *v.* Andrews, 15 Q. B. 756.

[5] Doe *v.* Deakin, 3 C. & P. 402; 8 B. & C. 22. As to judicial notice of death, see supra, § 333.

[6] Phene's Trusts, L. R. 5 Ch. 150; R. *v.* Lumley, L. R. 1 C. C. R. 196.

[7] See Bowden *v.* Henderson, 2 Sm. & Giff. 360; Innis *v.* Campbell, 1 Rawle, 373; Keech *v.* Rinehart, 10 Penn. St. 240; Bailey *v.* Bailey, 36 Mich. 181. Supra, § 1274; infra, § 1277. See on this topic article from

invoked in criminal prosecutions, to either weaken or strengthen the presumption that the life of a particular person continues.[1]

Period of death to be inferred from facts of case.

§ 1276. If a person has been unheard of for more than seven years, by those likely to have heard from him if alive, he is presumed in law to be dead, unless the circumstances of the case explain his not being heard from on grounds consistent with his continuance in life.[2] But the time of death, whenever it is material, must be inferred from all the circumstances of the case; for there is no presumption as to when during the seven years he died.[3]

Irish Law Times cited in 14 Cent. L. J. 286. Whart. & St. Med. Jur. iii. §§ 540, 520 *et seq.*, 917.

[1] R. *v.* Twyning, 2 B. & A. 386; R. *v.* Lumley, 1 Law Rep. C. C. 196; 38 L. J. M. C. 86; and 11 Cox, 274, *S. C.*; R. *v.* Wiltshire, L. R. 6 Q. B. D. 366; Shriver *v.* State, 65 Md. 279. See, further, R. *v.* Jones, 11 Cox, 358; and see, as to presumptions in bigamy prosecutions, Whart. Crim. Ev. §§ 811–13; R. *v.* Harborne, 2 A. & E. 540; R. *v.* Mansfield, 1 Q. B. 449. See, also, Lapsley *v.* Grierson, 1 H. of L. Cas. 498.

As already noticed, absence unheard of in another state of the American Union is equivalent to absence beyond seas. Newman *v.* Jenkins, 10 Pick. 515; Innis *v.* Campbell, 1 Rawle, 373. And see Nesbit, in re, 3 Demarest, 329; Whart. Cr. Ev. § 811; supra, § 1274.

[2] White *v.* Mann, 26 Me. 361; Eagle *v.* Emmett, 4 Bradf. N. Y. 117; Merritt *v.* Thompson, 1 Hilt. N. Y. 550; Clarke *v.* Canfield, 15 N. J. Ch. 119; Garden *v.* Garden, 2 Houst. 574; Gibbes *v.* Vincent, 11 Rich. (S. C.) 323; Ross *v.* Clore, 3 Dana, 189; Puckett *v.* State, 1 Sneed, 355. See Burr *v.* Sim, 4 Whart. 150.

[3] Re Phene's Trusts, L. R. 5 Ch. 150; Re Lewes's Trusts, L. R. 6 Ch. 357; 40 L. J. Ch. 507. See, to same effect, Lewes's Trusts, re, Law Rep. 11 Eq. 236; Hickman *v.* Upsall, L. R. 20 Eq. 136; Lambe *v.* Orton, 29 L. J. Ch. 286; Thomas *v.* Thomas, 2 Drew & Sm. 298; In re Benham's Trusts, 37 L. J. Ch. 265, per Rolt, L. J.; reversing decision by Malins, V. C., as reported in 36 L. J. Ch. 502; L. R. 4 Eq. 416, *S. C.*; In re Peck, 29 L. J. Pr. & Mat. 95; Dunn *v.* Snowden, 32 L. J. Ch. 104; 2 Drew & Sm. 201, *S. C.*; Doe *v.* Nepean, 5 B. & Ad. 86; 2 N. & M. 219, *S. C.*; Nepean *v.* Doe d. Knight, 2 M. & W. 894, in Ex. Ch.; 2 Smith L. C. 476, 492, 577, *S. C.* In that case Lord Denman, in pronouncing the judgment of the court, observes: "Inconveniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances." 2 M. & W. 913, 914. As to American cases to the same general effect may be cited, Davie *v.* Briggs, 97 U. S. 628; White *v.* Mann, 26 Me. 370; Smith *v.* Knowlton, 11 N. H. 197; Stourvenel *v.* Stevens, 2 Daly, 319; McCartee *v.* Camel, 1 Barbour Ch. 456; Whiting *v.* Nicholl, 46 Ill. 241; Tisdale *v.* Ins. Co., 26 Iowa, 171; 28 Iowa, 12; State *v.* Moore, 11 Ired. (N. C.) L. 160; Spencer *v.* Roper, 13 Ired. (L.) 333;

§ 1277. It has been incidentally observed that, aside from the general presumption of death arising from unexplained absence abroad for seven years, certain facts have been noticed by the courts as affording grounds on which inferences of death, more or less strong, may rest.[1] Among these facts may be noticed: Presence on board a ship known to have been lost at sea, the inference of death increasing with the

Fact of death inferred from other facts.

Conley *v.* Holloway, 22 S. C. 380; Hancock *v.* Ins. Co., 62 Mo. 26.

In Phene's Trusts, supra, the evidence was that N., born in 1829, went to America in 1853, and wrote home frequently until August, 1858, when he wrote on board an American man-of-war. From this date no letters were received from him. It was found, however, that he was entered in the books of the American navy as having deserted on June 16, 1860, when on leave, and had not been heard from since. "If I am to draw a conclusion at all," said Giffard, L. J., "I should infer that a person in the position of a sergeant, having nothing against his character, would not desert, and that he died while on leave, and so was not heard of by the authorities. It is enough for me, however, to state that in my opinion the burden of proof is on the representative of Nicholas Phene Mill, and that Nicholas Phene Mill's representative has not proved affirmatively that Nicholas Phene Mill survived the testator." Hence Giffard, L. J., refused to presume that N. was alive on January 6, 1861, overruling Benham's Trusts, L. R. 4 Eq. 416.

In Pennefather *v.* Pennefather, Irish Rep. 6 Eq. 171, the evidence was that a son, first tenant in tail in remainder, left Ireland on April 11th, 1858, and was not subsequently heard from. His father died May 8th, 1858. It was held in 1872 that it was to be presumed that the son survived the father.

The return of a person, presumed to have been dead, after an absence of over seven years, during which he has not been heard from, avoids any acts done by his representatives without judicial authority. Mayhugh *v.* Rosenthal, 1 Cincin. 492.

[1] Best on Evidence (1870), § 409. See R. *v.* Inhabitants of Twining, 2 B. & A. 386; R. *v.* Inhabitants of Harborne, 2 A. & E. 540. In the latter case Lord Denman said: "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of facts, *without reference to accompanying circumstances, such, for instance, as the age or health of the party.* There can be no such strict presumption of law. It may be said: Suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage." Proof, therefore, that the party was alive twenty-five days before the second marriage was held to overcome the presumption of innocence; which, on the other hand, prevailed in R. *v.* Twining against proof that the defendant had been heard of alive one year previous to the marriage. To the same effect is Lapsley *v.* Grierson, 1 H. L. Cas. 498.

length of time elapsing since the shipwreck ;[1] exposure to peculiar perils, to which death will be imputed if the party has not been subsequently heard from ;[2] ignorance, as to such person, after due inquiry, of all persons likely to know of him if he were alive ;[3] cessation of writing of letters, and of communications with relatives, in which case the inference rises or falls with the domestic attachments of the party.[4] Thus, death may be inferred by a jury from the mere fact that a party who is domestic, attentive to his duties, and with a home to which he is attached, suddenly, finally, and without explanation, disappears.[5] On the other hand, it is admissible to

[1] See Cockburn, C. J., charge in R. *v.* Orton, for an able exposition of this presumption ; Sillick *v.* Booth, 1 Y. & C. 117 ; Ommaney *v.* Stilwell, 23 Beav. 328 ; Patterson *v.* Black, 2 Park. on Ins. 919 ; Gary *v.* Post, 13 How. Pr. 118 ; Bowditch *v.* Jordan, 131 Mass. 321 ; North Carolina University *v.* Harrison, 90 N. C. 385 ; Jamison *v.* Smith, 35 La. An. 609 ; Hudson *v.* Poindexter, 42 Miss. 304.

[2] Watson *v.* King, 1 Stark. R. 121 ; 4 Camp. 272 ; White *v.* Mann, 26 Me. 361.

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 the absence of only two years, and administration was granted accordingly. In re Hutton, 1 Curt. 595 ; Taylor's Ev. § 158.

A tenant for life, having received a small quarterly payment, started on a pedestrian tour, and was never heard of since. The small sum which became payable at the end of the next quarter, was never applied for. It was held that the presumption was that she was dead ; that on the evidence she could not be presumed to have died before June, 1866, when such payment was due ; but that she must be taken to have died soon after June, 1866. Hickman *v.* Upsall, 20 L. R. Eq. 136.

There is no presumption that a man who disappeared at an undesignated period in the year 1809 was dead on the 29th of April, 1816. Dean *v.* Bittner, 77 Mo. 101. See Bailey *v.* Bailey, 36 Mich. 181.

[3] Pancoast *v.* Addison, 2 Har. & J. 350. See Benham's Trusts, in re, L. R. 4 Eq. 415 ; White *v.* Mann, 26 Me. 361 ; Hall, in re, Wallace, J., 185 ; Jackson *v.* Etz, 5 Cow. 314 ; McCartee *v.* Camel, 1 Barb. (N. Y.) Ch. 455 ; Clarke *v.* Canfield, 15 N. J. Ch. 119 ; Holmes *v.* Johnson, 42 Penn. St. 159 ; Spencer *v.* Roper, 13 Ired. 333 ; Ringhouse *v.* Keever, 49 Ill. 470 ; John Hancock Ins. Co. *v.* Moore, 34 Mich. 4 ; Bailey *v.* Bailey, 36 Mich. 181.

It is necessary that there should have been conscientious and diligent inquiry made at the places where the person resided when last heard from, as well as from his relatives and connections. Ibid. ; Wentworth *v.* Wentworth, 71 Me. 72.

[4] Supra, § 1274 ; Tisdale *v.* Ins. Co., 26 Iowa, 170 ; Hancock *v.* Ins. Co., 62 Mo. 121 ; Lancaster *v.* Ins. Co., 62 Mo. 12 ; Scheel *v.* Eidman, 77 Ill. 301 ; Eaton *v.* Tallmadge, 24 Wis. 217 ; Anderson *v.* Parker, 6 Cal. 197 ; Ewing *v.* Savary, 3 Bibb, 235. Supra, § 223.

[5] Hancock *v.* Ins. Co., 62 Mo. 26 ; Tisdale *v.* Ins. Co., 26 Iowa, 170 ; 28 Iowa, 12 ; Cox *v.* Ellsworth, 18 Neb.

explain such disappearance by putting in evidence pecuniary embarrassments.[1] It is scarcely necessary to say that evidence tending to rebut such presumption (*e. g.*, proof that the alleged deceased had been heard from by letter, or was personally warned in a litigated suit), is always relevant for what it is worth.[2]

It must be also kept in mind that, in any view, death, even when the alleged corpse is seen, is a matter of inference, not of demonstration, depending upon an identification of remains as to which there is always a possibility of mistake.[3] Reputation, not a matter of family acceptation, is, by itself, not admissible as proof of death.[4]

§ 1278. In all questions relating to the authority of the parties to whom letters testamentary or administrative are granted, such letters are *primâ facie* proof of the death of the alleged decedent,[5] and are conclusive in cases where there is "no plea in abatement denying the death of [the principal], and setting up the consequent invalidity of the letters of administration."[6] Such letters, also, may bind parties and privies.[7] But, as far as concerns a party, to whose estate letters of administration have been taken out, on an erroneous belief that he was dead, such letters are a nullity,[8] and hence he is not precluded by the letters from recovering from third parties debts they have *bonâ fide* paid to the administrator.[9] And between

Letters testamentary not collaterally proof of death.

664. See Doe d. Lloyd *v.* Deakin, 4 B. & A. 433. See the judgment of Lord Ellenborough in Doe d. George *v.* Jesson, 6 East, 85; Rowe *v.* Hasland, 1 W. Black. 404; Bailey *v.* Hammond, 7 Ves. 590; Doe d. France *v.* Andrews, 15 Q. B. 756.

[1] Sensenderfer *v.* Ins. Co., 19 Fed. Rep. 68.

[2] Keech *v.* Rinehart, 10 Penn. St. 240; Smith *v.* Smith, 49 Ala. 156. See Hoyt *v.* Newbold, 45 N. J. L. 219; Norris *v.* Edmunds, 90 N. C. 382. Supra, § 223.

[3] See Whart. on Hom. § 640; Udderzook's case, Ibid. Appendix; Nourse *v.* Packard, 138 Mass. 307.

[4] Supra, § 223.

[5] See fully supra, § 810; Thompson *v.* Donaldson, 3 Esp. 63; Moons *v.* De Bernales, 1 Russ. 301; French *v.* French, 1 Dick. 268; Newman *v.* Jenkins, 10 Pick. 515; McKimm *v.* Riddle, 2 Dall. 100; Cunningham *v.* Smith, 17 Penn. St. 458; McNair *v.* Ragland, 1 Dev. (N. C.) Eq. 533; Tisdale *v.* Ins. Co., 26 Iowa, 170; French *v.* Frazier, 7 J. J. Marsh. 425.

[6] Sharswood, J., Cunningham *v.* Smith, 70 Penn. St. 458; citing Newman *v.* Jenkins, 10 Pick. 515; McKimm *v.* Riddle, 2 Dall. 100; Axers *v.* Musselman, 2 P. A. Browne, 115.

[7] Carroll *v.* Carroll, 2 Hun, 609; *S. C.* on App., 60 N. Y. 123; Randolph *v.* Bayne, 44 Cal. 366; Lewis *v.* Ames, 44 Tex. 319.

[8] Supra, § 810.

[9] Lavins *v.* Bank, cited supra, § 810.

strangers, when the fact of death is to be proved, letters of administration to his estate are *res inter alios acta*, and are inadmissible.[1]

[1] Ibid.; Thompson *v.* Donaldson, 3 Esp. 63; Beamish, in re, 9 W. R. 475; Jochumsen *v.* Suffolk Bank, 3 Allen, 87; Carroll *v.* Carroll, 60 N. Y. 123; Buntin *v.* Duchane, 1 Blackf. 26; English *v.* Murray, 13 Tex. 366. See fully supra, §§ 810, 811. See Davis *v.* Greeve, 32 La. An. 420.

On this topic we have the following from the New York Court of Appeals:—

"Letters testamentary and of administration are conclusive evidence of the authority of the persons to whom granted, and are sufficient to establish the representative character of the plaintiff who assumes to sue by virtue thereof. 2 R. S. 80, § 56; Belden *v.* Meeker, 47 N. Y. 307; Farley *v.* McConnell, 52 Ibid. 630. So, also, a will proved with a certificate of the surrogate, and attested by his seal of office, may be read in evidence without further proof, and the record of the same, and the exemplification of the same by the surrogate, may be received in evidence the same as the original will would be if produced and proved. 2 R. S. 58, § 15. The object of this provision was to make the certificate of the surrogate and the record of the will or exemplification *primâ facie* evidence only. Vanderpoel *v.* Van Valkenburgh, 6 N. Y. 190, 199. In 2 Greenleaf's Evidence, § 339, it is said, that 'the proof of the plaintiff's representative character is made by producing the probate of the will, or the letters of administration, which *primâ facie* are sufficient evidence for the plaintiff of the death of the testator or intestate, and of his own right to sue.' This is undoubtedly the true rule, and it will be found upon examination that the authorities cited upon this question relate mainly to cases where the right of the administrator or executor to sue is involved, or where the parties were connected with the proceeding, interested in the estate, and had their rights adjudicated upon when the will was established before the Probate Court. Such are the cases cited from other states, with scarcely any exception, and none of them can be regarded as sustaining the broad principle that the probate of a will of itself establishes the death of the testator in any other case. The general rule laid down in 1 Greenleaf's Evidence, § 550, as to the effect of the probate of a will, or the grant of letters of administration, is also liable to criticism, and is not, I think, sustained by the English cases which are cited to support it. It may then be considered as established by the cases relied on by the plaintiff's counsel that letters testamentary, and the proofs of a will before a surrogate, are only evidence in some proceedings arising out of the will itself, and the parties who claim under it or are connected with it; and they cannot, upon their face, affect, or in any way control, the interest of parties who are entirely disconnected with the proceedings before the surrogate, and not within his jurisdiction. It follows, therefore, that in an action of ejectment brought by the widow to recover her dower, the probate of the will, and the proceedings thereon, are not competent evidence to prove the fact that the husband is dead, which is the very basis and foundation of the action, and without proof of which it cannot be maintained.

"The English cases sustain the doctrine that letters of administration are not evidence of death, and that it must

The suggestion on record of a plaintiff's death and the entering of his devisees as parties, is, so far as concerns the particular case, *primâ facie* evidence of his death.[1]

§ 1279. When simply the fact is known of the death of a person capable of having had issue, death without issue cannot be presumed.[2] But such presumption may be drawn from any circumstances indicating non-marriage or childlessness.[3] The presumption was held inapplicable to a woman, who emigrated along with her husband and seven children, to America, in 1847, where she died in 1866, though not any of the children had been heard of for ten years preceding the trial.[4]

Death without issue not to be presumed.

§ 1280. The Schoolmen, on the topic of survivorship, as well as on most other topics they discussed, laid down a series of presumptions of law, settling the various contingencies which they contemplated as probable. Presumptions of law of this class, we need scarcely say, are no longer recognized.[5] The question of survivorship must be de-

Presumption of survivorship in a common disaster one of fact.

be otherwise proved. In Thompson *v.* Donaldson, 3 Esp. 63, Lord Kenyon held that letters of administration are not sufficient proof of death, and remarked: 'The death was a fact capable of proof otherwise.' See, also, Moons *v.* De Bernales, 1 Russ. 301." Miller, J., Carroll *v.* Carroll, 69 N. Y. 123.

[1] Stebbins *v.* Duncan, 108 U. S. 32.

[2] Richards *v.* Richards, 15 East, 293; Stinchfield *v.* Emerson, 52 Me. 465; Sprigg *v.* Moale, 28 Md. 497; Harvey *v.* Thornton, 14 Ill. 217; Hays *v.* Tribble, 3 B. Mon. 106. See, however, Doe *v.* Deakin, 3 C. & P. 402; 8 B. & C. 22, under name of Doe *v.* Walley, where a jury were permitted to presume that four elder brothers, who had not been heard from, had died without issue.

[3] King *v.* Fowler, 11 Pick. 302; M'Comb *v.* Wright, 5 Johns. Ch. 263. See Doe *v.* Griffin, 15 East, 293; Webb's Est. in re, 5 Ir. R. Eq. 235; Shriver *v.* State, 65 Md. 279; Shour *v.* McMackin, 9 Lea, 601. See Greaves *v.* Greenwood, (Ex. Div. 1876), 24 W. R. 926; Miller *v.* Beates, 3 S. & R. 490.

[4] Mullaly *v.* Walsh, 6 Ir. R. C. L. 314.

[5] Phene's Trusts, in re, L. R. 5 Ch. 150. See Mason *v.* Mason, 1 Mer. 318; Barnett *v.* Tugwell, 31 Beav. 232; Selwyn, in re, 3 Hag. N. S. 748; Dowley *v.* Winfield, 14 Sim. 277; Nichols, in re, L. R. 2 P. & D. 361; Coye *v.* Leach, 8 Met. 371; Russell *v.* Hallett, 23 Kan. 276; Smith *v.* Croom, 7 Fla. 81; People *v.* Feilen, 58 Cal. 218.

To the same effect is Newell *v.* Nichols, 75 N. Y. 78, where Church, C. J., said: "It is not impossible for two persons to die at the same time, and when exposed to the same peril under like circumstances, it is not as a question of probability very unlikely to happen. At most the difference can only be a few brief seconds. The scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether

termined by all the facts in the particular case.[1] Hence in Massachusetts, in a case where a father, seventy years old, and his daughter, thirty-three years old, were lost together in a steamer foundering at sea, when of the circumstances of the loss nothing was known, it was held that there could be no presumption of survivorship, and that there was no evidence, therefore, on which a party bringing suit could recover.[2] In an English case, somewhat similar in character, the court, unable to reach a satisfactory conclusion, advised a compromise, which was effected.[3]

If there be no proof of circumstances of death *actor* must fail.

§ 1281. The rule that the *actor*, who seeks, when there is no proof of the circumstances of the common death, to recover on the basis of the survivorship of his decedent, must fail from want of proof to make out his case, has been further applied in a case in which a husband gave his whole property to his wife, providing that, "in case my said wife shall die in my lifetime," the estate should go to the children. The testator, his wife, and children perished at sea, being swept from the deck by the same wave. The Lord Chancellor (assisted by Cranworth, B., Wightman, J., and Martin, B.) held that there was no evidence to prove that the wife survived the husband, and that consequently the plaintiff, whose case rested on the assumption of the wife's survivorship, could not recover.[4] The same conclusion was afterwards reached, where the husband and wife and their two young children perished at sea in the same storm;[5] where a mother and a son of seven years so perished;[6] and where a hus-

during the momentary life struggle one or the other may have ceased to gasp first." See Sanders *v.* Simciek, 65 Cal. 50.

[1] Sillick *v.* Booth, 1 Y. & C. 117, 126; Moehring *v.* Mitchell, 1 Barb. Ch. 264; Pell *v.* Ball, 1 Cheves Ch. 99; Smith *v.* Croom, 7 Fla. 81.

[2] Coye *v.* Leach, 8 Met. 371.

[3] R. *v.* Hay, 2 W. Bl. 640. See Fearne's Posth. Works, 38.

[4] Underwood *v.* Wing, 4 De G., M. & G. 633.

[5] Wing *v.* Angrave, 8 H. of L. Cas. 183. See Robinson *v.* Gallier, 2 Wood's C. C. 478; *S. C.* in South. L. R. Oct. 1876. And see Scrutton *v.* Pultillo, L. R. 19 Eq. 369; Ridgway, in re, 4 Redf. 226.

[6] Stinde *v.* Goodrich, 3 Redf. 87; 55 How. N. Y. Pr. 301.

In Wollaston *v.* Berkeley, L. R. 2 Ch. D. 213, L. and G., a husband and wife were drowned with all hands on board at sea. By a settlement made on their marriage, L. agreed that he would after the marriage transfer certain funds to the trustees, and G. assigned to the trustees other funds. The trustees were to pay the income of the funds to be conveyed by L. to L. for life, and after his death to G. for

band and wife were killed in a railway collision, their dead bodies being found together two days after death.[1]

§ 1282. Upon a survey of the cases, we may conclude the law to be as follows:[2] (1.) Where persons ranging between infancy and extreme old age perish by a common catastrophe, and where there is no information as to either of them subsequent to the shock, no such presumption can be drawn from differences of age or sex as will enable a court to give judgment for a plaintiff seeking to recover on the claim of survivorship. (2.) At the same time, in consistency with the rulings above given, if one of the parties is in extreme infancy, or in very advanced and decrepit old age, we may assume, as a presumption of fact, that such person died before another not so disabled, in all cases where there was an opportunity to struggle for life. (3.) The law only refuses to permit a presumption of fact of this class to be drawn where there is no evidence at all as to the parties subsequent to the shock. If there is any evidence, no matter how slight, leading to the conclusion that one of the parties was alive subsequent to a period when the other was probably dead, this is ground on which a jury may find survivorship.[3]

But if any circumstances of death are proved, these are ground for induction.

life, and then in trust for children, or in default of children, in trust for the survivor of L. or G., his or her executors and administrators. The trustees were to pay the income of G.'s funds to L. during his and her joint lives, and in case he should survive, then, after G.'s decease, to transfer the bonds to whomever she might appoint by will, and, in default of appointment, to her next of kin; but if she should survive L., in trust to transfer the bonds to her, her executors or administrators. After the marriage L.'s funds were transferred to the trustees. L. by will gave his whole property to his wife, absolutely, and G. bequeathed the whole of her property to her husband for life, and after her death to her sisters. It was held that the funds settled belonged to the legal personal representatives of each settlor.

[1] Wheeler, in re, 31 L. J. P. M. & A. 40. See Kansas Pac. R. R. *v.* Miller, 2 Col. T. 442.

[2] See Whart. & St. Med. Jur. 3d ed. § 1045.

[3] Mr. Best (Evidence, § 410) states the rule as follows:—

"When, therefore, a party on whom the onus lies of proving the survivorship of one individual over another, has no evidence beyond the assumption that, from age or sex, that individual must be taken to have struggled longer against death than his companion, he cannot succeed. But then, on the other hand, it is not correct to infer from this, that the law presumes both to have perished at the same moment; this would be establishing an artificial presumption against manifest probability. The practical consequence is, however, nearly the same; because, if it cannot

§ 1283. The length of time after which it is to be presumed that a ship, which has been unheard of, is lost, is to be determined by the inferences to be drawn from the concrete case.[1] As a basis of proof, mere rumors are not sufficient; there must be trustworthy information.[2] If there are any indications of foundering,—*e. g.*, a violent storm at a particular point where the ship was, her unseaworthiness, remnants of wreck,—the loss may be put earlier than would be permissible if the ship had not been heard of at all.[3] But there must be proof of the ship having left port.[4]

Presumption of loss of ship from lapse of time.

IV. PRESUMPTIONS OF UNIFORMITY AND CONTINUANCE.

§ 1284. When a juridical relation is once established, it is enough, generally, for a party relying on such relation to show its establishment, and the burden is then on the opposite party to show that the relation has ceased to exist. It has frequently been said, that in such cases the law presumes the continuance of the relation. But this is to confound two very different things: burden of proof requiring me to prove a particular thing, and presumption of law assuming a thing without proof. Ordinarily a party seeking to assail an established condition has the burden on him to make good his case. I claim under a will, for instance; but, after proving the will, though the party attacking the will has the burden on him, supposing the will to be duly proved, to show a superior title, yet this is a matter only of burden of proof, and there is no such presumption of law in my favor as will interfere with the ultimate

Burden on party seeking to prove change in existing conditions.

be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary both individuals may have died at the same moment."

In Nourse *v.* Packard, 138 Mass. 307, it was held that where a party, who was found dead in the ruins of a fallen house, died from suffocation, the inference was that he survived the shock of the fall.

[1] Green *v.* Brown, 2 Str. 1199; Thompson *v.* Hopper, 6 E. & B. 172; Newby *v.* Reed, 1 Park. Ins. 148; Oppenheim *v.* Leo Woolf, 3 Sandf. Ch. 571; Biceard *v.* Shepherd, 14 Moore P. C. 471; Houstman *v.* Thornton, Holt N. P. C. 243; Twemlin *v.* Oswin, 2 Camp. 85.

[2] Koster *v.* Reed, 6 B. & C. 22.

[3] Silliek *v.* Booth, 1 Y. & C. 117. See charge of Chief Justice Cockburn, in R. *v.* Orton, as to loss of The Bella.

[4] Koster *v.* Innes, R. & M. 333; Cohen *v.* Hinckley, 2 Camp. 51.

adjudication of the case on the merits. A debt was due me a year ago. I prove this, and the defendant has the burden on him to prove payment; but when the question is whether such payment is proved, this question is not affected by any presumption of law drawn from the fact that a year ago the debt was due.[1] From this it follows that when I once establish a juridical relation in itself not so limited as to time as to have expired at the period of litigation, it is not necessary for me to prove the continuance of the relation. The burden is on my antagonist to prove that the relation has ceased to exist; though, as has just been said, there is no presumption of law against him which, when the evidence is all in, can outweigh any preponderance in such evidence in his favor.[2] We are therefore to understand that the presumption of continuance, as it is called, is simply a presumption of fact, whose main use is in designating the party on whom lies the burden of proof. In this sense we are justified in holding that the continuance of an existing condition is a presumption of fact, dependent for its intensity on the circumstances of the particular case. The burden is on the party seeking to show change, and if he fails to show it, he loses his case.[3] But the question is one dependent upon the relation of

[1] See L. 12, 25, § 2; D. L. 1 C. de probat. See supra, §§ 354 *et seq.*

[2] See Heffter, App. to Weber, 280; Scales *v.* Key, 11 A. & E. 819; Mercer *v.* Cheese, 4 M. & Gr. 804; Price *v.* Price, 16 M. & W. 232; Rixford *v.* Miller, 49 Vt. 319. It is in this sense that we are to understand the term "presumption," as used in the following as well as in other opinions:—

"A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty months since, justifies the presumption that he continues to be one. An adulterous interconrse is presumed to continue. So of ownership and non-residence. Walrod *v.* Ball, 9 Barb. 271; Cooper *v.* Dedrick, 22 Ibid. 516; Smith *v.* Smith, 4 Paige, 432; McMahon *v.* Harrison, 2 Seld. 443; Sleeper *v.* Van Middlesworth, 4 Denio, 431; Nixon *v.* Palmer, 10 Barb. 175. This analogy is fairly applicable to the present case, and justifies the admission of this evidence." Hunt, C., Wilkins *v.* Earle, 44 N. Y. 172. See, also, R. *v.* Lilleshall, 7 Q. B. 158.

[3] Bell *v.* Kennedy, L. R. 3 H. L. 307; Smout *v.* Ilbery, 10 M. & W. 1; Jackson *v.* Irvin, 10 Camp. 50; Brown *v.* Burnham, 28 Me. 38; Eames *v.* Eames, 41 N. H. 177; Farr *v.* Payne, 10 Vt. 615; Martin *v.* Ins. Co., 20 Pick. 389; Randolph *v.* Easton, 23 Pick. 242; Kilburn *v.* Bennett, 3 Met. 199; Brown *v.* King, 5 Met. 173; Gelston *v.* Hoyt, 1 Johns. Ch. 543; Wright *v.* Ins. Co., 6 Bosw. 269; Leport *v.* Todd, 32 N. J. L. 124; Bell *v.* Young, 1 Grant (Pa.), 175; Erskine *v.* Davis, 25 Ill. 251; Murphy *v.* Orr, 32 Ill. 489; Goldie *v.* McDonald, 78 Ill. 605; Montgomery Plank R. *v.* Webb, 27 Ala. 618; Barelli *v.* Lytle, 4

conditions to time. A state of war, for instance, existing yesterday, will be presumed to continue to-day; but it will not be presumed to continue after the lapse of three years.[1] In fact, so far from continuance being a legal presumption, in things dependent upon human purposes, the presumption, in the long run, is the other way. Man never continueth in one stay. Of what will happen ten years hence, the only presumption that can be offered with anything like certainty is, that there will be a change, at least in the actors in the drama, from what is happening to-day. The time required for the change depends upon the nature of the object. Fifty years ago, the houses in one of our western cities did not exist. Ten minutes ago, the man whom I now see standing in front of one of those houses was in his counting-room, or in the cars. We cannot, therefore, speak of a legal presumption of continuance, when, if we are to draw any inference that would be permanently applicable, it would be that of change. And yet, for short calculations, so far as is consistent with the inductions of social science, we are justified in saying, as a means for adjusting the burden of proof, that the presumption is so far in favor of continuance that the burden is on a party who seeks to show a change from a condition which, when we last heard from it, was settled, and which, from the nature of things, would probably exist to-day unchanged.[2]

La. An. 558; Swift *v.* Swift, 9 La. An. 117; Sullivan *v.* Goldman, 19 La. An. 12; Mullen *v.* Pryor, 12 Mo. 307; O'Neill *v.* Mining Co., 3 Nev. 141. As to continuance of partnership, see Clark *v.* Alexander, 8 Scott N. R. 161; Alderson *v.* Clay, 1 Stark. 405; Clark *v.* Leach, 32 Beav. 14. As to continuance of agency, see Whart. on Agency, § 94; Pickett *v.* Packham, L. R. 4 Ch. Ap. 190; Ryan *v.* Sams, 19 Q. B. 460.

[1] Covert *v.* Gray, 34 How. (N. Y.) Pr. 450.

[2] Among the illustrations of the proposition in the text may be mentioned the following:—

Where a jury found that a certain custom existed up to the year 1689, the court held that in the absence of all evidence of its abolition, it was to be concluded that the custom still subsisted at the time of the trial in 1840. Scales *v.* Key, 11 A. & E. 819.

It has also been held in England, in a settlement case, that where a son, though long since arrived at manhood, has continued unemancipated, as in the days of his infancy, this state would be held to continue, unless there be some evidence to the contrary. R. *v.* Lilleshall, 7 Q. B. 158; explaining R. *v.* Oulton, 5 B. & Ad. 958; 3 N. & M. 62, *S. C.* So the appointment of a party to an official situation will (R. *v.* Budd, 5 Esp. 230, per Ld. Ellenborough; Pickett *v.* Packham, 4 Law Rep. Ch. Ap. 190), at least for a reasonable time, be presumed to continue in force.

So, if a debt be shown to have once

§ 1285. For the purpose, in like manner, of determining the burden of proof, we may hold, as a presumption of fact, more or less strong according to the concrete case, that a party is presumed to continue to reside in the last place known to have been accepted by him as such residence.[1] The same inference is applicable to the settlement of a pauper,[2] and to domicile.[3] But here, again, we fall back upon inferences varying with the concrete case. A person leaving a comfortable home is "presumed," in this view, to intend to return; but it is otherwise with a tramp who owns only the clothes on his back. The "presumption" of continuous residence attaches properly to the man of solid business; no presumption but that of mobility of residence attaches to the tramp.[4]

Residence presumed to be continuous.

§ 1286. When occupancy is proved, whether of real or personal property, we may infer, for the like purpose, as a presumption of fact, that the occupation is continuous; the inference varying with the person occupying, the thing occupied, and the place and period of occupation.[5] For the same purpose, also, ownership is presumed to continue until alienation.[6]

Occupancy presumed to be continuous.

§ 1287. We have already noticed that in civil, as well as in criminal issues, the character of a party is presumed to be good, and that the burden is on those by whom it is assailed.[7] We have also seen that when, in particular issues, character is admissible to in-

existed, its continuance will be presumed, in the absence of proof of payment, or some other discharge. Jackson *v.* Irvin, 2 Camp. 50, per Ld. Ellenborough.

As to uniformity of habits, indicating system, see supra, §§ 38 *et seq.*; and see Blake *v.* Ass. Soc., 40 L. T. 211.

[1] Bell *v.* Kennedy, L. R. 3 H. L. 307; Whicker *v.* Hume, 7 H. of L. 124; Church *v.* Rowell, 49 Me. 367; Littlefield *v.* Brooks, 50 Me. 475; Shaw *v.* Shaw, 98 Mass. 158; Randolph *v.* Easton, 23 Pick. 242; Kilburn *v.* Bennett, 3 Met. 199; First Nat. Bk. *v.* Balcom, 35 Conn. 351; Goldie *v.* McDonald, 78 Ill. 605; Daniels *v.* Hamilton, 52 Ala. 105; Prather *v.* Palmer, 4 Ark. 456; Swift *v.* Swift, 9 La. An. 117; Whart. Confl. of Laws, § 56.

[2] R. *v.* Budd, 5 Esp. 230.

[3] Whart. Confl. of Laws, § 56; Lauderdale Peerage, 10 App. Ca. 692. As to inferences in respect to domicile, see Fulweiler *v.* Lutz, 112 Penn. St. 107.

[4] Ripley *v.* Hebron, 60 Me. 379. See Greenfield *v.* Camden, 74 Me. 56.

[5] Smith *v.* Stapleton, Plowd. 193; Winkley *v.* Kaime, 32 N. H. 268; Currier *v.* Gale, 9 Allen, 522; Rhone *v.* Gale, 12 Minn. 54; Hanson *v.* Chiatovich, 13 Nev. 395.

[6] Magee *v.* Scott, 9 Cush. 148.

[7] Supra, § 55.

crease or reduce damages, character is regarded as convertible with reputation; and the inquiry is, not what are the peculiar traits of the party, in the opinion of the witness examined, but what is the reputation of the party in the community in which he lives.[1] In questions of identity, however, the habits of individuals may come up for comparison, and it may become a material question whether a claimant has the characteristic traits of the person with whom he pretends to be identical. And the admissibility of evidence of this class rests on the psychological assumption that habits become a second nature, and that special aptitudes are not unlearned, and special characteristics are not extinguished.[2] But questions of identity are an exception to the general rule, which is, that evidence of habit is inadmissible for the purpose of showing that a particular person did or did not do a particular thing.[3] Another exception is that when a series of acts of a particular person is in evidence, a litigated act imputed to him may be tested by comparison with the acts proved to emanate from him.[4] It may be shown, for instance, to sustain a presumption

Habit and appearance presumed to be continuous.

[1] Supra, § 49.

[2] For a series of acute observations on this principle, see the charge of Cockburn, C. J., in R. *v.* Orton. As to admissibility of successive acts of drunkenness to prove habitual drunkenness, see Commonwealth *v.* Ryan, 134 Mass. 223; supra, § 40. But prior usurious habits cannot be shown to make out a particular case of usury; Ross *v.* Ackerman, 46 N. Y. 220; nor prior gambling habits to prove a particular act of gambling; Thompson *v.* Bowie, 4 Wall. 463; though in both these cases such proof might be admitted to disprove the defence of accident or imposition; supra, § 38.

[3] "Each separate and individual case must stand upon, and be decided by, the evidence particularly applicable to it. Although 'it is not easy in all cases to draw the line and to define with accuracy where probability ceases and speculation begins,' it seems clear that, ordinarily, evidence that the defendant entered into contracts with third persons in a particular form would not be admissible in tending to show that he had made a similar contract with the plaintiff. 'The fact of a person having once or many times in his life done a particular act in a particular way' does not prove 'that he has done the same thing in the same way upon another and different occasion.' See Hollingham *v.* Head, 4 C. B. N. S. (93 E. C. L.) 388; Jackson *v.* Smith, 7 Cowen, 717; Spenceley *v.* De Willott, 7 East, 108; Filer *v.* Peebles, 8 N. H. 226; Wentworth *v.* Smith, 44 N. H. 419; Holcombe *v.* Hewson, 3 Campb. 391; True *v.* Sanborn, 27 N. H. 383; Lincoln *v.* Taunton C. M. Co., 9 Allen, 181; Smith *v.* Wilkins, 6 C. & P. 180; Phelps *v.* Conant, 30 Vt. 277." Delano *v.* Goodwin, 48 N. H. 205.

[4] See argument as to comparison of hands, supra, § 717.

In a Pennsylvania case, decided in

of payment by an employer of a particular workman's wages, that all the workmen in the same employ were regularly paid.[1] It has also, as we have seen,[2] been held admissible to prove habit or system in order to rebut the defence of accident, or to infer *scienter*. We have a right, again, to infer, as a presumption of fact, that mental conditions continue unchanged, unless there be reasons to infer the contrary. It is on this ground that we infer the continuance of sanity and of chronic insanity;[3] and of purposes once deliberately formed;[4] and of habits of truthfulness or untruthfulness;[5] and of habits of negligence exhibited by prior facts.[6] The habits, also, of a writer, in using words in a particular sense, may be shown in certain cases of latent ambiguity,[7] and habits of spelling and writing to indicate genuineness.[8] The presumption of continuity of personal appearance is to be conditioned by the changes wrought by time, disease, and other modifying influences.[9]

§ 1288. Coverture, once proved, is inferred to continue, this being a presumption of fact, varying with the concrete case.[10] And so as to cohabitation,[11] and when illicit cohabitation is established it is presumed to continue until the charge is proved.[12]

Continuance of coverture and cohabitation.

§ 1289. The same inference is applied to solvency,[13] and to insolvency, each of which is presumed (as a presumption of fact) to continue until the contrary is proved,[14] or until lapse of years leads to the inference of change of

Solvency and insolvency.

1876, we have the following: "It was a very natural conclusion that a man who always paid his taxes promptly in biennial period, previous to the time of sale, would have paid them in time in 1832 and 1833. This, therefore, was a question for the jury, and not the court." Agnew, C. J., Coxe *v.* Derringer, 3 Weekly Notes, 103; *S. C.* 82 Penn. St. 236.

[1] Infra, § 1362.

[2] Supra, § 38.

[3] See supra, §§ 1252, 1253.

[4] Whart. on Homicide, § 440.

[5] Supra, § 562; Lum *v.* State, 11 Tex. Ap. 483. But see Com. *v.* Kennon, 130 Mass. 39.

[6] Supra, § 40.

[7] Supra, § 962.

[8] Supra, §§ 714–8.

[9] London Spectator, Sept. 22, 1885, 1258.

[10] Erskine *v.* Davis, 25 Ill. 251. As to presumption of continuance of status, see Kidder *v.* Stevens, 60 Cal. 444.

[11] R. *v.* Weltshey, 6 Q. B. D. 118; R. *v.* Jones, 11 Q. B. D. 118.

[12] Infra, § 1297.

[13] Wallace *v.* Hull, 28 Ga. 68.

[14] Brown *v.* Burnham, 28 Me. 38. See Eames *v.* Eames, 41 N. H. 177; Burlew *v.* Hubbell, 1 Thomp. & C. (N. Y.) 235; Body *v.* Jewsen, 33 Wis. 402; Ramsey *v.* McCanley, 2 Tex. 189. The presumption of insolvency from a return of *nulla bona* is elsewhere noticed. Supra, § 834.

circumstances. An adjudication of bankruptcy may, within a limited range of time, afford an inference of insolvency,[1] but, after the expiration of five months, the presumption has been held to be very slight.[2]

Value to be inferred from circumstances.

§ 1290. Whether the value of a thing at a particular period may be inferred from its value at other periods depends upon the circumstances of the case. An article whose value fluctuates greatly cannot, by proof that it had a certain price a year ago, be presumed to have the same value now.[3] On the other hand, as to a thing whose value is more or less constant, proof of recent price in the vicinity may be material in enabling the price at the period in litigation to be adjusted.[4] A remote period, under different conditions, cannot in any view be taken as a standard.[5] Nor can peculiar associations, likely to give a fictitious value, be taken into account.[6] Distant markets cannot be consulted in proof of value;[7] though it is otherwise if the markets be in any way inter-dependent,[8] or sympathetic.[9]

[1] Safford *v.* Grout, 120 Mass. 20.

[2] Donahue *v.* Coleman, 49 Conn. 464.

[3] Campbell *v.* U. S., 8 Ct. of Cl. 240; Kansas Stockyard Co. *v.* Couch, 12 Kans. 612; Waterson *v.* Seat, 10 Fla. 326. That value is to be inferred from circumstances, see Com. *v.* Burke, 12 Allen, 182; People *v.* Caryl, 12 Wend. 547; Harrison *v.* Glover, 72 N. Y. 451; Cummings *v.* Com., 2 Va. Cas. 128; Houston *v.* State, 13 Ark. 66. Hence a party, to show value, may prove what he paid. Dowdall *v.* R. R., 13 Blatch. 403. But see Haish *v.* Payson, 107 Ill. 365. Supra, §§ 39, 447, 448.

[4] The Pennsylvania, 5 Ben. 253; White *v.* R. R., 30 N. H. 188; French *v.* Piper, 43 N. H. 439; Paine *v.* Boston, 4 Allen, 168; Benham *v.* Dunbar, 103 Mass. 365; Dixon *v.* Buck, 42 Barb. 70; Columbia Bridge *v.* Geisse, 38 N. J. L. 39; Roberts *v.* Dunn, 71 Ill. 46. See Potteiger *v.* Huyett, 2 Notes of Cases, 690; Abbey *v.* Dewey, 25 Penn. St. 413; East Brandywine R. R. *v.* Ranck, 78 Penn. St. 454; Russell *v.* R. R., 33 Minn. 210.

[5] Palmer *v.* Ferrill, 17 Pick. 58; McCracken *v.* West, 17 Ohio, 16. See Cahen *v.* Platt, 69 N. Y. 349.

[6] Davis *v.* Sherman, 7 Gray, 291; Fowler *v.* Middlesex, 6 Allen, 92. See generally, Kent *v.* Whitney, 9 Allen, 62; Boston R. R. *v.* Montgomery, 119 Mass. 114; Freyman *v.* Knecht, 78 Penn. St. 141; Shenango *v.* Braham, 79 Penn. St. 447; Baber *v.* Rickart, 52 Ind. 594; McLaren *v.* Birdsong, 24 Ga. 265. See, as to proof of value, supra, §§ 446–450.

[7] Harrington *v.* Baker, 15 Gray, 538; Greely *v.* Stilson, 27 Mich. 153.

[8] Siegbert *v.* Stiles, 39 Wis. 533; Berry *v.* Duxberry, 54 Ala. 446.

[9] Cliquot's Champagne, 3 Wall. 114; Rice *v.* Manley, 64 N. Y. 82; Kermott *v.* Ayer, 11 Mich. 181; Sisson *v.* R. R., 14 Mich. 489; Comstock *v.* Smith, 20 Mich. 338; Hanson *v.* Lawdon, 19 Kans. 201.

§ 1291. Things of a different species cannot be taken into consideration in determining value;[1] nor should much weight be attached to proof that prices had been offered in private negotiations by third parties; such evidence being open to fraud; and at the best indicating only private opinion, not the opinion of a market.[2] Nor can a price in one case be fixed by proving prices in other insulated cases.[3] And while hearsay is admissible to prove the state of a market;[4] the value of an article, or the extent of a party's income, cannot ordinarily be inferred from the record of a tax assessment. This is the act of a third party, who must be called if obtainable.[5]

But system necessary to admission of collateral values.

§ 1292. In a previous chapter it has been shown[6] that the settled rule is that foreign states, whose jurisprudence is derived from the same common source as ours, are presumed to possess laws materially the same as our own.[7] This presumption, however, does not extend to states whose jurisprudence springs from a different system, nor can we impute to a foreign jurisprudence idiosyncrasies we know to be peculiar to ourselves.[8] But in any view, if we wish to prove a foreign law as distinguished from our own, we must prove such law as a fact.[9]

Foreign law presumed to correspond with our own.

§ 1293. The constancy of natural laws is to be assumed until the contrary be proved. The seasons, for instance, pursue, in the long run, a regular course; and we may therefore assume that winter is cold and summer is warm; though this may be qualified by proof that in an exceptional

Constancy of nature presumed.

[1] Gonge *v.* Roberts, 53 N. Y. 619.

[2] Perkins *v.* People, 27 Mich. 386. See Snell *v.* Cottingham, 72 Ill. 161.

[3] Haish *v.* Payson, 107 Ill. 365; Seurer *v.* Horst, 31 Minn. 479.

[4] Supra, § 449.

[5] Flint *v.* Flint, 6 Allen, 34; Kenderson *v.* Henry, 101 Mass. 152; Raynes *v.* Bennett, 114 Mass. 424.

[6] See supra, § 314; and see Cannon *v.* Ins. Co., 29 Hun, 470; Seyfert *v.* Edison, 45 N. J. L. 393; Rogers *v.* Look, 86 Ind. 237; Bradley *v.* Harden, 73 Ala. 70; Meyer *v.* McCabe, 73 Mo. 236.

[7] See cases supra, § 314.

[8] Floto *v.* Mulhall, 72 Mo. 522; Sloan *v.* Torry, 78 Mo. 623; Marsters *v.* Lash, 61 Cal. 622.

[9] Supra, §§ 314 *et seq.* And see Com. *v.* Kenney, 120 Mass. 387.

"It is doubtful whether this presumption will be made of statute law; McCulloch *v.* Norwood, 58 N. Y. 587; Wilcox Co. *v.* Green, 72 N. Y. 17. It will not be made of statutes imposing a penalty, or forfeiture. Cutter *v.* Wright, 22 N. Y. 472." Folger, C. J., Harris *v.* White, 81 N. Y. 522. See supra, § 315.

season the winter was comparatively mild or the summer was comparatively cool. It may be that in a particular winter, even in a northern climate, we may have no snow-storms; yet if this be not shown, we infer that what is usual is continuous, and not only do we take each fall the steps that will enable us to shelter ourselves against snow, but we assume as to any given past winter that there fell the usual quantity of snow. So with regard to ice. In New England, for instance, ice crops are usually formed each winter, and these may be stored if due diligence be shown; and on a suit based on lack of diligence in this respect, it would be inferred, until the contrary was shown, that the winter was cold enough to produce the usual quantity of ice. Hence it is that *casus*, or the extraordinary interruption of apparent physical laws, must be affirmatively shown by the party alleging such interruption; and until such proof, that which is usual is deemed to be constant.[1] In order, however, that evidence based on the constancy of nature should be received, similarity of conditions should be first established. Thus, in an action to recover damages for injury caused by removing stones from a river, resulting in the washing away the plaintiff's land, it has been held not error to exclude evidence of the effects of the action of the water at another place and time, the forces and surroundings not being first shown to be alike.[2] But when the conditions are the same, evidence of common phenomena (*e. g.*, snow in the immediate vicinity to prove snow in the place of inquiry) in one place may be received to infer such phenomena in another.[3]

Physical sequences to be presumed.

§ 1294. The ordinary physical sequences of nature are to be contemplated by us as probable; and hence we are to presume them as existing among the contingencies to be expected by reasonable men. Among these we may specify the falling of water from a higher to a lower level;[4] the spreading of fire in inflammable material;[5] the contin-

[1] See cases supra, § 363.

[2] Hawks *v.* Inhabitants, 110 Mass. 110. As to inferences from system, see §§ 39, 268, 448, 1346; Mill's Logic, ch. xiv.

[3] Brooks *v.* Acton, 117 Mass. 204. Supra, § 46.

[4] Collins *v.* Middle Level Com., L. R. 4 C. P. 279.

[5] L. 30, § 3; D. ad leg. Aquil.; Tuberville *v.* Stamp, 1 Salk. 13; Filliter *v.* Phippard, 11 Q. B. 347; Smith *v.* R. R., L. R. 5 C. P. 98; Perley *v.* R. R., 98 Mass. 414; Higgins *v.* Dewey,

uous movement of a railway train over the track, and the fact that the shock on meeting an obstacle is in proportion to momentum;[1] and the effect of water in extinguishing fire.[2]

So of probable habits of animals.

§ 1295. We may also assume, as a presumption of fact, that animals, as a general rule, will act in conformity with their nature.[3] Thus, it is probable that untended cattle will stray;[4] that horses will take fright at extraordinary noises and sights;[5] that shying horses may continue to shy;[6] that certain kinds of dogs will worry sheep;[7] that a cow will go through

107 Mass. 494; Calkins *v.* Barger, 44 Barb. 424; Collins *v.* Groseclose, 40 Ind. 414; Gagg *v.* Vetter, 41 Ind. 228; Hanlon *v.* Ingram, 3 Iowa, 81; Averitt *v.* Murrell, 4 Jones L. (N. C.) 223; Cleland *v.* Thornton, 43 Cal. 437.

[1] See R. *v.* Pargeter, 3 Cox C. C. 191; Caswell *v.* R. R., 98 Mass. 194; Wilds *v.* R. R., 29 N. Y. 315; Jones *v.* R. R., 67 N. C. 125.

[2] Metallic Comp. Co. *v.* R. R., 109 Mass. 277.

[3] See Carlton *v.* Hescox, 107 Mass. 410; Rowe *v.* Bird, 48 Vt. 578.

[4] Lawrence *v.* Jenkins, L. R. 8 Q. B. 274.

[5] R. *v.* Jones, 8 Camp. 230; Hill *v.* New River Co., 15 L. T. N. S. 555; Lake *v.* Milliken, 62 Me. 240; Jones *v.* R. R., 107 Mass. 261; Judd *v.* Fargo, 107 Mass. 265; People *v.* Cunningham, 1 Denio, 524; Congreve *v.* Morgan, 18 N. Y. 84; Loubz *v.* Hafner, 1 Dev. (N. C.) L. 185; Gilbert *v.* R. R., 51 Mich. 488; Moreland *v.* Mitchell County, 40 Iowa, 394, quoted supra, § 437. As to judicial notice in such cases, see supra, § 335.

In Darling *v.* Westmoreland, 52 N. H. 401, it was held, in an action against a town for an obstruction at which a horse took fright, admissible to prove that other horses had taken fright at the same obstruction. *Contra*, Hawks *v.* Charlemont, 110 Mass. 110. See supra, § 39, for other cases. In Clinton *v.* Howard, 42 Conn. 295, and Moreland *v.* Mitchell Co., 40 Iowa, 394 (see supra, § 735), it was held that it was admissible to prove that certain obstructions were likely to frighten horses.

[6] Chamberlain *v.* Enfeld, 43 N. H. 356; Maggi *v.* Cutts, 123 Mass. 535; see supra, § 40.

[7] See Read *v.* Edwards, 17 C. B. N. S. 245; Marsh *v.* Jones, 21 Vt. 378; Woolf *v.* Chalker, 31 Conn. 121; Swift *v.* Applebone, 23 Mich. 252.

When the character of an animal comes into question, the general inference is, that he will follow the natural bent of the species to which he belongs. See question discussed fully in Whart. on Neg. §§ 923–5. But when the burden is on a party to prove a *scienter* in the owner of a mischievous animal it is admissible to put in evidence particular facts; Worth *v.* Gilling, L. R. 2 C. P. 1; Judge *v.* Cox, 1 Stark. R. 285; Kittredge *v.* Elliott, 16 N. H. 77; Whittier *v.* Franklin, 46 N. H. 23; Arnold *v.* Norton, 25 Conn. 92; Buckley *v.* Leonard, 4 Denio, 500; Cockerham *v.* Nixson, 11 Ired. L. 269; McCaskell *v.* Elliott, 5 Strobhart, 196; as well as general reputation; Whart. on Neg. § 924; but as to general reputation, see *contra*, Heath *v.* West, 26 N. H. 191. And see Caldwell *v.* Snooks, 35 Hun, 73, and cases cited supra, § 41.

an opening in a fence instead of leaping the fence on either side of the opening.[1] The habits and temper of animals, however, it is said, cannot be shown by proof of habits or temper of particular animals of the same species.[2]

So of conduct of men in masses.

§ 1296. Taking men in bodies, and contemplating their action as a mass, there are certain incidents which may be regarded as probable, and which, under certain conditions, are presumable.[3] Thus, it is to be inferred that persons will be passing a thoroughfare in such numbers as to make it dangerous to discharge at random a gun towards such thoroughfare;[4] that a sudden alarm, resulting in injury, will be produced by a shock of any kind given to a crowd;[5] and that persons in fright will act instinctively and convulsively.[6]

V. PRESUMPTIONS OF REGULARITY.

Marriage presumed to have been regular. Divorce.

§ 1297. When a man and woman have lived together as man and wife, and have been recognized as such in the community in which they live, their marriage will be held *primâ facie* conformable, so far as concerns its solemnities, with the practice of the *lex loci contractus*.[7] If a marriage is shown to have taken place, then the law presumes regularity until the contrary be proved.[8] This "presumption of law," as was said by Lord Lyndhurst,[9] and approved by Lord Cottenham,[10] "is not lightly to be repelled. It is not to be broken in

[1] Tantzen *v.* R. R., 83 Mo. 171.

[2] Collins *v.* Dorchester, 6 Cush. 396; Hawks *v.* Charlemont, 110 Mass. 110. See, however, Darling *v.* Westmoreland, 52 N. H. 401.

[3] See Whart. on Neg. § 108.

[4] See People *v.* Fuller, 2 Parker C. R. 16; Barton's case, 1 Stra. 481; Triscoll *v.* Newark Co., 37 N. Y. 637; Sparks *v.* Com., 3 Bush. 111; State *v.* Vance, 17 Iowa, 138; State *v.* Worthingham, 23 Minn. 528; Bizzell *v.* Booker, 16 Ark. 308.

[5] Scott *v.* Shepherd, 2 W. Black. 892; Guille *v.* Swan, 19 Johns. 381; Fairbanks *v.* Kerr, 70 Penn. St. 86.

[6] R. *v.* Pitts, C. & M. 284; Adams *v.* R. R., 4 L. R. C. P. 739; Sears *v.* Dennis, 105 Mass. 310; Coulter *v.* Exp. Co., 5 Lansing, 67; Buel *v.* R. R., 31 N. Y. 314; Frink *v.* Potter, 17 Ill. 406; Greenleaf *v.* R. R., 29 Iowa, 47.

[7] Supra, § 84; Sastry *v.* Sembercutting, 6 Ap. Ca. 364; Harrod *v.* Harrod, 1 K. & J. 15; R. *v.* Brampton, 10 East, 302; Redgrave *v.* Redgrave, 38 Md. 93; Jones *v.* Reddick, 79 N. C. 290.

[8] R. *v.* Allison, R. & R. 109; Rugg *v.* Kingsmill, L. R. 1 Ad. & Ec. 343; R. *v.* Creswell, L. R. 1 Q. B. D. 446; Lauderdale Peerage, 10 App. Ca. 692.

[9] Morris *v.* Davies, 5 Cl. & Fin. 163.

[10] Piers *v.* Piers, 2 H. of L. Cas. 362.

upon or shaken by a mere balance of probability."[1] Thus, in support of a plea of coverture, a certificate of the defendant's marriage in a Roman Catholic chapel according to the rites of that church, with evidence of subsequent cohabitation, has been held *primâ facie* proof of a valid marriage under 6 & 7 Will. 4, c. 85, without proof that the solemnities prescribed by the statute were employed.[2] In short, wherever a marriage has been solemnized, the law strongly presumes that all legal requisites have been complied with.[3] It has been said, however, that this presumption will not be allowed to operate in suits for damages against alleged adulterers.[4] And when concubinage is once proved, the inference is that it continues; and consequently, in such case, marriage must be substantively and clearly proved, if set up.[5]

[1] Supra, § 84; infra, § 1318; and see Harrison *v.* Southampton, 22 L. J. Ch. 722; Breadalbane case, L. R. 1 H. L. Sc. 182; Cunningham *v.* Cunningham, 2 Dow, 507; Campbell *v.* Campbell, L. R. 1 Sc. App. 193; 13 Cox C. C. 126.

[2] Sichel *v.* Lambert, 15 C. B. N. S. 781.

[3] Smith *v.* Huson, 1 Phill. 924; Tetter *v.* Tetter, 101 Ind. 129.

In De Thoren *v.* Attorney-General, L. R. 1 App. Cas. H. L. (Div.) 686, it was ruled by the lord chancellor (Lord Cairns), that the presumption of marriage is much stronger than the presumption in regard to other facts. Hence, when a matrimonial ceremony took place in Scotland, the parties being ignorant of an impediment, and afterward removed, and when, believing themselves to be validly married, they lived together continuously for years as husband and wife, and were regarded as such by all who knew them, the marriage was held to have been established by the force of habit and repute, without any proof of mutual consent, by verbal declaration. The inference to be drawn was inference that the matrimonial consent was interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract. The *onus* of rebutting a marriage by habit and repute, it was said, is thrown on those who deny it. See remarks supra, §§ 83, 84, 298, 1096.

[4] Catherwood *v.* Caslon, 13 M. & W. 261; though see Rooker *v.* Rooker, 33 L. J. Pr. & Mat. 42.

[5] Lapsley *v.* Grierson, 1 H. L. Ca. 498; Cunningham *v.* Cunningham, 2 Dowl. 483; Blackburn *v.* Crawford, 3 Wall. 176; Clayton *v.* Wardell, 4 N. Y. 230; Caujolle *v.* Ferrie, 23 N. Y. 106; Foster *v.* Hawley, 8 Hun, 68; L. R. 8 Ch. 383; 25 W. R. 453; 34 L. T. 477; Yardley's Est., 75 Penn. St. 211; Hunt's Appeal, 86 Penn. St. 294; Reading Ins. Co.'s Appeal, 113 Penn. St. 204; Jones *v.* Jones, 48 Md. 391; *S. C.* 4 Am. Law T. R. 489; Williams *v.* Williams, 63 Wis. 68. See supra, § 84.

In Vane *v.* Vane, heard before the Vice-Chancellor Malins, on Nov. 1876, the contention of the plaintiff was that he was the oldest legitimate son of his late father, Sir F. F. Vane, and that an older brother, since deceased, leaving a son, who was defendant, was

Divorce must be proved by record;[1] but when the pertinent records are destroyed then it has been held that the presumption is that a party who married again was entitled by prior divorce to do so.[2] But by itself, the fact, when the records could be procured, that the husband and wife had lived apart for years, and that he had contracted a subsequent marriage, does not create any presumption that he had obtained a divorce.[3]

born before his parents' marriage. The vice-chancellor, in the teeth of the declarations of Lady Vane, in her extreme old age, decided in favor of the legitimacy of the older brother.

"We have no doubt," says an ingenious criticism on this ruling, "the vice-chancellor decided rightly in favor of the possessor of the title and estates; but he was obviously very much influenced by the excessive unusualness and romantic character of the plaintiff's story. Here, he says, is a man who declares that his own mother and father had palmed off an illegitimate child on the world as legitimate, and other relatives have assisted, and how monstrous a thing that is to believe!"

. . . . "A man of fashion," such is the allegation, "hating his distant heir, or devoutly attached to his mistress, determines that his next son by her shall be his heir, promises to marry her to legitimize the child, and when it is born prematurely, conceals the fact for six weeks. The marriage takes place at the end of three weeks from the birth, that is, as soon as the mother is strong enough, and for the rest of his life the father acknowledges the son as his heir, his excuse in his own mind being that he intended to be married before the child could be born. Nevertheless, he was so anxious about possible ultimate detection, that he took the excessively unusual step in a family of the second rank of obtaining a private act of parliament for the settlement of his estates, in which act the heirship of his son is incidentally declared. The mother, however, in extreme old age, in some anger with her son, or out of some regard for the law, declares that the baronet, like all born before him, was illegitimate. That it was not so the vice-chancellor has decided no doubt rightly; but taken in itself, where was the enormous improbability of the story? That Sir F. F. Vane should so act? Why in the last generation one of the Wortley Montagues advertised to all the world his intention of so acting, with the additional unfairness that the son whom he would have acknowledged as his heir would not have been his own. Once committed, neither Sir F. F. Vane nor Lady V. could retreat, and as to remainder of the family, certainty rested with those two alone. The story was disproved by counter evidence, but that evidence was not strengthened by the immense presumption of error which the courts saw in the inherent improbability of the story." London Spectator, Dec. 2, 1876.

But the question is not one of presumption in the case above stated. The principle is, that when a marriage is avowed and acted on by the parties for years, strong proof will be required to set it aside.

[1] Supra, §§ 816-8.

[2] Edwards's Estate, 58 Iowa, 431.

[3] Ellis *v.* Ellis, 58 Iowa, 720. See Randlett *v.* Rice, 121 Mass. 385.

§ 1298. That a person born in a civilized nation is legitimate is a presumption of law, to be binding until rebutted.[1] So far as concerns descent from particular parents, a child born during wedlock, before any judicial separation, is presumed to be the legitimate issue of such parents, no matter how soon the birth be after the marriage;[2] though this presumption may be overcome by proof that the alleged father was incapable, on ground either of impotence or absence, of being father of the child.[3] When access is proved, it requires the strongest evidence of non-intercourse or other proof beyond reasonable doubt, to justify a judgment of illegitimacy.[4] Separation, however, by a court of

Legitimacy a presumption of law.

[1] 5 Co. 98 *b*; Morris *v.* Davies, 5 Cl. & F. 163; Banbury Peerage case, 1 Sim. & St. 153; Head *v.* Head, 1 Sim. & St. 150; Cope *v.* Cope, 1 M. & Rob. 269, 276; *S. C.* 5 C. & P. 604; Sullivan *v.* Kelly, 3 Allen, 148; Caujolle *v.* Ferrie, 26 Barb. 177; Com. *v.* Stricker, 1 Br. App. xlvii.; Com. *v.* Shepherd, 6 Binn. 283; Senser *v.* Bower, 1 Pen. & Watts, 450; Strode *v.* Magowan, 2 Bush, 621; Ill. Land Co. *v.* Bonner, 75 Ill. 315; Whitman *v.* State, 34 Ind. 360; Telter *v.* Telter, 101 Ind. 129; State *v.* Romaine, 58 Iowa, 46; Wilson *v.* Babb, 18 S. C. 59; State *v.* Worthingham, 23 Minn. 528; Dinkins *v.* Samuel, 10 Rich. S. C. 66. As to presumptions in case of children born ten months after non-intercourse, see supra, § 334.

[2] Stegall *v.* Stegall, 2 Brock. 256; Dennison *v.* Page, 29 Penn. St. 420.

[3] Morris *v.* Davies, 5 Cl. & F. 163; R. *v.* Mansfield, 1 Q. B. 444; Atchley *v.* Sprigg, 33 L. J. Ch. 345; Strode *v.* Magowan, 2 Bush, 621; Ward *v.* Dulaney, 23 Miss. 410; Herring *v.* Goodson, 43 Miss. 392.

In Pittsford *v.* Chittenden, 58 Vt. 49, a child was held illegitimate where the putative father was shown to have been absent for four years.

In Hawes *v.* Draeger, 23 Ch. D. 173, it was held that the presumption of legitimacy of M., a child born during wedlock, could be rebutted by showing that the wife a year before the birth of M. had separated from her husband and lived with J. H., after which she had five children, of whom M. was the oldest, M. being the only one born during the lifetime of the putative father.

[4] Head *v.* Head, 1 Sim. & St. 150; Cope *v.* Cope, 1 M. & Rob. 269, 276; 5 C. & P. 604, *S. C.*; Morris *v.* Davies, 3 C. & P. 215, 427; 5 Cl. & Fin, 163, *S. C.*; Wright *v.* Holdgate, 3 C. & Kir. 158; Legge *v.* Edmonds, 25 L. J. Ch. 125; Banbury Peer. in Appendix, n. E. to Le Marchant's Gardner's Peer. Selw. N. P. 748–750, and 1 Sim. & St. 153, *S. C.*; R. *v.* Luffe, 8 East, 193; Taylor's Ev. § 91 *a*; Patterson *v.* Gaines, 6 How. U. S. 550; Phillips *v.* Allen, 2 Allen, 453; Cross *v.* Cross, 3 Paige, 139; Sullivan *v.* Kelly, 3 Allen, 148. That parents are incompetent to prove non-access, see supra, § 608.

But where the question was, who were the children of A., a married woman, so as to take under a will, it was held that under the 32 & 33 Vict. A.'s husband was admissible to corroborate evidence going to prove that only one of A.'s children was legitimate. Yearwood's Trusts, L. R. 5 Ch.

competent jurisdiction, even though there be no divorce, destroys the presumption, and the children born to the woman after the separation are *primâ facie* illegitimate.[1]

But adultery on the wife's part, no matter how clearly proved, will not have this effect, if the husband had access to the wife at the beginning of the period of gestation, unless there should be positive proof of non-intercourse.[2] "In every case," so is the rule declared by the English House of Lords, "where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child."[3]

How far parents can impeach legitimacy of child is already noticed.[4]

It has been held that, on the question whether a mulatto child of white parents is legitimate, evidence of experts is admissible to show that, by the "laws of nature," a white man and woman could not be the parents of a mulatto child.[5]

D. 545. See Rideout's Trusts, L. R. 10 Eq. 41.

Sir J. Stephen (Evid. art. 98) states the law to be, that declarations by either parent as to sexual intercourse are not regarded as relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not, provided that in applications for affiliation orders, when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.

Legitimacy cannot be assailed by evidence of the mother's bad character for chastity. Warlick *v.* White, 76 N. C. 175.

[1] Sidney *v.* Sidney, 3 P. Wms. 275; St. George's *v.* St. Margaret's, 1 Salk. 123.

[2] Bury *v.* Phillpot, 2 Mylne & K. 349; Head *v.* Head, 1 Sim. & St. 150; Com. *v.* Shepherd, 6 Binn. 283; Com. *v.* Stricker, 1 Br. App. xlvii.: Com. *v.* Wentz, 1 Ash. 269; State *v.* Pettaway, 3 Hawks, 623.

[3] Banbury Peerage case, 1 Sim. & St. 153. See Plowes *v.* Bossey, 2 Dr. & Sm. 145; Atchley *v.* Sprigg, 33 L. J. Ch. 345.

[4] Supra, § 427.

[5] Watkins *v.* Carlton, 10 Leigh, 560. President Tucker, in a note to his opinion, goes further, and declares that "a white couple cannot (according to the common course of things) have a black child. If, therefore, the wife, resident where a black man may have access to her, has a mulatto child, it would be more philosophical to suppose it to be the child of the black, than to imagine such a deviation from the general law of nature; that a white couple

§ 1299. In the Roman law we have the well-known maxim, *Pater est quem nuptiae demonstrant.*[1] This, however, has been construed to be a rebuttable presumption, simply throwing the burden of proof on those disputing the legitimacy of children born in wedlock. "For children," so is the law expressed by Windschied, a commentator of the highest recent authority,[2] "who are conceived in matrimony, the law gives the presumption that the child is procreated (erzeugt) by the husband; but this does not exclude proof to the contrary. This proof must, to be effective, show the impossibility of the husband being the father; it is not enough to prove adultery by the wife, at the period of conception, with another man."[3] To this point are several modern judicial decisions.[4] The time of conception is determined, in the Roman practice, by reckoning backwards from the time of birth; and the rule is, that there must be not less than 182 days, and not more than 10 months, to establish legitimacy.[5] German jurists have continued to maintain the *minimum* of 182 days.[6] In our own practice, the question of legitimacy, when a child is born on either side of the usual limits of parturition, is determined on the testimony of experts;[7] though, in cases beyond question, the court may determine what is notorious, as part of the ordinary laws of nature.[8]

Time of parturition may be settled by experts.

The presumption of legitimacy from family likeness has been already noticed.[9]

§ 1300. The inferences as to barrenness vary with circumstances, though a woman under fifty-two will not be ordinarily presumed to be beyond childbearing.[10] But

Woman over fifty-five presumed past

cannot procreate a child of the black race." To this he cites 1 Beck's Med. Jur. 307; 1 Edinb. Med. & Surg. Journal; and also Whistelo's case, pamphlet tract, where the same point was ruled. On the other hand, it is also a popular impression that if a white woman has a child by a colored man this taints all her progeny, no matter of what parentage.

[1] L. 5, D. (ii. 4).

[2] Windscheid, Lehrbuch des Pandektenrechts, 3d ed. Düsseldorf, 1873, § 56 *b*.

[3] L. 11, § 9, D. (xlviii. 5); L. 29, § 1, D. (xxii. 3); L. 6, D. l. 6.

[4] Seuff. Archiv. i. 162; ii. 254; viii. 229; x. 267; xii. 36; xix. 36.

[5] L. 12, D. i. 5; L. 5; L. 3, § 11, D. xxxviii. 16.

[6] Windscheid, *ut supra.*

[7] Hutchinson *v.* State, 19 Neb. 262.

[8] Supra, § 334. See cases reported at large in 2 Whart. & Stillé Med. Jur. §§ 40 *et seq.*

[9] Supra, § 346.

[10] Conduit *v.* Soanes, 24 L. T. 656; 19 W. R. 817. See In re Widdow's

childbearing.

such presumption may be strengthened by proof of physical infirmities.[1]

Paper presumed to be regularly negotiated.

§ 1301. Business men, in the negotiation of bills and notes, have every reason to act not only fairly but exactly; and hence, in view of the importance of extending to negotiable paper all proper aid for the maintenance of its credit, the courts have been prompt to determine that it is a *primâ facie* presumption of fact that such paper, when on the market, has been regularly negotiated. Hence, the holder of an unimpeached promissory note is presumed, until the contrary is shown, to be a *bonâ fide* holder for value.[2] Value is presumed, until the contrary is shown, in all acceptances and indorsements in regu-

Trusts, L. R. 11 Eq. 408, where a widow, aged fifty-five years and four months, and a spinster, aged fifty-three years and nine months, were presumed to be past childbearing; In re Millner's Estate, L. R. 14 Eq. 245, where a similar presumption was made about a married woman aged forty-nine years and nine months, who had been married some years; Groves *v.* Groves, 9 L. T. R. N. S. 533, where Wood, V. C., mentioned fifty as the age below which the court would presume a woman might bear children when there had been long prior cohabitation.

In Apgar, in re, 37 N. J. Eq. 501, the court refused to apply the presumption of non-childbearing to a woman of forty-eight years.

In Croxton *v.* May (1878) it was held by the Court of Appeal (9 Ch. D. 388, 39 L. T. R. N. S. 467) that the court would not presume that a woman aged fifty-four years and six months, and who has never had any children, but has only cohabited with her husband three years, is past childbearing. But this case, so far as concerns the point of age, is discredited in Taylor's Trusts, 43 L. T. R. N. S. 795.

And it may now be considered to be settled in England that an unmarried woman of the age of fifty-four years may be presumed to be beyond the probability of childbearing. Davidson *v.* Kimpton, 18 Ch. D. 213; approving Maden *v.* Taylor, 45 L. R. J. (Ch.) 569. See, also, Millner, in re, 14 L. R. Eq. 245, cited above.

As to judicial notice, see supra, § 334.

[1] Summers, in re, 30 L. T. 377.

[2] Collins *v.* Martin, 11 B. & P. 648; Goodman *v.* Simonds, 20 How. U. S. 343; Collins *v.* Gilbert, 94 U. S. 758; Scott *v.* Williamson, 24 Me. 343; Perain *v.* Noyes, 39 Me. 384; Perkins *v.* Prout, 47 N. H. 387; Tucker *v.* Morrill, 1 Allen, 528; Bank of Orleans *v.* Barry, 1 Denio, 116; Bank *v.* Hoge, 35 N. Y. 68; Phelan *v.* Moss, 67 Penn. St. 63; Ellicott *v.* Martin, 6 Md. 509; Patton *v.* Coit, 5 Mich. 505; American Ins. Co. *v.* Cutler, 36 Mich. 261; Curtis *v.* Martin, 20 Ill. 557; Lathrop *v.* Donaldson, 22 Iowa, 234; Dickerson *v.* Burke, 25 Ga. 225; Earbee *v.* Wolfe, 9 Port. 366; Boyd *v.* McIvor, 11 Ala. 822; Ross *v.* Drinkard, 35 Ala. 434; Fuller *v.* Hutchings, 10 Cal. 523.

lar course.[1] And the transfer of a bill or note is presumed, until the contrary is shown, to have been before maturity and in the usual course of business.[2] "Nothing short of fraud, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence or to invalidate the title of the holder supported by that presumption."[3]

§ 1302. The presumption of regularity is frequently applied to judicial proceedings; and it is sometimes said that whatever a court of record does, it is presumed to do right. This, however, is not correct. A court of record is required not only to act in conformity with law, but to keep record of all its important acts. If it does not, these acts cannot be put in evidence.[4] Unless in case of ancient records, missing links cannot be presumed. "With respect to the general principle of presuming a regularity of procedure," says Sir W. D. Evans, "it may perhaps appear to be the true conclusion, that wherever acts are apparently regular and proper, they ought not to be defeated by the mere suggestion of a possible irregularity. This principle, however, ought not to be carried too far, and it is not desirable to rest upon a mere presumption that things were properly done, when the nature of the case will admit of positive evidence of the fact, provided it really exists."[5] The true view is, not that the law presumes that a judicial record is right; but that, if on its face it is complete and regular, the law throws upon the party objecting to it the burden of proving any latent imperfections by which it may be affected.[6] And in all collateral proceedings, judgments, where

Burden on party assailing judicial records.

[1] Story on Bills, §§ 16, 78; Walker *v.* Sherman, 11 Met. (Mass.) 170; Miller *v.* McIntyre, 9 Ala. 638; Clark *v.* Schneider, 17 Mo. 295.

[2] Garland *v.* Lacomb, L. R. 8 Ex. 216; Leland *v.* Farnham, 25 Vt. 553; Burnham *v.* Webster, 19 Me. 232; Walker *v.* Davis, 33 Me. 516; Bissell *v.* Morgan, 11 Cush. 198; Noxon *v.* De Wolf, 10 Gray, 343; Hopkins *v.* Kent, 17 Md. 113; Mobley *v.* Ryan, 14 Ill. 51; Woodworth *v.* Huntoon, 40 Ill. 131; Cook *v.* Helms, 5 Wis. 107; Beall *v.* Leverett, 32 Ga. 105; New Orleans Can. *v.* Templeton, 20 La. An. 141. See Loomis *v.* Mowry, 8 Hun, 311. See other cases cited infra, § 1320.

[3] Clifford, J., Collins *v.* Gilbert, 94 U. S. 758; citing Story on Bills (4th ed.), § 416; Byles on Bills (10th ed.), 119; Chitty on Bills (12th ed.), 257; Mills *v.* Barber, 1 Mees. & Wels. 425; Murray *v.* Gardner, 2 Wall. 120; Bauk *v.* Neal, 22 How. 108. See supra, § 1058.

[4] Supra, § 830.

[5] 2 Ev. Poth. 33, cited in text by Mr. Best, Ev. § 360.

[6] R. *v.* Lynne Regis, 1 Dougl. 159; Caunce *v.* Rigby, 3 M. & W. 68; James

jurisdiction is shown, will be presumed, unless the contrary appear on the record, to have been properly and lawfully entered.[1]

§ 1303. In conformity with the rule above stated, where damages are assessed, it will be presumed that they are assessed on a good cause of action when such is averred;[2] where jurisdiction is averred, all the facts necessary to constitute jurisdiction will be presumed;[3] where successive decisions are inconsistent with a general order of court, a reversal of that order will be presumed;[4] where an amendment appears on the record in error it will be pre-

v. Heward, 3 G. & Dav. 264; Parsons *v.* Lloyd, 3 Wils. 341; Tayler *v.* Ford, 22 W. R. 47; 29 L. J. N. S. 392; Van Omeron *v.* Dowick, 2 Camp. 44; Phillips *v.* Evans, 1 Cr. & M. 461; Gosset *v.* Howard, 10 Q. B. 453; Bank U. S. *v.* Dandridge, 12 Wheat. 69; Florentine *v.* Barton, 2 Wall. 210; Cofield *v.* McClelland, 16 Wall. 331; McNitt *v.* Turner, 16 Wall. 352; Garnharts *v.* U. S., 16 Wall. 162; Pittsburgh R. R. *v.* Ramsey, 22 Wall. 322; Ready *v.* Scott, 23 Wall. 352; Sprague *v.* Litherberry, 4 McLean, 442; Segee *v.* Thomas, 3 Blatch. 11; Kibbe *v.* Dunn, 5 Biss. 233; Austin *v.* Austin, 50 Me. 74; Plummer *v.* Ossipee, 59 N. H. 55; Stearns *v.* Stearns, 32 Vt. 678; Cowen *v.* Bolkom, 3 Pick. 281; Apthorp *v.* North, 14 Mass. 167; Sanford *v.* Sanford, 28 Conn. 6; Schermerhorn *v.* Talman, 14 N. Y. 93; Rowe *v.* Parsons, 13 N. Y. Supreme Court, 338; Mandeville *v.* Reynolds, 68 N. Y. 528; Cromelien *v.* Brink, 29 Penn. St. 522; Williamson *v.* Fox, 38 Penn. St. 214; Smith *v.* Williamson, 11 N. J. L. 313; State *v.* Lewis, 22 N. J. L. 564; Den *v.* Gaston, 25 N. J. L. 615; Hudson *v.* Messick, 1 Houst. Del. 275; Brown *v.* Connelly, 5 Blackf. 390; Brackenridge *v.* Dawson, 7 Ind. 383; Morgan *v.* State, 12 Ind. 448; Kelly *v.* Garner, 13 Ind. 399; Owen *v.* State, 25 Ind. 371; Markel *v.* Evans, 47 Ind. 326; Kenney *v.* Phillippy, 91 Ind. 511; Burke *v.* Pinnell, 93 Ind. 540; Outlaw *v.* Davis, 27 Ill. 467; Tibbs *v.* Allen, 27 Ill. 119; Moore *v.* Neil, 39 Ill. 256; Rosenthal *v.* Renick, 44 Ill. 202; Stampofski *v.* Hooper, 86 Ill. 321; McNorton *v.* Akers, 24 Iowa, 369; Preston *v.* Wright, 60 Iowa, 351; Merritt *v.* Baldwin, 6 Wis. 439; Bunker *v.* Rand, 19 Wis. 253; Tharp *v.* Com., 3 Metc. (Ky.) 411; Vincent *v.* Eames, 1 Metc. (Ky.) 247; Letcher *v.* Kennedy, 3 J. J. Marsh. 701; Sidwell *v.* Worthington, 8 Dana, 74; Brown *v.* Gill, 49 Ga. 549; Tyler *v.* Chevalier, 56 Ga. 168; McGrews *v.* McGrews, 1 St. & Port. 30; Stubbs *v.* Leavitt, 30 Ala. 138; Gray *v.* Cruise, 36 Ala. 559; State *v.* Farish, 23 Miss. 483; Grinstead *v.* Foute, 26 Miss. 476; Reynolds *v.* Nelson, 41 Miss. 83; State *v.* Williamson, 57 Mo. 192; Wadsworth's Succes., 1 La. An. 966; Gibson *v.* Foster, 2 La. An. 509; Brooks *v.* Walker, 3 La. An. 150; Towne *v.* Bossier, 19 La. An. 162; People *v.* Garcia, 25 Cal. 531; Butcher *v.* Bank, 2 Kans. 70; Sumner *v.* Cook, 12 Kans. 162; Dodge *v.* Coffin, 15 Kans. 277; Ward *v.* Baker, 16 Kans. 31; State *v.* Gibson, 21 Ark. 140; Callison *v.* Autry, 4 Tex. 371; Frosh *v.* Holmes, 8 Tex. 29.

[1] Supra, § 799.

[2] Barnes *v.* Jennings, 40 Vt. 45.

[3] Ray *v.* Rowley, 4 Thomp. & C. 43; 1 Hun, 614; Hays *v.* Ford, 55 Ind. 52.

[4] Bohun *v.* Delessert, 2 Coop. 21.

sumed to have been duly authorized;[1] and where a writ is duly returned, it will be presumed that it was duly served;[2] though in all these cases the presumption is available simply for the purpose of throwing the burden on the party alleging defects in a record otherwise complete. It will be, to the same extent, inferred that where a parish deed of apprenticeship has been approved by the proper court, the proper statutory notices have been given;[3] and that there have been due stamps.[4] It should be remembered that the rebuttability of presumptions of this kind may be lost by delay in applying to the proper court for correction; and after twenty years such presumptions may be treated as irrebuttable.[5] It is scarcely necessary here to repeat that judicial records are presumed to have been correctly made.[6] When regular, they cannot, except in cases of fraud or non-jurisdiction, be collaterally impeached.[7] If erroneous, the court of the record must be applied to for relief.[8] The same presumption of regularity applies to judicial proceedings of other states;[9] and to inferior courts when jurisdiction appears on the record.[10]

§ 1304. We must again recall the caution that the presumption before us goes simply to the burden of proof, and cannot, except in cases of ancient records, on principles to be hereafter discussed,[11] supply the proof of averments necessary to make a record complete.[12] Hence the presumption will not be allowed to operate so as to dispense with a check

But patent defects cannot in this way be supplied.

[1] Pedan *v.* Hopkins, 13 S. & R. 45.

[2] Bastard *v.* Trutch, 3 A. & E. 451. 5 N. & M. 109; Bosworth *v.* Vandewalker, 53 N. Y. 597; Fitler *v.* Patton, 8 W. & S. 455; Drake *v.* Duvenick, 45 Cal. 455.

[3] R. *v.* Whiston, 4 A. & E. 607; R. *v.* Whitney, 5 A. & E. 191; 6 N. & M. 552.

[4] R. *v.* Long Buckley, 7 East, 45. See R. *v.* Benson, 2 Camp. 508; Lee *v.* Johnstone, L. R. 1 H. L. Sc. 426. As to stamps generally, see infra, § 1313.

[5] See Williams *v.* Eyton, 2 H. & N. 771; *S. C.* 4 H. & N. 357; Society Prop. Gos. *v.* Young, 2 N. H. 310; Brown *v.* Wood, 17 Mass. 68.

[6] Reed *v.* Jackson, 1 East, 355; Ramsbottom *v.* Buckhurst, 2 M. & Sel. 567, per Ld. Ellenborough; 1 Inst. 260; R. *v.* Carlisle, 2 B. & Ad. 367–369, per Lord Tenterden; Boyd *v.* Wyley, 18 Fed. Rep. 355; Leedom *v.* Lombaert, 80 Penn. St. 381; Coxe *v.* Derringer, 82 Penn. St. 236.

[7] Supra, §§ 981, 982.

[8] Supra, § 983.

[9] Ripple *v.* Ripple, 1 Rawle, 386; Morgan *v.* Neville, 74 Penn. St. 176.

[10] See infra, § 1308.

[11] Infra, § 1347.

[12] See supra, §§ 824, 830, 981; Messinger *v.* Kintner, 4 Binn. 97; Walker *v.* Jessup, 43 Ark. 163.

specifically prescribed by statute;[1] nor to cure process on its face defective;[2] nor to confer jurisdiction on a court when the record itself shows that the proceedings were so irregular that the court had no jurisdiction.[3]

In error, necessary facts will be presumed.

§ 1305. In matters *in pais*, the presumption of regularity is more liberally applied. Thus, after a verdict, a court in review will assume that all facts necessary for the support of the verdict were proved, unless the contrary appear in the record duly before the court.[4] It is also held that the notes taken by the judge at nisi prius will be so far assumed to be true, that no party is allowed to raise before the court in banc any question respecting the rejection of evidence at the trial, unless it appears from these notes that the evidence was formally tendered.[5]

So as to military courts.

§ 1306. When a military court has jurisdiction, and its records, if open to revision, give an adequate narrative of its procedure, the burden is on the party assailing them to prove irregularity.[6] It has been held that where a town was proved to be in the military occupation of an enemy, and proclamations, purporting to be signed by the general in command, were posted on its walls, the inference was proper that the placards had been posted by order of the commander.[7]

So as to keeping of records.

§ 1307. The law also assumes that proper official care is taken of public records and files. Hence from such care regularity may be inferred.[8]

[1] U. S. *v.* Jonas, 19 Wall. 598.

[2] Supra, § 795.

[3] Galpin *v.* Page, 18 Wall. 365; Com. *v.* Blood, 97 Mass. 538. Supra, § 804.

[4] Speers *v.* Parker, 1 T. R. 141; Jackson *v.* Pesked, 1 M. & Sel. 237, per Lord Ellenborough; Steph. Pl. 162–164; Davis *v.* Black, 1 Q. B. 911, 912, per Ld. Denman, C. J., and Patteson, J.; 1 G. & D. 432, *S. C.*; Harris *v.* Goodwyn, 2 M. & Gr. 405; 2 Scott N. R. 459; 9 Dowl. 409, *S. C.*; Goldthorpe *v.* Hardman, 13 M. & W. 377; Minor *v.* Bank, 1 Peters, 68; Pittsburgh R. R. *v.* Ramsay, 22 Wall. 276; Dobson *v.* Campbell, 1 Sumn. 319; Addington *v.* Allen, 11 Wend. 375; Wagers *v.* Dickey, 17 Ohio, 439; Coil *v.* Willis, 18 Ohio, 28. See, also, Smith *v.* Keating, 6 Com. B. 163; Kidgill *v.* Moor, 9 Com. B. 364; Delamere *v.* The Queen, 2 Law Rep. H. L. 419; 36 L. J. Q. B. 313, in Dom. Proc. *S. C.* So in Criminal cases. R. *v.* Waters, 1 Den. C. C. 356; R. *v.* Bowen, 13 Q. B. 790; Beale *v.* Com., 25 Penn. St. 11; Powell on App. Jur. 158.

[5] Gibbs *v.* Pike, 9 M. & W. 351; 1 Dowl. P. C. 409, cited in Taylor's Ev. § 78.

[6] Slade *v.* Minor, 2 Cranch C. C. 139.

[7] Bruce *v.* Nicolopulo, 11 Ex. R. 129.

[8] Reed *v.* Jackson, 1 East, 855; Hall *v.* Kellogg, 16 Mich. 135; Robinson *v.*

§ 1308. It is otherwise, so far as concerns jurisdiction, as to proceedings before justices of the peace, and before courts of special and limited jurisdiction, whatever may be their grade.[1] As to such tribunals, the facts necessary to jurisdiction must be shown.[2] But justices of the peace, and other judicial officers, though of special and limited powers, will be presumed to have acted regularly, as to a matter within their jurisdiction, unless the record show to the contrary,[3] but jurisdiction must appear, and cannot be presumed.[4] And a warrant of conviction, purporting to be founded on a preceding conviction, has been sustained in England, though it does not state that the evidence was given on oath, or in the presence of the prisoner.[5]

Otherwise as to presumption of jurisdiction of justices, and special courts.

§ 1309. The legislature, whether federal or state, when acting within its constitutional range, is presumed to act in conformity with law, whenever the contrary does not plainly and expressly appear.[6] Hence we must *primâ facie* hold that the respective houses, as component parts of a legislature, act within their jurisdiction, and agreeably to parliamentary usages and the rules of law and justice. It has therefore been held

Legislative proceedings presumed to be regular.

Snyder, 97 Ind. 56; Vandercook *v.* Baker, 48 Iowa, 199; Driscoll *v.* Smith, 59 Wis. 38; Davis *v.* Hudson, 29 Minn. 27; Weyand *v.* Stover, 35 Kan. 546; Seward *v.* Didier, 16 Neb. 58; Rice *v.* Cunningham, 29 Cal. 492. As to regularity of recorded title, see infra, § 1311.

[1] R. *v.* Hulcott, 6 T. R. 583; R. *v.* Bloomsbury, 4 E. & B. 520; Carratt *v.* Morley, 1 Q. B. 18; R. *v.* Totness, 11 Q. B. 80; Day *v.* King, 5 A. & E. 359; Johnson *v.* Reid, 6 M. & W. 24; Jackson *v.* New Milford, 34 Conn. 266; Pelton *v.* Platner, 13 Ohio, 209; Mills *v.* Hamaker, 11 Iowa, 206; Kane *v.* Desmond, 63 Cal. 464.

[2] R. *v.* All Saints, 7 B. & C. 790; Gossett *v.* Howard, 10 Q. B. 452; R. *v.* Stainforth, 11 Q. B. 66; R. *v.* Preston, 12 Q. B. 816; R. *v.* Morris, 4 T. R. 552; Omerod *v.* Chadwick, 16 M. & W. 367; Goulding *v.* Clark, 34 N. H. 148; Graham *v.* Whitely, 26 N. J. L. 254; State *v.* Hinchman, 27 Penn. St. 479; Swain *v.* Chase, 12 Cal. 283; Tompert *v.* Lithgow, 1 Bush, 176.

[3] Supra, § 800*a*; Christie *v.* Unwin, 11 A. & E. 379; Clark, in re, 2 Q. B. 630; Chesterton *v.* Fairlar, 7 A. & E. 713; Halleck *v.* Cambridge, 1 Q. B. 593; State *v.* Hinchman, 27 Penn. St. 479; Davis *v.* State, 17 Ala. 354; Brown *v.* Connelly, 5 Blackf. 390.

[4] See cases cited supra at beginning of this section.

[5] Bailey, ex parte, 3 E. & B. 607.

[6] See Cochran *v.* Arnold, 58 Penn. St. 399; Garrett *v.* R. R., 78 Penn. St. 465; Wickham *v.* Page, 49 Mo. 526; Chicot County *v.* Davies, 40 Ark. 200; Sedgwick's Stat. Law, 228, n.; Cooley's Const. Lim. 168, 172. Supra, §§ 980*a*, 1260.

that a warrant issued by the speaker of a legislative house, at the instance of the house, for the arrest of a witness, need not contain any recital of the grounds on which it was founded.[1]

Regularity assumed as to proceedings of corporations.

§ 1310. So far as concerns the burden of proof, when the record of a municipal or other corporation is put in evidence, and such record is complete, and is in conformity with law, the burden is on the party assailing it. The record is not presumed to be correct until it has been duly proved;[2] but when it is so proved, and when by law it is evidence of the facts it narrates, then it is to be accepted as true until impeached.[3] When, however, a statute prescribes certain conditions as the prerequisites of corporate action, it must appear from the record that these conditions existed.[4]

So of minutes of societies.

§ 1311. What has been said as to the records of corporations, when such records are kept in conformity with law, applies, though with diminishing force, to the minutes of societies,[5] and to the entries made by deceased business men.[6] Supposing such papers and entries to be admissible in evidence, and to be regular on their face, the burden of proof is on the party attacking them.

Dates inferred to be correctly averred.

§ 1312. We have already observed that dates stated in a document are true only *primâ facie*, and may be disputed even by parties.[7] But, until disproved, such dates are assumed to be correct. "This has been held to apply to letters,[8] bills of exchange and promissory notes,[9] and

[1] Gossett *v.* Howard, 10 Q. B. 411, 455–459. As to public acts generally, see Aycock *v.* R. R., 89 N. C. 321; Dowling *v.* Blackman, 70 Ala. 303; Ortis *v.* De Benevides, 61 Tex. 60.

[2] Schott *v.* People, 89 Ill. 195.

[3] Supra, § 987; Grady's case, 1 De Gex, J. & S. 488; Lane's case, 1 De Gex, J. & S. 504; Muzzey *v.* White, 3 Greenl. 290; Copp *v.* Lamb, 13 Me. 312; Hathaway *v.* Addison, 48 Me. 440; Soc. Prop. Gos. *v.* Young, 2 N. H. 310; Cobleigh *v.* Young, 15 N. H. 403; West Springfield *v.* Root, 18 Pick. 318; Spurr *v.* Bartholomew, 2 Met. 479; Bassett *v.* Porter, 10 Cush. 418; Slate *v.* Lime, 23 Minn. 521; Endres *v.* Lloyd, 56 Ga. 592; Louisville *v.* Hyatt, 2 B. Mon. 177; Wilson *v.* State, 16 Tex. Ap. 497; Bliss *v.* Canal Co., 65 Cal. 502.

[4] Clark *v.* Wardwell, 55 Me. 61.

[5] Supra, § 1131.

[6] Supra, § 238.

[7] Supra, § 977.

[8] Hunt *v.* Massey, 5 B. & Ad. 902; Goodtitle d. Baker *v.* Milburn, 2 M. & W. 853; Potez *v.* Glossop, 2 Exch. 191. See, however, the observations of Lord Wensleydale in Butler *v.* Lord Mountgarrett, 7 Ho. Lo. Cas. 633, 646.

[9] Anderson *v.* Weston, 6 Bing. N. C. 296; Meadows *v.* Cozart, 76 N. C. 450.

the indorsements on them,[1] and also to bankers' checks.[2] So, a deed is presumed to have been executed,[3] and delivered,[4] on the day it is dated;" and so as to receipts.[5] "And where deeds bear date on the same day, a priority of execution will be presumed, to support the clear intention of parties;[6] as, for instance, where property is sought to be conveyed by lease and release, both of which are contained in one deed, a priority of execution of the lease will be presumed.[7] So, in construing a deed or will, priority or posteriority in the collocation of words will be disregarded, in order to carry into effect the manifest intention of the parties."[8]

Formalities of documents presumed to be correct.

§ 1313. Documents, on their face solemnly executed, are presumed to have been executed in conformity with the local law of the place of execution, so far as to throw the burden of proving the contrary on the assailing party.[9] If secondary evidence be offered to prove the contents of a document, the inference, until the contrary is shown, is that the document was in due form,[10] and was duly stamped,[11] unless there is evidence that the document remained without stamp some time after the execution, in which case the *onus* is shifted, and lies upon the party who relies on the document.[12] It has been held by the Su-

[1] Smith *v.* Battens, 1 Moo. & R. 341. Supra, § 977.

[2] Laws *v.* Rand, 3 C. B. N. S. 442.

[3] Anderson *v.* Weston, 6 Bing. N. C. 296, 300.

[4] Stone *v.* Grubbam, 1 Rol. 3, pl. 5; Oshey *v.* Hicks, Cro. Jac. 263; Best's Ev. § 402.

[5] Caldwell *v.* Gamble, 4 Watts, 292.

[6] Taylor d. Atkyns *v.* Horde, 1 Burr. 106.

[7] Per North, C. J., in Barker *v.* Keets, 1 Freem. 251.

[8] Brice *v.* Smith, Willes, 1, and the cases cited; Richards *v.* Bluck, 6 C. B. B. 441. Supra, § 979; Best's Ev. § 364.

[9] R. *v.* Gray, 10 B. & C. 807; R. *v.* Ashburton, 8 Q. B. 876; R. *v.* Whiston, 4 A. & E. 667; Doe d. Griffin *v.* Mason, 3 Camp. 7; Davis *v.* Gaines, 104 U. S. 386. See, also, Doe d. Lewis *v.* Bingham, 4 B. & A. 672; Brighton Railway Company *v.* Fairclough, 2 Man. & G. 674; Clements *v.* Macheboeuf, 92 U. S. 418; Roberts *v.* Pillow, 1 Hempst. 624; Van Rensselaer *v.* Vickery, 3 Lansing, 57; Thayer *v.* Marsh, 18 N. Y. Sup. Ct. 501; Diehl *v.* Emig, 65 Penn. St. 320; Hardin *v.* Crate, 78 Ill. 583; Pringle *v.* Dunn, 37 Wis. 449; State *v.* Lawson, 14 Ark. 114; Sadler *v.* Anderson, 17 Tex. 245. Supra, § 739 *a*. As limiting such presumptions, see Dunn *v.* Miller, 75 Mo. 260. As to alteration of document, see supra, §§ 629, 630.

[10] Brown *v.* Bank, 3 Penn. St. 187.

[11] Hart *v.* Hart, 1 Hare, 1; Pooley *v.* Goodwin, 4 A. & E. 94; R. *v.* Long Buckley, 7 East, 65; Closmadeuc *v.* Carrel, 18 C. B. 36. Supra, §§ 697–9, and cases cited supra, § 1303.

[12] Marine Investment Co. *v.* Haviside, L. R. 5 E. & I. App. 624; 42 L. J. Chan. 173; Powell's Evidence, 4th ed. 83.

preme Court of the United States, where an executor's deed recited that the sale was made "after the publications prescribed by law," and his account in the probate court showed that he had paid for advertising the sale, that after sixty years' possession the deed and account were competent evidence of the advertisement.[1] So when an incorporated land company makes a partition of its lands, it will be presumed, after twenty years, that there was a due notification to parties of its procedure, and that its acts were regular.[2]

As already seen, proof of continued possession under a deed thirty years old will enable the possessor to dispense with proof of execution.[3]

A foreign notary will be presumed to have addressed a notice of non-payment, proved to have been posted, in the right way.[4]

When the place of execution of a document is in a foreign country, the way in which the execution is to be proved must be determined by the rules of private international law.

§ 1314. Generally, if a contract is on its face regularly executed, the burden of proof is on those who assail such regularity.[5] Thus, where certain formalities are requisite to the validity of an act done by a joint-stock company, as to which act there is evidence showing acquiescence by the stockholders, a compliance with these formalities will be *primâ facie* inferred.[6] Sealing (although there be no impressions of a seal) and delivery also may be inferred as a presumption of fact, from attestation and signature, when accompanied by transfer of possession.[7] It will also be presumed that attesting

[1] Davis *v.* Gaines, 104 U. S. 386.

[2] Freeman *v.* Thayer, 33 Me. 76; Munroe *v.* Gates, 48 Me. 463; Society *v.* Young, 2 N. H. 310; Freeholders *v.* State, 4 Zabr. 718. See infra, § 1347; Stevens *v.* Taft, 3 Gray, 487; Russell *v.* Marks, 3 Metc. (Ky.) 37.

As to curing by time of imperfections in old documents, see Pells *v.* Welquish, 129 Mass. 469; supra, §§ 194–5, 703, 733.

[3] Supra, §§ 134, 135 *et seq.*; and see further supra, §§ 703, 733 and cases cited infra, § 1314.

[4] McGarr *v.* Lloyd, 3 Penn. St. 474.

[5] Doe *v.* Mason, 3 Camp. 7; Doe *v.* Bingham, 4 B. & A. 672; Cherry *v.* Heming, 4 Ex. R. 633; Fogg *v.* Moulton, 59 N. H. 499; Horan *v.* Weiler, 41 Penn. St. 470; Sutphen *v.* Cushman, 35 Ill. 186; Thayer *v.* Barney, 12 Minn. 502; Smith *v.* Jordan, 13 Minn. 264. See Whart. on Contracts, § 681.

[6] Grady's case, 1 De Gex, J. & S. 504; British Prov. Ass. Co., in re, 1 De Gex, J. & S. 488.

[7] Fassett *v.* Brown, Pea. R. 23; Talbot *v.* Hodgson, 7 Taunt. 251; Doe *v.* Lewis, 6 M. & Gr. 386; 10 Cl. & F. 346; Hall *v.* Bainbridge, 12 Q. B. 699, 710; Sandilands, in re, L. R. 6 C. P. 411; Ward *v.* Lewis, 4 Piok. 518; Vernol *v.*

witnesses really and regularly witnessed the execution of the document to which their signatures are attached.[1] Missing links, also, as we will presently see, may be presumed, especially when these links are the formal execution, by trustees or agents, of powers conferred on them, and when the presumption is in aid of continuous possession.[2]

When execution of document is *primâ facie* shown, burden is on assailant.

§ 1315. It is a presumption of fact, varying in intensity with the circumstances, that a person acting as a public officer is authorized to act as such. The presumption may be very weak, as where a mere intruder, whose want of authority ordinary penetration would discover, usurps an office; or it may be very strong, as where a person, honestly believing himself to be appointed, is honestly accepted by

Officer and agent presumed to be regularly appointed.

Vernol, 63 N. Y. 45. As to what constitutes a seal, see supra, § 692; Whart. on Cont. § 681.

In Cherry *v.* Heming, 4 Exch. R. 633, an action of covenant was brought by the assignor against the assignees of certain letters patent to recover the consideration money for the assignment, and one of the defendants named Heming pleaded *non est factum*. At the trial Heming produced the deed, which was signed and executed by all the parties to it except himself; but, although a seal had been placed for him in the usual way, his signature was not attached, neither was there any attesting witness to his execution. As, however, he had acted under the deed, and recognized it as a valid instrument, the jury presumed, with the approbation of the court, that he had duly executed it. Taylor's Ev. § 128.

[1] See supra, § 739.

That parol evidence may prove delivery, see supra, §§ 930, 1016.

[2] Infra, §§ 1347-57; Robins *v.* Bellas, 4 Watts, 255; Warner *v.* Henby, 48 Penn. St. 187.

"The maxim, *Omnia praesumuntur rite esse acta*, is applied by the courts to the execution both of deeds and wills. Where all the witnesses are dead, and the handwriting of one of them is proved, the statement in the attestation clause will be presumed to be correct. Adam *v.* Kerr, 1 B. & P. 360; Andrews *v.* Mottley, 12 C. B. N. S. 526. The court of probate goes further than this, and presumes that all formalities have been complied with in respect of a will when the attestation clause is in the usual form. Vinnicombe *v.* Butler, 3 S. & T. 580. When there is no attestation clause, or when it is not in the usual form, the courts of common law will, it seems, presume compliance with all formalities in respect of a will; Spilsburg *v.* Burdett, 10 Cl. & F. 840; and the tendency of the court of probate will be to give effect to the testator's intentions. In the Goods of Rees, 34 L. J. P. M. & A. 56. Of course, the evidence of attesting witnesses may rebut the presumption of due execution. Croft *v.* Croft, 34 L. J. P. M. & A. 44; 13 W. R. 526. But when a will appears on the face of it to have been duly attested, and surrounding circumstances imply that this was so, the contrary evidence of one attesting witness will not rebut the presumption of due execution. Wright *v.* Rogers, 17 W. R. 833." Powell's Ev. 83.

the body of those with whom he acts. The presumption cannot be called a presumption of law, for it lacks one of the essential incidents of a presumption of law, *i. e.*, universal equality of application to all cases; and it is to be regarded simply as one of those presumptions of fact which determine the burden of proof. In this sense we are to hold that a person acting as a public or quasi public officer is to be so far recognized as such that his appointment is to be treated as regular until the contrary be proved.[1] As officers, in the sense above stated, have been regarded trustees under a turnpike act;[2] guardians of minors;[3] justices of the peace;[4] soldiers engaged in recruiting;[5] constables and policemen;[6] weigh-masters of particular markets;[7] attorneys;[8] post-officers and their employés,[9] and masters in chancery and commissioners.[10] Even when a party is indicted for misconduct in office, it is sufficient, *primâ facie*, to show that he acted in the particular office in which the misconduct

[1] R. *v.* Verelst, 3 Camp. 432; Monke *v.* Butler, 1 Rolle R. 83; Riley *v.* Packington, L. R. 2 C. P. 53; Butler *v.* Hunter, 7 H. & N. 826; Marshall *v.* Lam, 5 Q. B. 115; Bowley *v.* Barnes, 8 Q. B. 1037; R. *v.* Gordon, 2 Leach C. C. 581; Berryman *v.* Wise, 4 T. R. 366; Doe *v.* Brown, 5 B. & A. 243; R. *v.* Howard, 1 M. & Rob. 188; McGahey *v.* Alston, 2 M. & W. 188; Faulkner *v.* Johnson, 11 M. & W. 581; R. *v.* Roberts, 38 L. T. 690; Bank U. S. *v.* Dandridge, 12 Wheat. 70; Minor *v.* Tillotson, 7 Pet. 100; Sheetz *v.* Selden, 2 Wallace, 177; Mech. Bank *v.* Union Bank, 22 Wall. 276; Jacob *v.* U. S., 1 Brock. 520; Hutchins *v.* Van Bokkelen, 34 Me. 126; Cabot *v.* Given, 45 Me. 144; Jay *v.* Carthage, 48 Me. 353; State *v.* Roberts, 52 N. H. 492; Briggs *v.* Taylor, 35 Vt. 57; Fay *v.* Richmond, 43 Vt. 25; Com. *v.* McCue, 16 Gray, 226; Clough *v.* Whitcomb, 105 Mass. 482; Wilcox *v.* Smith, 5 Wend. 231; Hamlin *v.* Dingman, 5 Lansing, 61; Nelson *v.* People, 23 N. Y. 293; Woolsey *v.* Rondout, 4 Abb. App. Decis. 639; Salter *v.* Applegate, 3 Zabr. 115; Kilpatrick *v.* Frost, 2 Grant (Penn.), 168; Stevens *v.* Hoy, 43 Penn. St. 260; Seeds *v.* Kahler, 76 Penn. St. 263; Conolly *v.* Riley, 25 Md. 402; Strang, ex parte, 21 Ohio St. 610; Druse *v.* Wheeler, 22 Mich. 439; Shelbyville *v.* Shelbyville, 1 Metc. (Ky.) 54; State *v.* Holcomb, 86 Mo. 371; Landry *v.* Martin, 15 La. R. 1; Cooper *v.* Moore, 44 Miss. 386; Titus *v.* Kimbro, 8 Tex. 210; James *v.* State, 41 Ark. 451; Whart. on Agency, §§ 44, 121.

[2] Pritchard *v.* Walker, 3 C. & P. 212.

[3] Fink's Appeal, 101 Penn. St. 74; Brown *v.* Brown, 59 Tex. 457.

[4] Berryman *v.* Wise, 4 T. R. 366.

[5] Walton *v.* Gavin, 16 Q. B. 48.

[6] Berryman *v.* Wise, 4 T. R. 366; Butler *v.* Ford, 1 C. & M. 662.

[7] McMahan *v.* Leonard, 6 H. of L. Cas. 970; Hays *v.* Dexter, 13 Ir. L. R. N. S. 106.

[8] Pearce *v.* Whale, 5 B. & C. 38. Infra, § 1317.

[9] R. *v.* Rees, 6 C. & P. 606.

[10] Marshall *v.* Lamb, 5 Q. B. 115; R. *v.* Newton, 1 C. & Kir. 480.

is supposed.[1] The rule which has just been stated applies though the suit be brought in the name of the officer,[2] and though the title be directly put in issue by the pleading.[3]

§ 1316. This presumption, however, does not apply to special private agents,[4] though the fact that a general agent is recognized as such by his principal makes it unnecessary for the party relying on such agency to prove a formal authorization as against the principal.[5] It is also clear that if I recognize A. as agent for P., and deal with A. as such, this relieves him, when subsequently proceeding against me, from the burden of proving his official character.[6] Nor does the rule affect special officers, such as executors and administrators, whose appointment is to be proved by record.[7]

Special agents.

§ 1316 *a*. The fact that a corporation is doing business as such is ordinarily *primâ facie* proof that it has the legal right to do

[1] Clay's case, 2 East P. C. 580; R. *v.* Rees, 6 C. & P. 606; R. *v.* Goodwin, 1 Lew. C. C. 100; Com. *v.* Fowler, 10 Mass. 290; People *v.* Cock, 4 Seld. 67; State *v.* Perkins, 4 Zab. 409; Com. *v.* Rupp, 9 Watts, 114; State *v.* Hill, 2 Speers, 150.

[2] M'Gahey *v.* Alston, 2 M. & W. 206, 211; M'Mahon *v.* Lennard, 6 H. of L. Cas. 970; Doe *v.* Barnes, 8 Q. B. 1037, which was an action of ejectment brought by parish officers; Cannell *v.* Curtis, 2 Bing. N. C. 228; 2 Scott, 379, *S. C.*

[3] Dexter *v.* Hayes, 11 Ir. Law R. N. S. 106; *S. C. nom.* Hayes *v.* Dexter, 13 Ir. Law R. N. S. 22, per Ex. Ch.; M'Mahon *v.* Lennard, 6 H. of L. Cas. 1000.

[4] Short *v.* Lee, 2 Jac. & W. 468; Best's Ev. § 357.

[5] See Whart. on Agency, §§ 42, 44; Merchants' Bank *v.* State Bank, 10 Wall. 604; Faneuil Hall Bk. *v.* Bk. of Brighton, 16 Gray, 534; Reed *v.* R. R. 120 Mass. 43; Hughes *v.* R. R., 36 N. Y. Sup. Ct. 222; Reynolds *v.* Collins, 78 Ala. 94. That agency can be proved by parol in collateral proceedings, even though there be a written power, see Columbia Co. *v.* Geisse, 38 N. J. L. 39.

[6] Supra, § 1153.

[7] Supra, § 67; Hathaway *v.* Clark, 5 Pick. 490.

"When the appointment is the result of the proceedings or determinations of a court, such as the assignee of a bankrupt (Passmore *v.* Bontfield, vol. 1 Cow., Hill & Edwards's Notes to Phil. Ev. 5th ed. 1868, p. 593; Starkie's Ev. by Sharswood, pp. 647, 717), this kind of parol proof is not sufficient, but the appointment must be strictly proved in the ordinary way, . . . by letters of administration themselves, or by the record, or a certified copy of the proceedings, or of the appointment, as the action of courts is proved in other cases. 2 Cow., H. & Ed. Notes, above cited, 452 to 454; 1 Green. Ev. § 519; Starkie's Ev. 717, 693, and 694." Christiancy, J., Albright *v.* Cobb, 30 Mich. R. 361. See Piatt *v.* McCullough, 1 McLean, 78.

such business, and this right cannot be collaterally contested.[1]

Corporations.

When it brings suit on an obligation due to itself, and describing itself by its corporate name, it is entitled, on the plea of *nul tiel corporation*, to recover on the issue so raised, on the production of the obligation, and no further proof is required of its existence until such *primâ facie* proof is rebutted by the opposing party.[2]

So of person exercising a profession.

§ 1317. That to a person exercising a profession the same rule applies may be generally declared. What a person holds himself out to be he cannot deny that he is; and hence if a person claims to be a professional man, it is not necessary to prove him to be a professional man in a suit against him for damages. The same rule applies to all cases where a party claims to hold a particular position on the faith of

[1] Whart. Cr. Ev. § 164*a*; R. *v.* Langton, L. R. 2 Q. B. D. 296; Balt. etc. R. R. *v.* Sherman, 30 Grat. 602; Calkins *v.* State, 18 Ohio St. 236; Oakland Gas Co. *v.* Damerou, 67 Cal. 663.

[2] Brown *v.* Mortgage Co., 110 Ill. 235; Hudson *v.* Seminary, 113 Ill. 618. See Baker *v.* Neff, 73 Ind. 68; Rice *v.* R. R., 21 Ill. 93.

This rule, however, does not apply (1) where the question at issue is the due organization of the corporation, when it sues on a debt conditioned on such organization (see Cooke *v.* Pearce, 23 S. C. 239) as in Nelson *v.* Blakely, 54 Ind. 30; Bigelow *v.* Gregory, 73 Ill. 197; Gent *v.* Ins. Co., 107 Ill. 652; as where assessments or subscriptions were conditioned on such organization; (2) where it claims as against third parties penalties or forfeitures dependent on its corporate character; (3) where the question is whether it comes up to a description in a will; (4) where its title is contested by the sovereign; (5) where it asserts the rights of eminent domain. See Abbott's Trial Evidence, p. 19.

With the exceptions above mentioned, it is enough for a corporation to show by parol *de facto* existence; nor is it any reply that the corporation does not exist *de jure*. Douglass Co. *v.* Bolles, 94 U. S. 104; Railroad Co. *v.* Ellerman, 105 U. S. 173; Bank of Manchester *v.* Allen, 11 Vt. 302; Sudbury *v.* Stearns, 21 Pick. 148; Merchants' Bank *v.* Glendon, 120 Mass. 97; Vernon *v.* Hills, 6 Cow. 23; National Dock Co. *v.* R. R., 32 N. J. Eq. 755; Jersey City Gaslight Co. *v.* Consumers' Gas Co., 40 N. J. Eq. 427; Thompson *v.* Cander, 60 Ill. 247; Darst *v.* Gale, 83 Ill. 136; Miama Co. *v.* Hotchkiss, 17 Ill. Ap. 622; Williams *v.* R. R., 89 Ind. 339; Sprague *v.* Lumber Co., 106 Ind. 242; Toledo R. R. *v.* Johnson, 55 Mich. 456; S. & L. R. R. *v.* C. R. R., 45 Cal. 680; Page *v.* Bank, 20 Kan. 440. See Williams *v.* Hintermeister, 26 Fed. Rep. 889.

A party taking the bonds of a corporation may, as to such bonds, be estopped from denying its corporate existence. See Wallace *v.* Loomis, 97 U. S. 146.

In New York it is said that when the plaintiff alleges itself to be a corporation, the fact need not be proved unless denied. Concordia Savings Co. *v.* Reed, 93 N. Y. 474.

which he claims credit. He is estopped from afterwards disputing his pretensions, even though they be false.[1] The converse position, though open to much greater difficulty, has been held true,[2] and an attorney has been permitted to maintain an action for defamation of him in his professional capacity, on mere proof that he acted as an attorney.[3] At common law the same rule has been held as to surgeons in all cases in which the slander assumes that the plaintiff was a surgeon;[4] and in actions against physicians for negligence, it is sufficient to prove that the physician lacked the qualifications customary with physicians of the school he claimed to belong to, without showing that he had a diploma.[5] But where the issue is, directly, or indirectly, whether the plaintiff was entitled to exercise a particular profession, then he must prove his title.[6]

§ 1318. On the same reasoning the acts of an executive officer of the government (*e. g.*, sheriffs, registers, treasurers, surveyors) are presumed to be regular, so far as to throw the burden of proof on the party collaterally assailing such acts on the ground of irregularity.[7] Of course this protection to officers does not apply to cases in which the

Action of officers and other functionaries presumed to be regular.

[1] Supra, §§ 1087, 1151. See R. *v.* Fordingbridge, E., B. & E. 678; R. *v.* St. Marylebone, 4 D. & R. 475; Bevan *v.* Williams, 3 T. R. 635.

[2] Radford *v.* McIntosh, 3 T. R. 632.

[3] Berryman *v.* Wise, 4 T. R. 366. See McGahey *v.* Alston, 2 M. & W. 206; McMahan *v.* Leonard, 6 H. of L. Cas. 970.

[4] Gremare *v.* Valon, 2 Camp. 144; Cope *v.* Rowlands, 2 M. & W. 160.

[5] See Whart. on Neg. § 733.

[6] Collins *v.* Carnegie, 1 A. & E. 695; *S. C.*, 3 N. & M. 703. See Taylor's Ev. § 143, citing and criticising Sellers *v.* Tell, 4 B. & C. 655; Cortis *v.* Kent, 7 B. & C. 314.

[7] R. *v.* Hinckley, 12 East, 361; R. *v.* Catesby, 2 B. & C. 814; Gosset *v.* Howard, 10 Q. B. 411; R. *v.* Stainforth, 11 Q. B. 66; R. *v.* Broadhempston, 1 E. & E. 155; Ross *v.* Reed, 1 Wheat. 482; Phil. R. R. *v.* Stimpson, 14 Pet. 448; Minter *v.* Crommelin, 18 How. 89; U. S. *v.* Weed, 5 Wall. 62; Campbell *v.* Gas Co., 119 U. S. 445; Gonzales *v.* U. S., 120 U. S. 605; Dixon *v.* R. R., 4 Biss. 137; U. S. *v.* Adams, 24 Fed. Rep. 348; Shorey *v.* Hussey, 32 Me. 579; Wheelock *v.* Hall, 3 N. H. 310; Kimball *v.* Lamphrey, 19 N. H. 215; Forsaith *v.* Clark, 21 N. H. 409; Drake *v.* Mooney, 31 Vt. 617; Richardson *v.* Smith, 1 Allen, 541; Jones *v.* Boston, 104 Mass. 461; People *v.* Bank, 4 Bosw. 363; Smith *v.* Hill, 22 Barb. 656; Wood *v.* Terry, 4 Lansing, 80; Coxe *v.* Deringer, 82 Penn. St. 236; Plank Road *v.* Bruce, 6 Md. 457; Davis *v.* Johnson, 3 Munf. Va. 81; Ward *v.* Barrows, 2 Ohio St. 241; Titus *v.* Lewis, 33 Ohio, 304; Ashe *v.* Lanham, 5 Ind. 435; Banks *v.* Bales, 16 Ind. 423; Elston *v.* Castor, 101 Ind. 406; Chickering *v.* Failes, 29 Ill. 294; Niantic Bk. *v.* Dennis, 37 Ill. 381; Morrison *v.* King, 62 Ill. 30; McHugh *v.* Brown, 33 Mich. 2; Sinclair *v.* Learned, 51 Mich. 335;

warrants under which they act are on their face illegal. All that the rule decides is that it is not necessary for the warrant or other authorizing record to assert specifically all antecedent steps of procedure, not in themselves essential to jurisdiction, the averment of the taking of which may be assumed to be implied in the averments actually expressed. In such case the burden is on the opposite side to show that the steps were not actually taken. It is also said that when a duty is undertaken, and time requisite for the performance of the duty has elapsed, and there is no proof of the non-performance of the duty, the jury, as a presumption of fact, to be drawn from the whole case, may infer that the duty was performed.[1] The presumption just given is not limited to officers of state.[2] Thus, in a prosecution for bigamy, where the marriage was proved by the witness present to have taken place at the parish church and to have been solemnized by the curate of the parish, it was held unnecessary to prove either the registration of the marriage, or the fact of any license having been granted.[3]

This presumption, however, is not to be extended so as to make it cover substantive independent facts as distinguished from facts which are the incidents of official duty.[4]

Rowan *v.* Lamb, 4 Greene (Iowa), 468; Arnold *v.* Juneau Co., 43 Wis. 627; Kobs *v.* Minneapolis, 22 Minn. 159; Palmer *v.* Boling, 8 Cal. 384; Boyd *v.* Buckingham, 10 Humph. 434; Jewell *v.* Porche, 2 La. An. 148; Morse *v.* McCall, 13 La. An. 215; Webster *v.* Gottschalk, 15 La. An. 376; New Orleans *v.* Halpin, 17 La. An. 148; Trotter *v.* Schools, 9 Mo. 69; Moreau *v.* Branham, 27 Mo. 351; Dupuis *v.* Thompson, 16 Fla. 69; Sadler *v.* Anderson, 17 Tex. 245. See Johnson *v.* U. S., 14 Ct. of Cl. 276.

[1] That the rule applies to administrators, see Doe *v.* Turford, 3 B. & Ad. 890; Rugg *v.* Kingsmill, L. R. 1 Ad. & Ec. 343; R. *v.* Stainforth, 11 Q. B. 66; Minter *v.* Crommelin, 18 How. 87; Dana *v.* Kemble, 19 Pick. 112; Todemier *v.* Aspinwall, 43 Ill. 401; Conwell *v.* Watkins, 71 Ill. 488; Paine *v.* Tutwiler, 27 Grat. 440; Phillips *v.* Morrison, 3 Bibb, 105; Forman *v.* Crutcher, 2 A. K. Marsh. 69.

[2] O'Hara *v.* Blood, 27 La. An. 57.

[3] R. *v.* Allison, R. & R. 109. See supra, § 1297, for other cases.

[4] Murphy *v.* Chase, 103 Penn. St. 260. "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his treatise on Evidence, § 300, says: 'The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of facts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by

It must be further kept in mind as to presumptions of this class, that to throw the burden on the objector, the conduct of the officer must be on its face regular.[1]

§ 1319. It is sometimes said that the law presumes that public officers do their duty. The law, however, presumes no such thing. If a public officer is sued for misconduct, then the case goes to the jury on the evidence, there being no presumption of virtue in his favor sufficient to outweigh preponderating proof on the other side. What the law says, and all that it in this respect says, is that a public officer is so far assumed *primâ facie* to do his duty that the burden is on the party seeking to charge him with misconduct.[2] And this is in full harmony with the general rule above given, that on the actor lies the burden. The same reasoning applies in cases where the conduct of the officer comes collaterally in question. The burden is on those assailing such conduct; and so far, but only so far, the conduct of such officer is *primâ facie* presumed to be right.[3] In a suit by a private person against an officer the burden is on the plaintiff to make out his case, just as a similar burden is on the plaintiff in a suit by an officer against a private person. When the facts go to the jury, there is no more presumption of law in either case that the officer did right than there is a presumption of law that the private person did right. In criminal prosecutions for misconduct in office, the presumption in favor of the officer, when the case goes to the jury, is only the ordinary presumption of innocence.

Burden of proof is on party charging public officer with misconduct.

which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' Nowhere is the presumption held to be a substitute for proof of an independent and material fact." Strong, J., U. S. *v.* Ross, 92 U. S. 283, 284, 285. See Houghton *v.* Rees, 34 Mich. 481. Hence the presumption has no application to a constable who distrains and sells goods under a landlord's warrant, he being the agent of the landlord and not an officer of the law. Murphy *v.* Chase, 103 Penn. St. 260.

[1] Supra, § 1304; Welsh *v.* Cochran, 63 N. Y. 181.

[2] Bruce *v.* Holden, 21 Pick. 187; Clapp *v.* Thomas, 5 Allen, 158; Phelps *v.* Cutler, 4 Gray, 137; McMahon *v.* Davidson, 13 Minn. 357; State *v.* Melton, 8 Mo. 417.

[3] Lee *v.* Polk Co. Copper Co., 21 How. 493; Dixon *v.* R. R., 4 Biss. 137; Hartwell *v.* Root, 19 Johns. R. 345; Sheldon *v.* Wright, 7 Barb. 39; Nelson *v.* People, 23 N. Y. 293; Allegheny *v.* Nelson, 25 Penn. St. 232; Kelly *v.* Green, 53 Penn. St. 302; Jenkins *v.* Parkhill, 25 Ind. 473; Todemier *v.*

Regularity of business men presumed.

§ 1320. We have already had occasion to observe[1] that it is an ordinary inference that the action of business men will be conducted with business regularity.[2] Of this inference it may be mentioned, by way of illustration, that a party is assumed to have read a paper to which his name is signed,[3] and this inference distinctively applies to officers in banks.[4] Where, also, a partnership is found to exist between two persons, but there is no evidence to show in what proportions they are interested, it is to be assumed that they are interested in equal moieties.[5] We infer, in the same way, that bills of exchange and promissory notes are given for a sufficient consideration.[6] Indorsements, also, are inferred to have been made in due time.[7] And a bill of exchange, in the absence of proof to the contrary, is inferred to have been accepted within a reasonable time after its date, and before it came to maturity.[8] A seal, also, attached to a bond, will be presumed to be the proper seal of the party.[9] But this presumption is to be limited to the regularity of the act.[10]

Non-existence to be inferred from non-claimer.

§ 1320 *a*. On the same principle, if a party should present a claim, of old date, to a solvent person, the fact that the claim had lain dormant for years subjects it to much prejudice.[11] The presumption, however, is open to be rebutted by proof of the intermediate insolvency of the

Aspinwall, 43 Ill. 401; Dollarhide *v.* Muscatine Co., 1 Greene (Iowa), 158; Guy *v.* Washburn, 23 Cal. 111; Hickman *v.* Boffman, Hard. (Ky.) 348; Ellis *v.* Carr, 1 Bush, 527; Phelps *v.* Ratcliffe, 3 Bush, 334; Dawkins *v.* Smith, 1 Hill (S. C.) Ch. 369; Jones *v.* Muisbach, 26 Tex. 235.

[1] Supra, §§ 1243, 1301.

[2] See Clark *v.* Carey, 63 Ind. 105.

[3] Hartford Ins. Co. *v.* Gray, 80 Ill. 28. Supra, § 1243, for other cases.

[4] Knickerbocker Ins. Co. *v.* Pendleton, 115 U. S. 339.

[5] Farrar *v.* Beswick, 1 Moo. & R. 527, per Parke, B.

[6] Supra, § 1301; Byles on Bills (8th ed.), 2, 108.

[7] Garland *v.* Jacomb, L. Q. 8 Ex. 216; Batch *v.* Ornon, 4 Cush. 559; supra, § 1301.

[8] Roberts *v.* Bethell, 12 C. B. 778. For other instances generally of such inferences, see supra, § 1301; Carter *v.* Abbott, 1 B. & C. 444; Houghton *v.* Gilbart, 7 C. & P. 701; Leuckart *v.* Cooper, 7 C. & P. 119; Cunningham *v.* Fonblanque, 6 C. & P. 44; Leland *v.* Farnham, 25 Vt. 553; Best's Ev. § 404.

[9] Mills *v.* Machine Co., 79 Ill. 450. Supra, § 694.

[10] Lockhart *v.* Bell, 90 N. C. 499.

[11] T. *v.* D., L. R. 1 P. & D. 27; Sibbering *v.* Balcarres, 3 De Gex & Sm. 735; Taylor's Ev. § 121, citing Birch, in re, 17 Beav. 358. See H., falsely called C., *v.* C., 31 L. J. Pr. & Mat. 103.

debtor, or of other grounds for the suspension of the debt. The reasoning is, that a claim which a party does not undertake to realize, he discredits. On the same reasoning, the fact that a patent lies dormant for years affords an inference of its inutility.[1] And a settlement of a counter-claim may be inferred from the giving an obligation for a sum materially less than due on the face of the account.[2]

§ 1321. When services are accepted, the ordinary inference is that the party accepting has agreed to pay for them.[3] But this presumption varies with circumstances, and when the services are rendered by one member of a family to another, no such presumption can be drawn.[4]

Agreement to pay to be inferred from acceptance of services.

§ 1322. If a business man forwards goods to another, either for the latter's use, or for sale, the delivery and acceptance of the goods presume an agreement to purchase ;[5] if a servant is hired, it is presumed to be for the usual period of service ;[6] when marriage is promised, the engagement will be presumed to be to marry within a reasonable time.[7]

Other implied agreements.

§ 1323. The posting a letter, either in the proper place of deposit or by delivery to a postman, such letter being properly addressed and stamped, to a person known to be doing business in a place where there is established a regular delivery of letters, is *primâ facie* proof of the reception of the letter by the person to whom it is addressed.[8] Such proof,

Posting letter *primâ facie* proof of delivery.

[1] Bakewell's Patent, in re, 15 Moo. P. C. 385 ; Allen's Patent, in re, L. R. 1 P. C. 507 ; *S. C.* 4 Moo. P. C. N. S. 443.

[2] Crist *v.* Garner, 2 Pen. & W. 251.

[3] See 1 Broom and Hadley's Com. (Am. ed.) 132–4 ; Whart. on Agency, § 323 ; 1 Wait's Actions, 99 ; Smith *v.* Thompson, 8 C. B. 44 ; Scott, in re, 1 Redf. (N. Y.) 234.

[4] See Wharton on Agency, § 324, and cases there cited ; and see Wilcox *v.* Wilcox, 48 Barb. 327 ; Gallagher *v.* Vought, 8 Hun, 87 ; King *v.* Kelly, 28 Ind. 89.

[5] See 1 Broom and Hadley's Com. (Am. ed.) 132–4, and cases there cited ; 1 Wait's Actions, 99 ; Barr *v.* Williams, 23 Ark. 244.

[6] Best's Ev. § 400.

[7] Phillips *v.* Crutchley, 3 C. & P. 78 ; 1 Moore & P. 239.

[8] Saunderson *v.* Judge, 2 H. Bl. 509 ; R. *v.* Johnson, 7 East, 65 ; Kufh *v.* Weston, 3 Esp. 54 ; Warren *v.* Warren, 1 C. M. & R. 250 ; Stocken *v.* Collin, 7 M. & W. 515 ; Woodcock *v.* Houldsworth, 16 M. & W. 124 ; Shipley *v.* Todhunter, 7 C. & P. 630 ; Skilbeck *v.* Garbett, 7 Q. B. 846 (a case of delivery to a postman) ; Dunlap *v.* Higgins, 1 H. of L. Cas. 381 ; Lindenberger *v.* Beal, 6

however, is open to rebuttal, and ultimately the question of delivery will be decided on all the circumstances of the case.[1] In cases of letters in well-organized postal routes, where business men are the sendees, the presumption is strong ;[2] in cases of letters where there is no mail delivery, or where the sendee has no settled business address, there is no presumption at all,[3] and delivery must be substantively proved.[4] The rule as to letters, however, applies only to

Wheat. 104; Rosenthal *v.* Walker, 111 U. S. 184; Oakes *v.* Weller, 13 Vt. 63; Connecticut *v.* Bradish, 14 Mass. 296; New Haven Bank *v.* Mitchell, 15 Conn. 200 ; Oregon St. Co. *v.* Otis, 100 N. Y. 446 ; Russell *v.* Beckley, 4 R. I. 525; Thallhimer *v.* Brinckerhoff, 6 Cow. 90 ; Austin *v.* Hartwig, 49 N. Y. Sup. Ct. 256; Starr *v.* Torrey, 22 N. J. L. (2 Zab.) 190; Callan *v.* Gaylord, 3 Watts, 321; Tanner *v.* Hughes, 53 Penn. St. 289 ; Shoemaker *v.* Bank, 59 Penn. St. 79; Plath *v.* Ins. Co., 23 Minn. 479; Sullivan *v.* Kuykendall, 82 Ky. 483; Breed *v.* Bank, 6 Col. 235.

In England this presumption has been adopted by the legislature in many acts of Parliament, but with this difference, that no rebutting evidence is admissible, and therefore the presumption is conclusive. Powell's Ev. 4th ed. 86. For decisions on these statutes, see Bishop *v.* Helps, 2 C. B. 45; Bayley *v.* Nantwich, 2 C. B. 118.

That posting of a letter accepting a contract is sufficient proof of the completion of the contract, see Household Fire Insurance Company *v.* Grant, 4 Ex. D. 216 ; 48 L. J. Ex. 577 ; C. A. S. P. Imperial Land Company, in re, 7 L. R. Ch. 587; overruling Brit. & Am. Tel. Co. *v.* Çolson, L. R. 6 Eq. 108. See these and other cases discussed at large in Whart. on Contracts, § 18.

"The rule is well settled that if a letter properly directed is proved to have been either put in the post-office or delivered to the postman, it is presumed, from the ordinary course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." Woods, J., Rosenthal *v.* Walker, 111 U. S. 193, citing, among other cases, Huntley *v.* Whittier, 105 Mass. 391. According to Sir J. Stephen (Evidence, art. 13), the facts that the letter "was posted in due course, properly addressed, and *was not returned through the dead-letter office*," are deemed to be relevant; but this qualification in italics is not given in the American cases.

[1] Ibid. ; Reidpath's case, 40 L. J. Ch. 39 ; U. S. *v.* Babcock, 3 Dillon C. C. 571 ; Freeman *v.* Morey, 45 Me. 50 ; Greenfield Bank *v.* Crafts, 4 Allen, 447 ; Huntley *v.* Whittier, 105 Mass. 391 ; Austin *v.* Holland, 69 N. Y. 571 ; First Nat. Bank *v.* McManigle, 69 Penn. St. 156 ; Susquehanna Ins. Co. *v.* Toy Co., 97 Penn. St. 424 ; Foster *v.* Leeper, 29 Ga. 294. See Tate *v.* Sullivan, 30 Md. 464 ; Lyons *v.* Guild, 5 Heisk. 175.

[2] Best's Ev. § 403.

[3] Freeman *v.* Morey, 45 Me. 50 ; First Nat. Bk. *v.* McManigle, 69 Penn. St. 156 ; Bilbgerry *v.* Branch, 19 Grat. 393 ; James *v.* Wade, 21 La. An. 548.

[4] "There is no presumption of law that a letter, mailed to one at the place he usually receives his letters, was received by him. A strong probability of its receipt may arise, as was said in Tanner *v.* Hughes, 3 P. F. Smith, 289, and the fact of its deposit in the mail-bag, in connection with other circumstances, may be sufficient to warrant

letters posted at points other than that at which the party written to resides. Notices of local transactions, to persons living in the same place as that from which the notice is issued, should, when such is the usage, be served personally;[1] though when the custom is to send such notices by post, and where the custom is reasonable, from the distances at which parties live, and the greater economy and accuracy of mail delivery, this limitation cannot apply.[2] It is generally held that, when the party resides in another town, notice by the post-office is sufficient,[3] and may in some cases bind, even though not received.[4] To enable the presumption to operate it

the court in referring the question of its receipt to the determination of the jury." Williams, J., First Nat. Bank of Bellefonte *v.* McManigle, 69 Penn. St. 159.

"Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known post-office address, prepaid, and actually deposited in the post-office, we concur, both of us, in the conclusion, adopting the language of Chief Justice Bigelow, in Comm. *v.* Jeffries, 7 Allen, 563, that this 'is evidence tending to show that such letters reached their destination, and were received by the persons to whom they were addressed.' This is not a conclusive presumption; and it does not even create a legal presumption that such letters were actually received; it is evidence, if credited by the jury, to show the receipt of such letters. 'A fact,' says Agnew, J., Tanner *v.* Hughes, 53 Penn. St. 290, 'in connection with other circumstances, to be referred to the jury,' under appropriate instruction, as its value will depend upon all the circumstances of the particular case." Dillon, Circuit Judge, United States *v.* Babcock, 3 Dillon's C. C. R. 573. In Huntley *v.* Whittier, 105 Mass. 391, it was ruled that the posting a letter addressed to a merchant at his place of business is *primâ facie* proof that he received it in due course of mail, but only when there is no other evidence. See Briggs *v.* Harvey, 130 Mass. 187. In Hedden *v.* Roberts, 134 Mass. 38, where the issue was whether the plaintiff sent a bill of the goods by mail to the defendant, and the defendant received it, evidence was held admissible that upon the envelope containing the bill was printed a request for a return of the letter to the post-office address of the plaintiff, if not called for in ten days, and that it was not returned to him. Hedden *v.* Roberts, 134 Mass. 38.

[1] Shelburne Bank *v.* Townsley, 102 Mass. 177; Ransom *v.* Mack, 2 Hill, 587; Sheldon *v.* Benham, 4 Hill, 129.

[2] See reasoning of court in Shelburne Bank *v.* Townsley, supra, citing Pierce *v.* Pendar, 5 Met. 352; Chit. Bills (12th Am. ed.), 473, and see, also, Cabot Bank *v.* Russell, 4 Gray, 169; Manchester Bk. *v.* White, 30 N. H. 456.

[3] Ibid.; Munn *v.* Baldwin, 6 Mass. 316.

[4] Shed *v.* Brett, 1 Pick. 401. "In this case the transaction occurred in New York, and not in Buckland, where the defendants resided. The letter, however, in which the plaintiffs undertook to give the notice, was addressed to the defendant, not at Buckland, but at Shelburne Falls, and the report shows that he was in the habit of receiving letters at the post-offices of these

is essential that the letter should be addressed with specific correctness. Thus, it has been held that no presumption of delivery attached to a letter addressed, "Mr. Haynes, Bristol,"[1] though the burden, when the posting of a letter to a particular person is shown, is on the party impeaching the completeness of the address.[2] Such letters may be evidence of the dishonor of commercial paper, and, coupled with proof that they were not returned from the dead-letter office, may be received as giving notice of the dissolution of a partnership.[3] How far this inference from regularity applies to telegraphic dispatches will be presently noticed;[4] though ordinarily the original message should be produced.[5]

Letter presumed to arrive at usual time of delivery.

§ 1324. A letter, duly stamped and posted, is inferred by a presumption of fact, to be delivered at the usual time for such delivery.[6]

two places respectively, and about as often at one as at the other. The question as to the proper mode of notifying a man by mail depends much less on the place of his exact legal domicile than upon the locality of the post-office at which he usually receives his letters; and if he is in the habit of resorting for that purpose equally and indifferently to two post-offices, a communication may very properly be addressed to him at either. United States Bank *v.* Carneal, 2 Pet. 543; Story on Notes, § 343. The plaintiffs appear to have put him on the same footing, for the purpose of post-office communication, as if he were a resident of Shelburne Falls. The letter was left at the post-office, not for the purpose of being transmitted by mail to any other town or post-office, and not to go into the hands of any official carrier charged with the distribution of letters at the dwelling-houses and places of business of inhabitants of the vicinity; on the contrary, it did not go into the mail at all, but was simply deposited at the Shelburne Falls post-office, to remain there until called for by the defendant." Shelburne Bk. *v.* Townsley, 102 Mass. 177, Ames, J.

[1] Walter *v.* Haynes, Ry. & M. 149. And see, as narrowing the rule, Allen *v.* Blunt, 2 Woodb. & M. 121. See Phillips *v.* Scott, 43 Mo. 86.

[2] McGarr *v.* Lloyd, 3 Penn. St. 474.

[3] Kenney *v.* Altvater, 77 Penn. St. 34. See Wilcoxen *v.* Bohanan, 53 Ga. 219.

[4] Infra, § 1329. Com. *v.* Jeffries, 7 Allen, 548; U. S. *v.* Babcock, 3 Dillon, 571.

[5] Howley *v.* Whipple, 48 N. H. 487; cited at large supra, § 76.

[6] The law on this point is thus well stated by Mr. Powell (Evidence, 4th ed. 81): "A letter is presumed to have arrived at its destination at the time at which it would be delivered in the ordinary course of postal business, and the sender is never held answerable for any delay which occurs in its transmission through the post. Stocken *v.* Collin, 7 M. & W. 515. So that where any notice has to be given on a particular day, it is sufficient to post it so that it would, in the ordinary course, arrive at its destination on that day, and if it is delayed in the post, the sender is not responsible for the delay. Ward *v.* Lord Londesborough, 12 C. B. 252. This is important in reference to notices to quit and notices of dishonor.

§ 1325. The post-mark on a letter, if decipherable, raises a presumption that the letter was in the post at the time and place specified in such post-mark, but this again is a rebuttable presumption.[1] The presumption is not rebutted, however, by showing that other envelopes not posted have been stamped with a given post-mark.[2] The post-mark, however, is not, it is said, evidence of the date of forwarding.[3]

Post-mark *primâ facie* proof.

§ 1326. If a servant or clerk is permitted by his master to act as such, then whenever a letter, whether sent by post or by hand, is proved to have been correctly addressed and delivered to the clerk or servant of the person to whom it was addressed, it will be presumed that it came into his hands, although this presumption can be rebutted.[4] Where notices to quit are delivered to a servant at the house occupied by the tenant, this presumption has been applied.[5] So where a letter is put in a box from which it is an invariable practice of a letter-carrier to take letters at fixed periods, posting will be presumed.[6]

Delivery to servant is delivery to master.

Here we may allude to the rule laid down by the House of Lords in Dunlop *v.* Higgins, 1 H. L. Cas. 381, that a contract to buy goods entered into by letter is complete when the letter of acceptance is posted; and the rule was held to be the same in the case of a contract to take shares, by the Court of Appeal in Chancery in Harris's case, 20 W. R. 690; 41 L. J. Ch. 621; L. R. 7 Ch. 587. But the Court of Exchequer, in The British & American Telegraph Co. *v.* Colson, L. R. 6 Ex. 108; 40 L. J. Ex. 97, held that if the letter of allotment is not received there is no contract; and in Reidpath's case, 19 W. R. 219; L. R. 11 Eq. 86; 40 L. J. Ch. 39, Lord Romilly held that it was necessary to prove receipt by the allottee when denied. Lord Justice Mellish, in Harris's case, said that he had great difficulty in reconciling The British & American Telegraph Co. *v.* Colson with the decision in Dunlop *v.* Higgins, and Vice-Chancellor Malins followed suit in Wall's case, L. R. 15 Eq. 20; 42 L. J. Ch. 372. Although the decisions in The British & American Telegraph Co. *v.* Colson and Reidpath's case have not been overruled, they would appear to be unsound; for if a contract is complete when a letter of acceptance is posted, how can it possibly become subsequently incomplete because that letter is not received?"

[1] Powell's Evidence, 4th ed. 88; R. *v.* Johnson, 7 East, 65; Fletcher *v.* Braddyl, 3 Stark. R. 64; R. *v.* Watson, 1 Campb. 315; Archangelo *v.* Thompson, 2 Camp. 623; Shipley *v.* Todhunter, 7 C. & P. 680; Stocken *v.* Collen, 7 M. & W. 515; Butler *v.* Mountgarrett, 7 H. of L. Cas. 633; *S. C.* Ir. Law R. (N. S.) 77; New Haven Bk. *v.* Mitchell, 15 Conn. 206; Callan *v.* Gaylord, 3 Watts, 321.

[2] U. S. *v.* Noelke, 17 Blatchf. C. Ct. 554.

[3] Shelburne Bk. *v.* Townsley, 102 Mass. 177.

[4] Macgregor *v.* Kelly, 3 Ex. 794.

[5] Tanham *v.* Nicholson, L. R. 5 H. L. 561.

[6] Skilbeck *v.* Garbett, 7 Q. B. N. S. 846.

§ 1327. The principle before us, based as it is on the assumption that as absolute certainty in such proof cannot be obtained, it is enough, in order to make out a *primâ facie* case, to show that a letter is forwarded in a way by which letters are usually received, applies to other than post-office delivery.[1] Hence, where it was proved to be the usage of a hotel for letters addressed to guests to be deposited in an urn at the bar, and then to be sent, about every fifteen minutes, to the rooms of the guests to whom such letters were addressed, it was held to be a presumption of fact that a letter addressed to one of the guests, and left at the bar, was received by such guest.[2] In case of a denial, by the party addressed, of reception, then the case goes to the jury as a question of fact.

Letters sent by carrier presumed to have been received.

§ 1328. If I should mail a letter to B., addressing him at his residence, and I should receive by mail an answer purporting to come from B., the fact that such an answer is so received makes a *primâ facie* case in favor of the genuineness of the answer. The subalterns of the post-office are government officials, whose action is presumed to be regular; and if I can prove that B. lived at the place where he was addressed, then the burden is on him to show that he did not receive the letter, and that the reply mailed in response was not genuine.[3]

Letter in answer to one mailed to the writer presumed to be genuine.

§ 1329. The presumption of due delivery of telegraphic messages, applicable to letters, is applicable in a less degree, determined by all the circumstances of the case, to telegraphic dispatches.[4]

Telegrams.

§ 1330. Testimony by a clerk that it was his invariable custom to carry certain classes of letter to the post-office, of which class the letter in question was one, though he had no recollection as to such letter specifically, has been held sufficient to let a copy of the letter in evidence, after

Presumption from habits of forwarding letters.

[1] See cases cited supra, § 1323; New Haven Bk. *v.* Mitchell, 15 Conn. 206. See Crandall *v.* Clark, 7 Barb. 169.

[2] Dana *v.* Kemble, 19 Pick. 112.

[3] Connecticut *v.* Bradish, 14 Mass. 296; Chaffee *v.* Taylor, 3 Allen, 598; Johnson *v.* Daverner, 19 Johns. 134.

[4] Supra, § 76; Gray on Telegraphs, § 136; U. S. *v.* Babcock, 3 Dillon, 571; State *v.* Hopkins, 50 Vt. 316; Com. *v.* Jeffries, 7 Allen, 548; Oregon St. Co. *v.* Otis, 100 N. Y. 447 (where the question is well argued by Finch, J.); though as to telephone, see Sullivan *v.* Kuykenhall, 82 Ky. 483; Howley *v.* Whipple, 48 N. H. 488. As tending to sustain such presumption, see Trotter *v.* Maclean, L. R. 13 Ch. D. 574; Rosenthal *v.* Walker, 111 U. S. 193.

notice to the other side to produce.[1] If the letter is shown to have been given to such a clerk for the purpose of mailing, then it will be inferred that the letter was posted, though the clerk has no specific recollection of the letter.[2] Posting will, in such case, be also inferred, if the witness state that it was in the ordinary course of business his practice to carry letters delivered to him (as was the letter in controversy) to the post, although he has no recollection of the particular letter.[3] And where a witness swore that a copy of a letter was in his own hand and that he should, in the ordinary course of business have posted the original: this was held evidence of posting, and that, the original not being produced, the copy was good secondary evidence.[4]

VI. PRESUMPTIONS AS TO TITLE.

§ 1331. It has been frequently said that possession of property, whether real or personal, is a presumption of title.[5] But this is not

[1] Thallhimer *v.* Brinckerhoff, 6 Cow. 96.

[2] Hetherington *v.* Kemp, 4 Camp. 193; Ward *v.* Londesborough, 12 C. B. 252; Toosey *v.* Williams, 1 Moo. & M. 129; Patteshell *v.* Turford, 3 B. & Ald. 890; Pritt *v.* Fairclough, 3 Camp. 305; Hagedorn *v.* Reid, 3 Camp. 379; Skilbeck *v.* Garbett, 7 Q. B. 846; Spencer *v.* Thompson, 6 Ir. L. R. (N. S.) 537.

[3] Skilbeck *v.* Garbett, 7 Q. B. 846; Hetherington *v.* Kemp, 4 Camp. 193; Ward *v.* Ld. Londesborough, 12 Com. B. 252; Spencer *v.* Thompson, 6 Ir. Law R. (N. S.) 537, 565.

[4] Trotter *v.* Maclean, 13 Ch. D. 542; L. J. Ch. 735.

[5] 2 Wms. Saund. 47 f; Best's Ev. § 366; Webb *v.* Fox, 1 T. R. 397, by Lord Kenyon; Millay *v.* Butts, 35 Me. 139; Vining *v.* Baker, 53 Me. 544; Baxter *v.* Ellis, 57 Me. 178; Waldron *v.* Tuttle, 3 N. H. 340; Winkley *v.* Kaime, 32 N. H. 268; Carr *v.* Dodge, 40 N. H. 403; Austin *v.* Bailey, 37 Vt. 219; Simpson *v.* Carleton, 14 Gray, 506; Currier *v.* Gale, 9 Allen, 522; Durbrow *v.* McDonald, 5 Bosw. 130; Gray *v.* Gray, 2 Lansing, 173; Bordine *v.* Combs, 15 N. J. L. (3 Gr.) 412; Entriken *v.* Brown, 32 Penn. St. 364; Robinson *v.* Hodgson, 73 Penn. St. 202; Coxe *v.* Deringer, 78 Penn. St. 271; Drummond *v.* Hopper, 4 Harr. (Del.) 327; Allen *v.* Smith, 1 Leigh, 231; Hovey *v.* Sebring, 24 Mich. 232; Stevens *v.* Hulin, 53 Mich. 93; Ward *v.* McIntosh, 12 Ohio St. 231; Caldwell *v.* Evans, 5 Bush, 380; Park *v.* Harrison, 3 Humph. 412; Finch *v.* Alston, 2 St. & P. (Ala.) 83; Sparks *v.* Rawls, 17 Ala. 211; Vastine *v.* Wilding, 45 Mo. 89; Goodwin *v.* Garr, 8 Cal. 615.

For the position above stated, that the possessor of property is presumed to have rightfully acquired title, is sometimes cited a well-known Roman maxim: *Quaelibet possessio praesumitur juste adquisitur*. But the reasoning of the jurists, taking their exposition of presumptions in a body, shows that they intend by presumptions, when used in this as well as in all other relations, rules for the burden of proof,

a presumption, but an inference to be drawn only in those cases in which the possession has a color of right, and if so, the statement is a mere truism, amounting to simply this, that where a person holds property claiming it as his own, he holds it on a claim of right. But there is no such presumption in favor of a wrong-doer, appearing as such, or of a person whose possession is confessedly not based on title. Thus, a person picking up money in the street has no presumption of title in his favor; nor is there any ultimate presumption in favor of the possessor of chattels when the subject of an action of replevin or of an indictment for larceny.

Presumption in favor of possession.

§ 1332. So far as concerns real estate, possession, or reception of rents from the person in possession, has been held so far *primâ facie* evidence of seisin in fee, as to throw, in actions of ejectment, upon a contesting party, the burden of proving a superior title;[1] but this arises from the peculiar character of the action.[2] Possession, also, is sufficient title to sus-

As to realty.

and not presumptions of law; and that, in the particular case before us, they are to be construed only as asserting that, as a matter of proof, he who holds property is entitled to retain it until a better title is shown in some one else. In other words, no one is to be presumed to have a good title against a possession. But this negative presumption is far from being equivalent to the affirmative proposition, that every possessor is presumed to have a good title. Weber, Heffter's ed. 95. The presumption, if it be such, is effective only in regulating the burden of proof. When the evidence of both sides is in, then there is no presumption, in the strict sense of the term, at all. Indeed, a brief tortious possession, as is noticed in the text, resisted promptly by the dispossessed party, tells rather against than for the aggressor. On the other hand, a long possession, acquiesced in by a dispossessed party, may estop the latter, when by any acts on his part he induced the party in possession to remain, and make improvements, and thereby alter his position. The question is one of inference from the facts in the concrete.

[1] Best's Ev. § 366; Jayne *v.* Price, 5 Taunt. 326; Denn *v.* Barnard, Cowp. 595; R. *v.* Overseers, 1 B. & S. 763; Metters *v.* Brown, 1 H. & C. 686; Doe *v.* Coulthred, 7 A. & E. 239; Lewis *v.* Davies, 2 M. & W. 503; Wendell *v.* Blanchard, 2 N. H. 456; Hawkins *v.* County, 2 Allen, 251; Platt *v.* Grover, 130 Mass. 115; Brown *v.* Brown, 30 N. Y. 519; Corning *v.* Troy Factory, 44 N. Y. 577; Read *v.* Goodyear, 17 S. & R. 350; Seechrist *v.* Baskin, 7 W. & S. 403; Hoffmau *v.* Bell, 61 Penn. St. 444; Coxe *v.* Deringer, 78 Penn. St. 271; Ward *v.* McIntosh, 12 Ohio St. 231; Hunt *v.* Utter, 15 Ind. 318; Smith *v.* Hamilton, 20 Mich. 433; Crow *v.* Marshall, 15 Mo. 499. And, see, further, cases cited in last section. As to presumption of regularity of tax sales, see infra, § 1353.

[2] The whole theory of lease, entry, and ouster is based on the idea of some

tain a suit for trespass;[1] and it has been held that on a suit against a county for road damages, proof of possession of real estate for only nine years makes a sufficient *primâ facie* case.[2] Proof of payment of taxes is admissible in order to strengthen the presumption.[3]. Death does not terminate such presumption, but the same possessory rights pass at once to the representatives of the deceased; and the burden of proof is on all parties attacking such possession.[4]

Otherwise as to tortious possession.

§ 1333. A mere tortious possession, however, obtained by violence, is not possession in the meaning of the rule before us; and against such a wrong-doer the party wrongfully dispossessed may make out a *primâ facie* case, in an action of ejectment, on proof of a prior possession, however short.[5] Possession of a year, for instance, by a party who received the key of a room from the lessor of the plaintiff, has been held sufficient to sustain the plaintiff's case against the defendant, who broke in at night and took forcible possession.[6]

Such possession must be independent.

§ 1334. The possession, also, to found such presumption, must be independent. If the evidence shows only a qualified, subordinate, or contested interest, no title beyond that proved is to be presumed as against a superior title, even though a possession of twenty years be shown.[7] Posses-

imaginary grantor who made a lease, on the strength of which the plaintiff entered, and then the defendant turned him out of possession. This leads directly back to the title which would confer the right of possession. Hence, to show an adverse title to the imaginary lessor is to destroy the possessory right dependent thereon; and hence the form of action is used to determine title.

But this would not have been the case in the older forms of action at the common law, the writ of right, above all, or the writ of entry *sur disseisin*, where the presumption of rightfulness of possession had no place.

[1] Elliott *v.* Kent, 7 M. & W. 312; where it was said that in such case presumption was conclusive.

[2] Hawkins *v.* County, 2 Allen, 251.

[3] Hodgdon *v.* Shannan, 44 N. H. 572; Durbrow *v.* McDonald, 5 Bosw. 130; Burke *v.* Hammond, 76 Penn. St. 172.

[4] Alexander's Succession, 18 La. An. 337.

[5] Asher *v.* Whitelock, Law Rep. 1 Q. B. 1; Clifton *v.* Lilley, 12 Tex. 130; White *v.* Cooper, 8 Jones (N. C.) L. 48. See Weston *v.* Higgins, 40 Me. 102. That a mere tortious possession, however, can be the basis from which a title by presumption may run, is elsewhere shown.

[6] Doe *v.* Dyehall, 3 C. & P. 610; M. & M. 346, *S. C.* See Doe *v.* Barnard, 13 Q. B. 945; Doe *v.* Cooke, 7 Biug. 346; 5 M. & P. 181, *S. C.* See, also, Brest *v.* Lever, 7 Mees. & Wels. 593.

[7] Linscott *v.* Trask, 35 Me. 150

sion with consent of the owner raises no presumption against such owner.[1]

But need not be so as to the whole period.

§ 1335. The circumstance that a constructive possession only has been maintained for at least part of the time does not remove the burden of proving title from a party claiming against a possession which for the rest of the time was absolute.[2]

Possession may infer title as to personalty.

§ 1336. What has been said as to realty applies necessarily to personalty.[3] A striking illustration of this principle is to be found in the rulings that ordinarily the possession of a negotiable promissory note, indorsed in blank, is such evidence of ownership as to sustain a suit.[4] The possession of negotiable paper under such circumstances, however, is not evidence of money lent,[5] nor can a loan be presumed from the handling of securities from one party to another, but rather the payment of a prior debt.[6] Property, also, is presumed to be in the consignee named in a bill of lading.[7]

So as to vessels.

Vessels are subject to the same presumption.[8] Possession, therefore, of a ship, under a bill of sale which is void for non-compliance with a registry statute, enables a plaintiff to support an action for trover against a stranger for converting a part of the ship.[9] In fine, it may be generally held that a mere naked possession, when on its face fair, will entitle a party to maintain trespass, or even trover, as against a wrong-doer.[10]

Dame *v.* Dame, 20 N. H. 28; Colvin *v.* Warford, 20 Md. 357; Field *v.* Brown, 24 Grat. 96; Sparks *v.* Rawls, 17 Ala. 211; Nieto *v.* Carpenter, 21 Cal. 455.

[1] Magee *v.* Scott, 9 Cush. 148; Nieto *v.* Carpenter, 21 Cal. 455.

[2] Glass *v.* Gilbert, 58 Penn. St. 266.

[3] Elliott *v.* Kemp, 7 M. & W. 312; Millay *v.* Butts, 35 Me. 139; Cambridge *v.* Lexington, 17 Pick. 222.

[4] Shepherd *v.* Currie, 1 Stark. 454; Alford *v.* Baker, 9 Wend. 323; Wickes *v.* Adirondack Co., 4 Thomp. & C. 250; Weidner *v.* Schweigart, 9 S. & R. 385; Zeigler *v.* Gray, 12 S. & R. 42; Union Canal *v.* Lloyd, 4 Watts & S. 393. See Crandall *v.* Schroeppel, 4 Thomp. & C. 78; 1 Hun, 557; Rubey *v.* Culbertson, 35 Iowa, 264; Penn *v.* Edwards, 50 Ala. 63. See fully for other cases, infra, §§ 1362, 1363.

[5] Fesenmayer *v.* Adcock, 16 M. & W. 449. See Gerding *v.* Walker, 29 Mo. 426.

[6] Aubert *v.* Wash, 4 Taunt. 293; Boswell *v.* Smith, 6 C. & P. 60. But see infra, § 1337.

[7] Lawrence *v.* Minturn, 17 How. 100.

[8] Stacy *v.* Graham, 3 Duer, 444; Bailey *v.* New World, 2 Cal. 370.

[8] Sutton *v.* Buck, 2 Taunt. 302.

[10] Jeffries *v.* Great West. Rail. Co., 5 E. & B. 802. See Sutton *v.* Buck, 2 Taunt. 309; Fitzpatrick *v.* Dunphey,

Possession, also, will be sufficient evidence of title in an action on a marine policy of insurance; and the fact of possession will sustain a recovery until the defendant produces conflicting evidence.[1]

§ 1337. Even though there be no ear-marks or links associating the holder with the document, such holder, by the fact of producing a document, presents *primâ facie* evidence for a jury in support of his claim.[2] We have an illustration of this in an English case, in which it was held that the production by a plaintiff of an I O U signed by the defendant, though not addressed to any one by name, is, in general, evidence of an account stated between the parties.[3] It was held, however, that such evidence may be rebutted by showing that the writing was not given in acknowledgment of a debt due.[4]

Mere holder of paper has this presumption.

§ 1338. Lord Plunkett, in a famous metaphor, has expressed a truth in this relation which has been frequently repeated by other courts, if not with the same felicity of expression, at least with equal emphasis. "If Time," said Lord Plunkett, in words afterwards adopted by Lord Brougham, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the lawgiver has placed an hour-glass, by which he metes out incessantly those portions of duration which render needless the evidence that he has swept away."[5] The weight to be attached to

Policy of the law is favorable to presumptions from lapse of time.

Irish L. R. 1 N. S. 366; Viner *v.* Baker, 53 Me. 923; Magee *v.* Scott, 9 Cush. 150.

[1] Robertson *v.* French, 4 East, 130, 137; Sutton *v.* Buck, 2 Taunt. 302. See Thomas *v.* Foyle, 5 Esp. 88, per Lord Ellenborough.

[2] Fesenmayer *v.* Adcock, 16 M. & W. 449, per Pollock, C. B.

[3] Fesenmayer *v.* Adcock, 16 M. & W. 449, qualifying Douglass *v.* Holme, 12 A. & E. 691; Curtis *v.* Rickards, 1 M. & Gr. 47; Jacobs *v.* Fisher, 1 C. B. 178; Wilson *v.* Wilson, 14 C. B. 606.

[4] Lemere *v.* Elliott, 30 L. J. Ex. 350; 6 H. & N. 656, *S. C.*; Croker *v.* Walsh, 2 Ir. Law Rep. (N. S.) 552; Wilson *v.* Wilson, 14 Com. B. 616, 626.

[5] See "Statesmen of the Time of George III.," by Ld. Brougham (3 ed.), p. 227, n. The above passage has been variously rendered in different publications. In the case of Malone *v.* O'Connor, Napier, Ch., cited it as follows; "Time, with the one hand, mows down the muniments of our titles; with the other, he metes out the portions of duration which render these muniments no longer necessary." Drury's Cas. in Ch. temp. Napier, 944. This version is probably more accurate than any other, as it was furnished to

presumptions of this class, as dispensers of security and enhancers of value, has been recognized by a series of eminent Pennsylvania judges. "Now, when we add to these considerations and precedents," says Agnew, C. J., in 1875, "the weight always attached to the lapse of time, in raising presumptions and quieting titles, as the means of maintaining peace, order, and harmony in the relations of civil society, there can be but one right conclusion in this case. The importance of such presumptions is stated with great emphasis and fulness of reference to authorities by Justice Kennedy, in Bellas *v.* Levan,[1] which he sums up in this conclusion: It is too obvious not to be seen and felt by every one how very important it is to the best interests of the state that titles to lands, instead of being weakened and impaired by lapse of time, should be strengthened, until they shall become incontrovertibly confirmed by it."[2] The presumptions which are thus favored, it should at the same time be remembered, apply only to such possession as gives title under the statute of limitations, or is so long and undisputed as to imply acquiescence on the part of, if not grants from, adverse interests.

the chancellor by one of the counsel in the *quare impedit*, on the trial of which Ld. Plunkett made use of the imagery in his address to the jury. Taylor's Evid. § 67. See, also, remarks in Whart. Crim. L. § 31 *a*; Whart. Cr. Pl. & Pr. § 316, and passage from Demosthenes there cited.

[1] 4 Watts, 294.

[2] "The application of this doctrine to chamber surveys," so the same opinion goes on to say, "is a striking example. Caul *v.* Spring, 2 Watts, 390; Oyster *v.* Bellas, Ibid. 397; Nieman *v.* Ward, 1 W. & S. 68. Justice Kennedy, in Bellas *v.* Levan, supra, says: 'Twenty years (now twenty-one) from the return of survey by the deputy into the surveyor-general's office were held (referring to Caul *v.* Spring) to be sufficient to raise an absolute and conclusive presumption that the survey was rightly made.' 'And that,' said C. J. Black, 'even where there was an unexecuted order of resurvey by the board of property,' referring to Collins *v.* Barclay, 7 Barr, 67. 'In short,' continued Judge Black, 'the courts of this state seem uniformly, and especially of late, to have refused to go back more than twenty-one years to settle any difficulties about the issue of warrants or patents, or the making or returning of surveys, or the payment of purchase-money to the commonwealth.' Stimpfler *v.* Roberts, 6 Harris, 299. On the subject of presumptions from lapse of time, see, also, Mock *v.* Astley, 13 S & R. 382; Goddard *v.* Gloninger, 5 Watts, 209; Nieman *v.* Ward, 1 W. & S. 68; Ormsby *v.* Ihmsen, 10 Casey, 462; McBarron *v.* Gilbert, 6 Wright, 279. In the case before us, the surveys of Gray were made and accepted thirty-three years before the issuing of John Bitler's warrant, and thirty-five years before the survey made upon it." Fritz *v.* Brandon, 78 Penn. St. 355.

§ 1339. It has been observed in a prior chapter,[1] that when system has been established, in connection with a litigated fact, the conditions of other members of the same system may be proved. It is to the same general principle that we may trace a presumption, often recognized, that the soil to the middle of a highway belongs to the owner of the adjoining land,[2] which land is necessary to the grant under which such owner takes. The presumption, however, may be rebutted by showing that the road and the adjoining land belonged to different proprietors;[3] or that there was an adverse proprietorship in a stranger.[4] But the use of a private right of way gives no presumption of ownership of the soil.[5]

Soil of highway presumed to belong to adjacent proprietor.

§ 1340. Another illustration of the same rule is to be found in an English decision, that where farms belonging to different owners and separated by a hedge and ditch, the hedge is presumed (so far as concerns the burden of proof) to belong to the owner of the land which does not contain the ditch.[6] On the other hand, it is argued that when partition walls are used in common by the owners of the houses or lands thus separated, it will be presumed, *primâ facie*, that the wall, and the land on which it stands, belong to them in equal moieties as tenants in common.[7] This presumption, however, yields to proof that the wall is built on land, parts of which were separately contributed by each proprietor.[8] A bank or boundary of earth, taken

So of hedges and walls.

[1] Supra, § 44.

[2] Doe *v.* Pearsay, 7 B. & C. 304; 9 D. & R. 908, *S. C.*; Steel *v.* Prickett, 2 Stark. R. 463, per Abbott, C. J.; Cooke *v.* Green, 11 Price, 736; Scoones *v.* Morrell, 1 Beav. 251; Simpson *v.* Dendy, 8 Com. B. (N. S.) 433; Berridge *v.* Ward, 10 Com. B. (N. S.) 400; R. *v.* Strand Board of Works, 4 B. & S. 526; 2 Smith's Lead. Cas. 5th Am. ed. 216; Harris *v.* Elliott, 10 Pet. 53; Morrow *v.* Willard, 30 Vt. 118; Newhall *v.* Ireson, 8 Cush. 595; Child *v.* Starr, 4 Hill, 369; Winter *v.* Peterson, 4 Zab. 527; Cox *v.* Freedly, 33 Penn. St. 124.

[3] Headlam *v.* Hedley, Holt N. P. R. 463.

[4] Doe *v.* Hampson, 4 C. B. 269.

[5] Smith *v.* Howden, 14 C. B. (N. S.) 398.

[6] Guy *v.* West, 2 Sel. N. P. 1296, per Bayley, J.

[7] Cubitt *v.* Porter, 8 B. C. 257; 2 M. & R. 267, *S. C.*; Wiltshire *v.* Sidford, 1 M. & R. 404; 8 B. & C. 259, n., *S. C.*; Washburn on Easements, ch. 4, § 3. See Doane *v.* Badger, 12 Mass. 65; Campbell *v.* Mesier, 4 Johns. Ch. 334.

[8] Matts *v.* Hawkins, 5 Taunt. 20; Murly *v.* McDermott, 8 A. & E. 138; 3 N. & P. 256.

from the adjacent soil, on the other hand, is presumed *pro tanto* to belong to the proprietor of the adjacent land.[1]

Soil under water presumed to belong to owner of land adjacent.

§ 1341. Unless there is an express limitation by way of boundary shown on the title of a party claiming, it is presumed that the soil of unnavigable rivers, *usque ad medium filum aquae*, together with the right of fishing,[2] but not the right of abridging the width or interfering with the course of the stream,[3] belongs to the owner of the adjacent land.[4] On the other hand, as to navigable rivers and arms of the sea, the soil *primâ facie* is vested in the sovereign and the fishing *primâ facie* is public.[5]

So of alluvion.

§ 1342. Alluvion is presumed to belong to the owner of the land upon which it is formed.[6] The same rule holds as to alluvion on the sea-shore; though it has been ruled that where the sea retreats suddenly, leaving uncovered a tract of land, the title to this tract belongs to the state.[7] It is scarcely necessary to add that presumptions in all cases of title of this class are controlled by the specific limitations of deeds.[8]

Tree presumed to belong to owner of soil.

§ 1343. A tree is presumed to belong to the owner of the land from which its trunk arises, though its roots extend into an adjacent estate.[9] When the tree grows on a boundary, it has been argued that the property in the tree is presumed to be in the owner of the land in which it was first sown or planted.[10] The weight of authority, however,

[1] Callis on Sewers, 4th ed. 74; D. of Newcastle *v.* Clark, 8 Taunt. 627, 628, per Park, J.

[2] See Marshall *v.* Nav. Co., 3 B. & S. 732.

[3] Bickett *v.* Morris, 1 Law Rep. H. L. Sc. 47.

[4] Carter *v.* Murcot, 4 Burr. 2163; Wishart *v.* Wyllie, 1 Macq. Sc. Cas. H. of L. 389; Lord *v.* Commiss. for City of Sydney, 12 Moo. P. C. R. 473; Crossley *v.* Lightowler, Law Rep. 3 Eq. 279; Law Rep. 2 Ch. Ap. 478, *S. C.*

[5] Carter *v.* Murcott, 4 Burr. 2163; Malcomson *v.* O'Dea, 10 H. of L. Cas. 593; 3 Washb. Real Prop. 56; Blundell *v.* Catterall, 5 B. & A. 293, 298.

[6] Banks *v.* Ogden, 2 Wall. 57; Saulet *v.* Shepherd, 4 Wall. 508; Granger *v.* Swart, 1 Woolw. 88; The Schools *v.* Risley, 10 Wall. 91; Deerfield *v.* Arms, 17 Pick. 41; Trustees *v.* Dickinson, 9 Cush. 544.

[7] Att'y-Gen. *v.* Chambers, 4 De G. & J. 55; Emans *v.* Turnbull, 2 Johns. 322; St. Clair *v.* Lovingston, 23 Wall. 47.

[8] See 3 Wash. on Real Prop. 4th ed. 420 *et seq.*

[9] Claflin *v.* Carpenter, 4 Met. 580; Hoffman *v.* Armstrong, 48 N. Y. 201.

[10] Holder *v.* Coates, M. & M. 112, per Littledale, J.; Masters *v.* Pollie, 2 Roll. R. 141. *Contra*, Waterman *v.* Soper, 1 Ld. Ray. 737; Anon. 2 Roll. R. 255.

in such case, is that the tree is owned in common by the landowners.[1]

So of minerals.

§ 1344. *Primâ facie*, the ownership of subjacent minerals is imputed to the owner of the surface.[2]

§ 1345. But this presumption readily yields to proof of a grant of the minerals to a stranger.[3] The rights, so it has been held, is one of the ordinary incidents of property in land, and is not founded on any presumption of a grant or an easement.[4]

Easements may be presumed from unity of grant.

§ 1346. A common system of title,[5] or a unity of grant, gives a *primâ facie* right, so it has been held, to the proprietor of an upper story to the support of a lower story; and, on the same principle, the owner of the lower story has a *primâ facie* claim to the shelter naturally afforded by the upper rooms.[6] When there are two adjoining closes, also, belonging to different owners, taking from a common vendor, the owner of the one has *primâ facie* a limited right[7] to the lateral support of the other.[8] The right, however, does not justify the imposition of an additional weight by the erection of new buildings.[9] And the right, either to support or drainage, may be sus-

[1] 1 Wash. on Real Prop. 12; Griffin *v.* Bixby, 12 N. H. 454; Skinner *v.* Wilder, 38 Vt. 45; Dubois *v.* Beaver, 25 N. Y. 115.

[2] Humphries *v.* Brogden, 12 Q. B. 739, 746; Smart *v.* Norton, 5 E. & B. 30; Harris *v.* Ryding, 5 M. & W. 60; Roberts *v.* Haines, 6 E. & B. 643; aff. in Ex. Ch., Haines *v.* Roberts, 7 E. & B. 625; Rowbotham *v.* Wilson, 6 E. & B. 593; 8 E. & B. 123, *S. C.* in Ex. Ch.; 8 H. of L. Cas. 348; Caledonian Rail. Co. *v.* Sprot, 2 Macq. Sc. Cas. H. of L. 449.

[3] Adams *v.* Briggs, 7 Cush. 366; Caldwell *v.* Fulton, 31 Penn. St. 478; Caldwell *v.* Copeland, 37 Penn. St. 427; Clement *v.* Youngman, 40 Penn. St. 341; Armstrong *v.* Caldwell, 53 Penn. St. 287. See Yale's Title to California Lands.

[4] Backhouse *v.* Bonomi, 9 H. of L. Cas. 503. Also, Wakefield *v.* Buccleuch, Law Rep. 4 Eq. 613, per Malins, V. C.; Taylor's Ev. § 106.

[5] Supra, § 44.

[6] Humphries *v.* Brogden, 12 Q. B. 747, 756, 757; Caledonian Ry. Co. *v.* Sprot, 2 Macq. Sc. Cas. H. of L. 449. See Foley *v.* Wyeth, 2 Allen, 131; Lasala *v.* Holbrook, 4 Paige, 169; McGuire *v.* Grant, 1 Dutch. (N. J.) 356.

[7] See Smith *v.* Thackeray, Law Rep. 1 C. P. 564; 1 H. & R. 615, *S. C.* As to these limits, see Thurston *v.* Hancock, 12 Mass. 226.

[8] 2 Roll. Abr. 564, Trespass, J., pl. 1; Taylor's Ev. § 106.

[9] Murchie *v.* Black, 34 L. J. C. P. 337; Farrand *v.* Marshall, 21 Barb. 409. As to right of support based on twenty years' possession, see Wyatt *v.* Harrison, 3 B. & Ad. 871; Hide *v.* Thornhorough, 2 C. & Kir. 250; Partridge *v.* Scott, 3 M. & W. 220; Humphries *v.* Brogden, 12 Q. B. 748–750; Richart *v.* Scott, 7 Watts, 460.

tained when both proprietors take the property as it stands from a common grantor.[1] It has, however, been held by Lord Westbury, where a dock and a wharf belonging to A. were so situated that the bowsprits of vessels in the dock for many years projected over a part of the wharf, and where A. subsequently granted the wharf to B., the law would not imply a reservation in favor of the vendor of the right for the bowsprits to project over the wharf as before.[2]

Where title substantially good exists, and there is long possession, missing links will be presumed.

§ 1347. Where a title, good in substance, is held, and where adverse to the parties against whom the presumption is invoked, there is undisputed possession, consistent with such title, for twenty years, or for a period which other circumstances make equivalent to twenty years, missing links, of a formal character, may be presumed (as a presumption of fact, based on all the circumstances of the case) against adverse parties who, when competent to dispute such possession, have acquiesced in it.[3]

[1] See Murchie *v.* Black, 34 L. J. C. P. 337; Washburne on Easements, 556; Richards *v.* Rose, 9 Ex. R. 218; U. S. *v.* Appleton, 1 Sumn. 492; Partridge *v.* Gilbert, 15 N. Y. 601. Cf. Solomon *v.* Vintners' Co., 4 H. & N. 585; Pyer *v.* Carter, 1 Hurl. & Nor. 916; Hall *v.* Lund, 32 L. J. Exch. 113. See, however, as greatly qualifying this conclusion, Suffield *v.* Brown, 3 New R. 343; Carbery *v.* Willis, 7 Allen, 369; Randell *v.* McLaughlin, 10 Allen, 366; Butterworth *v.* Crawford, 46 N. Y. 349.

[2] Suffield *v.* Brown, 9 L. T. N. S. 627; 33 L. J. Ch. 249; *S. C.* per Ld. Westbury, Ch., reversing a decision of Romilly, M. R., 2 New R. 378; Taylor's Ev. § 106. As dissenting from Lord Westbury's reasoning, however, we may notice the argument of the court in Pyer *v.* Carter, *ut supra*, and the conclusions in Huttemeier *v.* Albro, 18 N. Y. 52; and McCarty *v.* Kitchenmann, 47 Penn. St. 243. See, also, Leonard *v.* Leonard, 7 Allen, 283; but see, as according with the principle of Suffield *v.* Brown, Randall *v.* McLaughlin, 10 Allen, 366.

[3] See Best's Evidence, § 392; Johnson *v.* Barnes, L. R. 7 C. P. 593; *S. C.* L. R. 8 C. P. 527; Hammond *v.* Cooke, 6 Bing. 174; Attorney-Gen. *v.* Hospital, 17 Beav. 435; Angus *v.* Dalton, L. R. 4 Q. B. D. 162; Burr *v.* Galloway, 1 McLean, 496; Clements *v.* Macheboeuf, 92 U. S. 418; Hill *v.* Lord, 48 Me. 83; Brattle *v.* Bullard, 2 Met. 363; Valentine *v.* Piper, 22 Pick. 85; White *v.* Loring, 24 Pick. 319; Jackson *v.* McCall, 10 Johns. 377; Cuttle *v.* Brockway, 24 Penn. St. 145; Earley *v.* Euwer, 102 Penn. St. 338; Cheney *v.* Walkins, 2 Har. & J. 96; Coulson *v.* Wells, 21 La. An. 383; Paschall *v.* Dangerfield, 37 Tex. 273. See, as indicating limits of this rule, Hanson *v.* Eustace, 2 How. 653; Nichol *v.* McCalister, 52 Ind. 586; and see, for specifications, infra, § 1352. That a dedication of a highway may be thus presumed, subject to the reservations which usage establishes, see Mercer *v.* Woodgate, 10 B. & S. 833; Arnold *v.* Holbrook, L. R. 8 Q. B. 96.

§ 1348. When there has been continued possession, of the character stated, the court will presume a grant or letter patent from the sovereign, as initiating such possession.[1] Hence, in England, charters, and even acts of Parliament, have been thus presumed, after long possession accompanied by uncontested acts of ownership;[2] and in several American states (*e. g.*, Pennsylvania) an analogous limitation is adopted by statute. But a grant of public lands will not be presumed from uninterrupted possession of only ten years;[3] nor will this presumption be made in behalf of a party with whose case the presumption is inconsistent.[4]

Grant from sovereign will be so presumed.

§ 1349. By the English common law, if a party, and those under whom he claims, have enjoyed from time immemorial estates the subject of grant, the presumption that a grant has been made is irrebuttable, and the right is held to be valid. But, as it is impossible to prove enjoyment from time immemorial, a definite period of uninterrupted possession (*e. g.*, twenty years as a minimum)[5]

Grant of incorporeal hereditament presumed after twenty years.

[1] Lopez *v.* Andrews, 3 M. & R. 329; Mayor *v.* Horner, Cowp. 102; Reed *v.* Brookman, 3 T. R. 158; Attorney-General *v.* Dean of Windsor, 24 Beav. 679; Devine *v.* Wilson, 10 Moore P. C. R. 527; O'Neill *v.* Allen, 9 Ir. Law N. S. 132; Healey *v.* Thurm, L. R. 4 C. L. 495; Reed *v.* Brookman, 3 T. R. 158; Pickering *v.* Stamford, 2 Ves. Jun. 583; Townsend *v.* Downer, 32 Vt. 183; Emans *v.* Turnbull, 2 Johns. R. 313; Jackson *v.* McCall, 10 Johns. R. 377; Mather *v.* Trinity Ch., 3 S. & R. 509; Cuttle *v.* Brockway, 24 Penn. St. 145; Williams *v.* Donell, 2 Head. 695; Rooker *v.* Perkins, 14 Wis. 79; Davis *v.* Bowmar, 55 Miss. 673; Beatty *v.* Michon, 9 La. An. 102; Hogans *v.* Carrutch, 19 Fla. 84; Grimes *v.* Bastrop, 26 Tex. 310.

"Thus, 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." Greenl. Ev. § 45, citing among other cases Roe *v.* Ireland, 11 East, 289; Doe *v.* Wilson, 10 Mood. P. C. 502; Mayor *v.* Warren, 5 Q. B. 773; Jackson *v.* McCall, 10 Johns. 37. See Carter *v.* Fishing Co., 77 Penn. St. 310; State *v.* Wright, 41 N. J. L. 478, 556.

[2] Delarue *v.* Church, 2 L. J. Ch. 113; Little *v.* Wingfield, 11 Ir. Law R. N. S. 63; Roe *v.* Ireland, 11 East, 280; Goodtitle *v.* Baldwin, 1bid. 488; Attor.-Gen. *v.* Ewelme Hospital, 17 Beav. 366; and see Johnson *v.* Barnes, L. R. 7 C. P. 593; *S. C.* L. R. 8 C. P. 527.

[3] Walker *v.* Hanks, 27 Tex. 535; Biencourt *v.* Parker, 27 Tex. 558.

[4] Sulphen *v.* Norris, 44 Tex. 204.

[5] Bailey *v.* Appleyard, 3 N. & P. 257.

was considered by the courts as a basis from which prior indefinite possession might be presumed by the jury. Subsequently, this rule was extended by presuming the existence, not of an ancient, but of a modern grant, from the proof of user, as of right, for twenty years.[1] By Lord Tenterden's Act,[2] thirty years' uninterrupted enjoyment to rights of common or profits *à prendre* gives a *primâ facie* title, and sixty years' adverse possession an absolute title. The limits as to rights of way, easements, and water-courses are reduced to twenty and forty years respectively.[3] Prior to Lord Tenterden's Act, "it became a usual mode of claiming title to an incorporeal hereditament" (for it is to incorporeal hereditaments alone that title by prescription applies at common law) "to allege a feigned grant, within the time of legal memory, from some owner of the land or other person capable of making such grant, to some tenant or person capable of receiving it, setting forth the names of the supposed parties to the document, with the excuse of profert that the document had been lost by time or accident. On a traverse of the grant, proof of uninterrupted enjoyment for twenty years was held cogent proof of its existence; and this was termed making title by non-existing grant."[4] The same presumption, as to the grant of an incorporeal hereditament, based on enjoyment for twenty years, has been sustained in this country.[5] But there must be an exclu-

[1] See Reed *v.* Brookman, 3 T. R. 151; Angus *v.* Dalton, L. R. 4 Q. B. D. 162; Lon. Law Mag. May, 1879.

[2] 2 & 3 Will. 4, c. 71.

[3] For cases construing this statute, see Lowe *v.* Carpenter, 6 Exch. 825; Warburton *v.* Parke, 2 H. & N. 64; Blewett *v.* Tregonning, 3 A. & E. 554; Wilkinson *v.* Proud, 11 M. & W. 33; Cooper *v.* Hubbuck, 12 C. B. (N. S.) 456; Shuttleworth *v.* Le Fleming, 19 C. B. (N. S.) 687.

[4] Best's Evidence, § 377.

[5] Tudor's Leading Cases, 114; Washburn on Easements, 3d ed. 110; 2 Washb. Real Prop. (4th ed.) 319; Ricard *v.* Williams, 7 Wheat. 109; Farrar *v.* Merrill, 1 Greenl. 17; Bullen *v.* Runnels, 2 N. H. 255; Valentine *v.* Piper, 22 Pick. 93; Melvin *v.* Locks, 17 Pick. 255; Brattle St. Ch. *v.* Mullard, 2 Met. 363; Sibley *v.* Ellis, 11 Gray, 417; Ingraham *v.* Hutchinson, 2 Conn. 584; Emans *v.* Turnbull, 2 Johns. R. 313; Benbow *v.* Robbins, 71 N. C. 338; Hall *v.* McLeod, 2 Metc. (Ky.) 98. See Glass *v.* Gilbert, 58 Penn. St. 266; McCarty *v.* McCarty, 2 Strobh. 6.

In Pennsylvania, while it is doubted whether a legal prescription is recognized (Rogers, J., Reed *v.* Goodyear, 17 S. & R. 352), yet the presumption stated in the text, as to incorporeal hereditaments, is established. Ibid., citing Tilghman, C. J., in Kingston *v.* Leslie, 18 S. & R. 383; and approved in 1875, by Agnew, C. J., in Carter *v.* Tinicum Fishing Co., 77 Penn. St. 315; quoted infra, § 1352.

sive enjoyment for twenty years to sustain such presumption; and the presumption may be rebutted by proof of lack of such enjoyment.[1] Thus, a general usage (*e. g.*, that of leaving lumber on a river bank), when not accompanied by claim of title and exclusive occupation, gives no foundation to the presumption of a grant.[2] But, on the other hand, a right to an easement may be inferred from long lapse of uninterrupted enjoyment, irrespective of the question of statute of limitations.[3]

Fisheries are hereafter specifically considered.[4]

§ 1350. It should be remembered that the grant, to be presumed against the owner of the inheritance, must have been with *his* acquiescence: acquiescence by a tenant for life, or other subordinate party, will not be enough to incumber the fee.[5] To this acquiescence, a knowledge of the easement is essential. If there be no such knowledge (*e. g.*, where water percolates through undefined subterranean passages), no length of time can establish

Acquiescence must have been by owner of inheritance and with knowledge of the facts.

[1] Livett *v.* Wilson, 3 Bing. 115; Dawson *v.* Norfolk, 1 Price, 246; Hurst *v.* McNeil, 1 Wash. C. C. 70; Rowell *v.* Montville, 4 Greenl. 270; Nichols *v.* Gates, 1 Conn. 318; Brant *v.* Ogden, 1 Johns. R. 156; Palmer *v.* Hicks, 6 Johns. R. 133; Irwin *v.* Fowler, 5 Robt. (N. Y.) 482; Burke *v.* Hammond, 76 Penn. St. 179; Field *v.* Brown, 24 Grat. 74; Best's Ev. § 378.

The time, it should be noticed, varies with local law. "In Connecticut it is fifteen years, in analogy to its statute of limitations. Sherwood *v.* Burr, 4 Day, 244–249. In Pennsylvania, twenty-one years. Strickler *v.* Todd, 10 S. & R. 63, and cases cited infra. In Massachusetts, twenty years. Sargent *v.* Ballard, 9 Pick. 251, 254." 2 Washb. Real Prop. 4th ed. 319.

As to presumptive rights to fences, in Maine, see Harlow *v.* Stinson, 60 Me. 349.

Where a fishing mill-dam built more than 110 years before 1861, in the river Derwent, in Cumberland (the river at the place not being navigable), was used more than sixty years before 1861, in the manner in which it was used in 1861, a presumption was held to exist of a grant from the proprietors of adjacent lands whose rights were thereby affected. Leconfield *v.* Lonsdale, L. R. 5 C. P. 657.

[2] Bethum *v.* Turner, 1 Greenl. 111; Tickham *v.* Arnold, 3 Greenl. 120.

[3] Munroe *v.* Gates, 48 Me. 463; Atty.-Gen. *v.* Proprietors, 3 Gray, 62; Edson *v.* Munsell, 10 Allen, 557; Nichols *v.* Boston, 78 Mass. 39; Briggs *v.* Prosser, 14 Wend. 227. See Kingston *v.* Leslie, 13 S. & R. 383. Infra, § 1351.

[4] Infra, § 1352.

[5] Best's Ev. § 379, citing 2 Wms. Saund. 175; and see Wood *v.* Veal, 5 Barn. & Ald. 454; Daniel *v.* North, 11 East, 372; Ricard *v.* Williams, 7 Wheat. 59; Cooper *v.* Smith, 9 S. & R. 26; Edson *v.* Munsell, 10 Allen, 568; Stevens *v.* Taft, 11 Gray, 33; Smith *v.* Miller, 11 Gray, 148; Coalter *v.* Hunter, 4 Rand. 58; Nichols *v.* Aylor, 7 Leigh, 546; Biddle *v.* Ash, 2 Ashm. 211. Supra, § 1161.

acquiescence.[1] But the acquiescence of the owner may be established inferentially.[2] Thus, after the evidence was given of user by the public of an alleged public way for nearly seventy years, during the whole of which period the land had been on lease, it was held that from these facts the jury were at liberty to infer a dedication to the public use by the owner of the inheritance.[3]

Such presumption may amount to an estoppel.

It need scarcely be added that the presumption of title to an easement merely from twenty years' possession is only *prima facie*, and may be rebutted.[4] When, however, it appears that this enjoyment has for the period in question been acquiesced in by the owner of the inheritance, this may estop him from disputing the right to the easement; and in such case the presumption may be treated as irrebuttable,—not because it is technically a *praesumtio juris et de jure*, but because a party is not permitted, after inducing by his acquiescence another to alter his position, to ignore the rights which such other has thereby acquired. "It may," also, "be stated as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement, a stream of water, for instance, in a particular way, for more than twenty-one, or twenty, or such other period of years as answers to the local period of limitation, it affords conclusive presumption of right in the party who shall have enjoyed it, provided such use and enjoyment be not by authority of law, or by or under some agreement between the owner of the inheritance and the party who shall have enjoyed it."[5]

[1] Chasemore *v.* Richards, 7 H. of L. Cas. 349. See Reath *v.* Driscoll, 20 Conn. 533.

[2] Gray *v.* Bond, 2 B. & B. 667. See Wheatley *v.* Baugh, 12 Ohio St. 294.

[3] Winterbottom *v.* Derby, L. R. 2 Ex. 316.

[4] Livett *v.* Wilson, 3 Bing. 115; Campbell *v.* Wilson, 3 East, 294; Bethnm *v.* Turner, 1 Greenl. 111; Tyler *v.* Wilkinson, 4 Mason, 397; Sargent *v.* Ballard, 9 Pick. 251; Corning *v.* Gould, 16 Wend. 531; Cooper *v.* Smith, 9 S. & R. 26; Wilson *v.* Wilson, 4 Dev. 154; Ingraham *v.* Hough, 1 Jones (N. C.), 39; Lamb *v.* Crossland, 4 Rich. 536. And see supra, §§ 1087 *et seq.*

[5] Washburne on Easements, 3d ed. 114, citing Strickler *v.* Todd, 10 S. & R. 63; Olney *v.* Fenner, 2 R. I. 211; Pillsbury *v.* Moore, 44 Me. 154; Belknap *v.* Trimble, 3 Paige, 517; Townshend *v.* McDonald, 2 Kern. 381; Hazard *v.* Robinson, 3 Mason, 272; Wilson *v.* Wilson, 4 Dev. (N. C.) 154; Gayetty *v.* Bethune, 14 Mass. 51; Parker *v.* Foote, 19 Wend. 309; Corning *v.* Gould, 16 Wend. 531; Hall *v.* McLeod, 2 Metc. (Ky.) 98; Wallace *v.* Fletcher, 10 Foster, 434; Winnipiseogee Co. *v.* Young, 40 N. H. 420; Tracy *v.* Atherton, 36 Vt. 512; Burnham *v.* Kempton, 44 N. H. 88. See Leconfield *v.* Lonsdale, L. R. 5 C. P. 657; and see opinion of Ag-

§ 1351. It must be repeated that a possession for less than twenty years can be helped out by proof of other circumstances, so as to enable a grant to be presumed.[1] The presumption in such case is one of fact for the jury, under the instructions of the court.[2] And among the circumstances which will sustain such a presumption, as has been seen, is to be considered such acquiescence by adverse interests as approaches an estoppel.[3]

Acquiescence for less than twenty years may, with other circumstances, infer a grant.

§ 1352. Intermediate deeds of conveyance of interests in freehold may, on like principles, be inferred in cases where there has been quiet possession for at least twenty years,[4]

Presumption as to

new, C. J., in Carter *v.* Tinicum Fishing Co., 77 Penn. St. 315, quoted infra, § 1352.

Duncan, J., in Strickler *v.* Todd, 10 S. & R. 63, speaks of an "uninterrupted exclusive enjoyment above twenty-one years" of a water privilege as affording a "*conclusive* presumption;" but this must be understood, in order to reconcile the case with other Pennsylvania rulings, to mean "conclusive *proof* of prescription."

[1] See supra, §§ 1347, 1348; and see Bright *v.* Walker, 1 C., M. & R. 222, 223, per Parke, B.; Stamford *v.* Dunbar, 13 M. & W. 822, 827; Lowe *v.* Carpenter, 6 Ex. R. 830, 831, per Parke, B.; Taylor, § 111.

[2] Doe *v.* Cleveland, 9 B. & C. 844; Doe *v.* Davies, 2 M. & W. 503; Carter *v.* Tinicum Fishing Co., 77 Penn. St. 310.

[3] Doe *v.* Helder, 3 B. & Ald. 790; Kingston *v.* Leslie, 10 S. & R. 383; Foulk *v.* Brown, 2 Watts, 214.

[4] See supra, § 1347; Knight *v.* Adamson, 2 Freem. 106; Wilson *v.* Allen, 1 Jac. & W. 611; Tenny *v.* Jones, 3 M. & Scott, 472; Cooke *v.* Soltan, 2 S. & St. 154; Farrer *v.* Merrill, 1 Greenl. 17; Stockbridge *v.* West Stockbridge, 14 Mass. 257; Com. *v.* Low, 3 Pick. 408; Melvin *v.* Locks, 17 Pick. 255; White *v.* Loring, 24 Pick. 319; Ryder *v.* Hathaway, 21 Pick. 298; Brattle *v.* Bullard, 2 Met. 363; Attorney-General *v.* Meeting-house, 3 Gray, 1, 62; Jackson *v.* Murray, 7 Johns. R. 5; Livingston *v.* Livingston, 4 Johns. Ch. 287; Burke *v.* Hammond, 76 Penn. St. 179; Cheney *v.* Walkins, 2 Har. & J. 96; Jefferson Co. *v.* Ferguson, 13 Ill. 33; Riddlehoner *v.* Kinard, 1 Hill (S. C.) Ch. 376; Nixon *v.* Car Co., 28 Miss. 414; Newman *v.* Studley, 5 Mo. 291; McNair *v.* Hunt, 5 Mo. 300.

"The general statement of the doctrine, as we have seen from the authorities cited, is that the presumption of a grant is indulged merely to quiet a long possession, which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given at the time of the acquisition of the property by him, or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect. And hence, as a general rule, it is only when the possession has been actual, open, and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land, that the presumption of a deed can be involved." Fletcher *v.* Fuller, 120 U. S. 551, Field, J.

intermediate deeds and other procedure.

or when after long-continued possession there is conduct equivalent to an estoppel, which may be imputed to the party from whom the deed is presumed.[1] In such case

[1] See Doe *v.* Hilder, 3 B. & A. 790; Cottrell *v.* Hughes, 15 C. B. 532.

In a case decided in 1875, in Pennsylvania, it was shown that Sanderlin held title to a fishery in 1748, and that in 1754 the fishery, on proceedings in partition, was adjudged to "the representatives of Mary (his daughter), late wife of James," subject to a groundrent, the whole estate being divided into five shares. Elizabeth and others, reciting that they were heirs of "James, who was an heir of Sanderlin," conveyed in 1805 to Carter; the deed also recited the proceedings in partition; also prior deeds reciting the partition, and that the grantors were heirs of other heirs of Sanderlin, and conveying to Carter their interest in two-fifths of the fishery. There was no other evidence of the pedigree of the grantors, nor of any claim by the descendants of Sanderlin for the fishery. This was held sufficient to raise a presumption of a grant, to make a good title to Carter of the fishery. Carter *v.* Tinicum Fishing Co., 77 Penn. St. 310.

In this case we have from Agnew, C. J., the following valuable summary of the Pennsylvania cases:—

"Presumptions arising from great lapse of time and non-claim are admitted sources of evidence, which a court is bound to submit to a jury, as the foundation of title by conveyances long since lost or destroyed.

"This is stated by C. J. Tilghman, in Kingston *v.* Leslie, 10 S. & R. 383. There the absence of all claim for years, on the part of a female branch of a family, represented by Honorie Herman, at an early day was held to constitute a ground to presume that her title had been vested in the male branch. Judge Tilghman remarked: 'I do not know that there is any positive rule defining the time necessary to create a presumption of a conveyance. In the case of easements and other incorporeal hereditaments, which do not admit of actual possession, the period required by law for a bar of the statute of limitations is usually esteemed sufficient ground for a presumption.' This doctrine of lapse of time is discussed at large by Justice Rogers, in Reed *v.* Goodyear, 17 S. & R. 352, 353. 'The courts of law,' he remarks, 'pay especial attention to rights acquired by length of time. Although it has been doubted (he says) whether a legal presumption exists in Pennsylvania, yet the doctrine of presumption prevails in many instances.' He quotes and approves the language of Chief Justice Tilghman, in Kingston *v.* Leslie, in relation to presumptions in the case of easements and incorporeal hereditaments, and adds: 'The rational ground for a presumption is where, from the conduct of the party, you must suppose an abandonment of his right.' Among the cases he cites is one directly applicable to a fishery: 'So a plaintiff had forty years' possession of a piscary; the court decreed the defendants to surrender and release their title to the same, though the surrender made by the defendant's ancestor was defective;' Penrose *v.* Trelawney, cited in Vernon, 196. Justice Sergeant said, in Foulk *v.* Brown, 2 Watts, 214, 215, 'The court will not encourage the laches and indolence of parties, but will presume, after a great length of time, some composition or release to have been made; this length of time does not operate as a positive bar, but

possession will justify the presumption, provided it be exclusive and continuous.[1] Hence it has been held in England, that where

as furnishing evidence that the demand has been satisfied. But it is evidence from which, when not rebutted, the jury is bound to draw a conclusion, though the court cannot.' Again he says: 'The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors.' Acts of ownership over incorporeal hereditaments, corresponding to the possession of corporeal, are deemed a foundation for a presumption. 'The execution of a deed,' says Gibson, C. J., 'is presumed from possession in conformity to it for thirty years; and why the entire existence of a deed should not be presumed from acts of ownership for the same period, which are equivalent to possession, it would not be easy to determine.' Taylor *v.* Dougherty, 1 W. & S. 327. And said Black, C. J., in Garrett *v.* Jackson, 8 Harris, 335: 'But where one uses an easement whenever he sees fit, without asking leave and without objection, it is adverse, and an uninterrupted adverse enjoyment for twenty-one years is a title which cannot be afterwards disputed. Such enjoyment, without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant.' This is repeated by Justice Woodward, in Pierce *v.* Cloud, 6 Wright, 102–114. See his remarks also in Fox *v.* Thompson, 7 Casey, 174, that links in title are supplied by long and unquestioned assertion of title. The same principles are repeated by the late C. J. Thompson, in Warner *v.* Henby, 12 Wright, 190. The necessity of relaxing the rules of evidence in matters of ancient date was shown in Richards *v.* Elwell, 12 Wright, 361, a case of parol bargain and sale of land, and possession for forty years. The court below held the party to the same strictness of proof required in a recent case. It was there said by this court: 'If the rule which requires proof to bring the parties face to face and to hear them make the bargain, or repeat it, and to state all its terms with precision and satisfaction, is not to be relaxed after the lapse of forty years, when shall it be? It is contrary to the presumptions raised in all other cases,—presumptions which are used to cut off and destroy rights and titles founded upon records, deeds, wills, and the most solemn acts of men. Based upon a time much shorter, we have the presumptions of a deed, grant, release, payment, survey, abandonment, and the like.' And again: 'There is a time when the rules of evidence must be relaxed. We cannot summon witnesses from the grave, rake memory from its ashes, or give freshness and vigor to the dull and torpid brain.' The same principles are held in the following cases: Turner *v.* Waterson, 4 W. & S. 171; Hastings *v.* Wagner, 7 Ibid. 215; Brock *v.* Savage, 10 Wright, 83." Agnew, C. J., Carter *v.* Tinicum Fishing Co., 77 Penn. St.

[1] Doe *v.* Gardiner, 12 C. B. 319; Burke *v.* Hammond, 76 Penn. St. 179.

the plaintiff's title rests on feoffment, and he shows that he has had uninterrupted enjoyment of the premises for twenty years, without

315. See, also, to same effect, Brown *v.* Day, 78 Penn. St. 129.

As to fisheries, see further, Leconfield *v.* Lonsdale, L. R. 5 C. P. 657; cited supra, §§ 1349, 1350.

For the following note I am indebted to my brother, the late Henry Wharton.

Ownership or title to land is really not a fact, but a conclusion of law from a series of facts. The existence of any one of these, it is true, is a matter of proof by the person who is obliged to assert it, as in any other case; but the result of the whole is a legal right. Besides this, not merely the nature of the proof of the facts from which such title is deduced, but, owing to the varied forms of action in which it is tried, the person by whom the proof is to be made, must be considered.

It follows from this that it is not proper to speak, in an absolute sense, of presumptions of title. At least in England, and those of the United States who still follow the traditions of the feudal system, all land in the first instance belongs to the sovereign, and his rights cannot be affected by lapse of time or mere adverse claim; a grant from him must be positively shown, unless under very peculiar circumstances. In Pennsylvania this was once carried so far that no one could recover in ejectment without showing title out of the commonwealth, though he might not be able to connect that title with his own. This, however, was qualified as to long-settled parts of the state, by later decisions, see Smith *v.* Townshend, 32 Penn. St. 434, and is now remedied by statute.

It follows, therefore, that there can be no legal presumption of ownership as such. Nor as a presumption of fact has it any existence. When a man is seen to enter a house with a pass-key, there is a presumption in favor of the rightfulness of the act; but standing alone it would give rise to a very faint inference of title, because he might be but a tenant, a lodger, or a member of the owner's family. The same may be said in regard to a man ploughing a field, or gathering fruit, or any other such isolated act. No abstract conclusion is warranted by incidents like these; it is only when repeated so often, under such circumstances, and with such apparent exclusion of the rights of others, as to fall under the legal definition of possession, that there is any room for presumptions; but even then it must appear that, according to the common experience of men at the particular time and place, possession is most usually associated with ownership. Such is the case in the newer parts of this country, where agricultural tenancy is exceptional: and so it would be in France. But in certain counties of England and Ireland, and also in parts of India, the probability would be the other way. The weight to be given to possession must vary, therefore, with the circumstances, and it can seldom, without other explanatory facts, justify a peremptory conclusion. Indeed, when the effect of possession is considered in the abstract, without regard to the form of the action in which it is presented, it will in general, if not always, be found, that the presumption which is derived from it is confined to some alleged fact, which is merely a link in the chain of title: as where a man enters claiming under a deed and remains in exclusive possession for many years, this raises a presumption—not of ownership—but of the former existence of

molestation from the feoffer, the jury will be entitled to presume, in his favor, that the necessary formalities of a livery of seisin took

the deed, which may or may not suffice to complete the chain.

The true doctrine on this subject is laid down by Tindal, Ch. J., in Doe *v.* Cooke, 6 Bing. 179: "No case can be put 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* to make it complete in point of form. In such cases, where the possession has been shown to be consistent with the fact directed to be presumed, and in such cases only, has it ever been allowed." And to the same effect are Doe *v.* Reed, 5 B. & A. 236; Doe *v.* Waterton, 3 B. & A. 149. In Pennsylvania, before the Statute of 1855, it was held that in the case of a perpetual rent no presumption of a release or extinguishment of the rent could be made upon the mere fact of its nonpayment for any period of years. St. Mary's Church *v.* Miles, 1 Whart. 229.

The case of easements is somewhat different. In regard to ways, watercourses, fisheries, or the like, an uninterrupted user is a constant and conspicuous interference with the exclusive right of the owner of the soil, and not ordinarily justifiable on any theory of tenancy or subordinate title. Hence the user being *primâ facie* inconsistent with the owner's right, and from its nature not concealed from him, it is held that the court may direct the jury to presume some previous grant, because unlawfulness cannot be presumed, and the only way by which at law an incorporeal hereditament can be created is by a grant under seal. In truth, it is the extremely artificial nature of this presumption that has created the difficulty which judges and juries often have felt in regard to it. If the modern doctrine of license, which is the more rational explanation of such special rights, had been earlier introduced, it would have saved much trouble, for juries would then have had their attention called to the question whether the license was revocable or not, an element of which would be the consideration given. At any rate in England the Prescription Act of William IV. has put an end to what was, in theory at least, a very unsatisfactory state of the law, by substituting an actual statute of limitations in its stead.

Now, passing from these general observations, the occasions on which the presumption of the existence of a fact essential to title is made are obviously in *actions*:—

I. Between the real owner and the possessor of the land.

II. Between a former possessor of the land and one in actual possession.

III. Between vendor and purchaser.

I. As a general rule, nothing but some statute of limitations can prevent the holder of the legal title from recovering at law: no mere possession different from or of less duration than that which is requisite under the statute creates any presumption of title. The difference at common law between the writs of right and of entry, and the action of ejectment, is familiar. The latter is based on a right of possession, and a consequent right of entry on the land. The writ of entry was based on an actual previous seisin, and a consequent right of entry. The writ of right was based on title alone. Formerly in England the periods of limitation in respect to each of these actions was different. In many of the

place.[1] So as we have seen, under similar conditions, the formalities of deeds will be presumed to have been duly executed, when this does not contradict the deeds themselves.[2]

United States, as in Pennsylvania, the distinction has vanished, and the same period of time is applicable where the suit is based on possession alone, or where on title, or where on both. But this has not produced any effect on the rules at common law as applied to actions of ejectment; for instance, that the defendant must have had actual, open, notorious, continuous, and adverse possession during the statutory period upon some color of right, otherwise the right of entry is not taken away. There may be reason for the interference of a court of equity, on special grounds, but at law the true owner must recover unless barred by the statute. In the case of a vacant lot of ground, for instance, the true owner will always recover, no matter how remote the origin of his title, and no matter under what number of mesne conveyances the defendant claims. De Haven *v.* Landell, 31 Penn. St. 120.

The case as between tenants in common is not an exception to this, though it is sometimes spoken of as that of presumption of grant or release. The truth is, that the statute does not run as between tenants in common, because each has a right of entry. But where there has been an exclusive and hostile perception of the whole profits of the land for more than the statutory period, there the jury can justly be told to presume a turning out, or assumption of adverse ownership, on some ground bad or good. The only difference is, that this presumption would require a stronger state of facts than as between strangers. Indeed, the shortest way of expressing this is, that with tenants in common, as with tenants for years, there is a preliminary presumption that possession remains consistent with its origin till the contrary is proved; and this must be shown by acts and conduct inconsistent with that presumption.

II. When the suit is by a former possessor for a disturbance of his possession, the question is complicated in a double way: by the form of action, and by the character of the possession. As to the form of action, where there has been a mere temporary disturbance of possession, for which trespass is the remedy, very little needs to be said in the first instance. If the plaintiff has acquired possession, however wrongfully, he can recover damages for an interference therewith by a mere intruder, who cannot use the want of title of his adversary as a shield. This is the rule in all civilized jurisprudence. In Rome, indeed, there was a special interdict to protect possession even against the rightful owner. In England, and in many of the United States, however, while the exercise of force in recovering possession is a criminal offence, it is not a ground for civil remedies: Buring *v.* Reed, 11 Q. B. 904; Harvey *v.* Brydges, 14 M. & W. 437; 1 Exch. 117; Overdeer *v.* Lewis, 1 W. & S. 90; Rich *v.* Keyser, 54 Penn. St. 86 (except when there is personal injury); and, therefore, to an

[1] Rees *v.* Lloyd, Wightw. 123; Doe *v.* Cleveland, 9 B. & C. 864; 4 M. & R. 666, *S. C.*; Doe *v.* Davis, 2 M. & W. 503; Doe *v.* Gardiner, 12 Com. B. 319.

[2] Supra, § 1313.

The doctrine of presumption in such cases is ably discussed in the London Law Magazine for May, 1859, p. 281.

§ 1353. On the principle, and with the limitations just stated, the courts have held that after a long-extended continuous possession, acquiesced in by parties capable of contesting such possession, juries may rightfully presume

Instances of links of title so supplied.

action of trespass, a plea of title, or *liberum tenementum*, to use the technical phrase, will convert trespass, according to some authorities, into a contest of ownership. Fisher *v.* Morris, 5 Whart. 358; Hagling *v.* Okey, 8 Exch. 531. When this is the case, however, presumptions can be made only of particular facts, and not of ownership itself.

Still, as a rule, in trespass the plaintiff will succeed, upon proof of antecedent actual physical possession of the land, for however short a period. Catteris *v.* Cowper, 4 Taunt. 547. If the action is ejectment, however, a more difficult problem is often to be solved. That action, of course, is an admission of possession by the defendant at the date of the issuing of the writ. The first question is, then, How was that possession acquired? The old English books are full of nice distinctions on the subject of disseisin, which correlates with, but is not the same thing, as dispossession. Seisin had a meaning in the feudal times involving duties and privileges in regard to the lord, mesne or suzerain, which has long faded away. Yet, when Lord Mansfield, as late as the case of Taylor *v.* Horde, 2 Smith Lead. Cas. 485, developed, if he did not invent, the doctrine of disseisin by election, through which an action of ejectment was enabled to do the work of the old real actions,—for it gives the plaintiff the right to treat the same state of facts either as a temporary trespass or a formal ouster at his pleasure,—it was thought an innovation. Resulting from this, however, there is one matter which belongs to the subject in hand, and that is, that for the purposes of an ejectment, almost any act by a defendant infringing on the possession of the plaintiff will be presumed to have been done under pretence or claim of ownership, unless a formal disclaimer has been filed.

Then as to the plaintiff's own case. It is sometimes said broadly he must recover on the strength of his own and not on the weakness of the defendant's title, and that title in a mere stranger can be set up to defeat him. *Beati possidentes* is a law maxim which has become famous; but it is not universal. There remains always the distinction between the possessor and the intruder. One who, without pretence of claim, goes on land in possession of another, cannot retain it on the mere ground of an outstanding title. If the antecedent possession has been so established as to be consistent only with ownership, it will, for the purpose of the suit, be presumed to be connected with it. And an outstanding title to be resorted to must be a living one capable of enforcement, and not abandoned or ideal. There is a good deal of conflict of authority on this subject, but this at least is now admitted, that where the plaintiff's case is one of possession morally just, every presumption of fact to supply wanting links will be made. The best illustration of this is in the English decisions on the subject of attendant terms. These are long terms of years created by way of mortgage, usually, for the payment of debts or portions. If their purpose had been answered, it was very usual not to obtain a formal surrender of them by the trustees; but they were

the execution of ancient deeds of partition;[1] of ancient wills so far as the curing of defects of execution;[2] of powers to agents

left, as it was called, to attend the inheritance. As the unexpired term constitutes the legal estate for the time being, it furnished to purchasers and others protection against intervening concealed incumbrances. But if, in an action of ejectment by the true owner, the defendant could set up such an outstanding term, whose purposes had long since been answered, he could insist on its being a legal bar to the plaintiff's recovery. Hence grew up the practice of judges directing juries in such cases to *presume* a surrender of such a term after many years of inaction. But this was long contested, and perhaps rightly, as a presumption contrary to the truth, and what was worse in a presumption, contrary to usual experience, which was, that conveyances constantly abstained from requiring a surrender of such terms, for the reasons stated. Hill on Trustees, p. *255. Indeed, when the beneficial owner has never been in actual possession, no such presumption can be made. Doe *v.* Williams, 2 M. & W. 749.

Of course, the extent to which a plaintiff in ejectment can rely on his antecedent possession alone is a matter of degree. Theoretically, if the *factum* be once established; if, to put an extreme case, a plaintiff can show against an intruder a notorious exclusive possession for nineteen years, this would authorize a judge to disregard an apparent title in another, though as between him and the plaintiff the statute of limitations would be no bar. On the other hand, when it comes down to a case of mere "squatting" on either side, the last in time may well insist on holding until the rightful owner appears. So again the nature of the property must affect the presumptions derived from possession. In a case in Pennsylvania, Krider *v.* Lafferty, 1 Whart. 303, cutting of willows on swamp land for basket-making during the proper season of the year, was held to be evidence of possession sufficient to raise a presumption of right. In some states, though the sea-shore is *publica juris*, yet the right to gather seaweed may be established by evidence of user. But no one could imagine any such inference possible from mere casual trespasses, such as fishing from rocks or shooting in the woods. These are wanting in the continuity which characterizes the assertion of a just claim, and hence fail on the presumption of that rightfulness.

III. Lastly, between vendor and vendee the weight of presumption is measured by a different standard still. Setting aside actions at law for breach of a contract to convey in equity the rule as to specific performance is inflexible not to force on a purchaser a title doubtful in law or fact; not to compel him to accept a lawsuit instead of an estate. Hence a chancellor must be chary of taking presumptions for facts, though he might, as a juryman, be willing to act on them. It is only one side that he hears, the other is not in court. For

[1] Hepburn *v.* Auld, 5 Cranch, 262; Munroe *v.* Gates, 48 Me. 463; Society *v.* Wheeler, 1 N. H. 310; Allegheny *v.* Nelson, 25 Penn. St. 332; Russell *v.* Marks, 3 Metc. (Ky.) 37.

[2] Hill *v.* Lord, 48 Me. 83; Maverick *v.* Austin, 1 Bailey, 59; Morrill *v.* Cone, 22 How. 82.

to make conveyances;[1] of deeds by agents shown to have had due power to convey;[2] of deeds of conveyance by trustees to

this reason a court of equity seldom acts on mere presumption of fact, which may be passed upon without hesitation in hostile litigation. The rule seems settled that a purchaser can be bound only where a judge at nisi prius should direct a jury peremptorily, on any point in the title where direct evidence is wanting, to find, on the facts as proved, the existence of a missing link, as a presumption of law. Fry on Specific Perform. § 581. See Emery *v.* Grocock, 6 Mad. 54. And even then there is room for argument on the difference between presumptions *juris et de jure*, and *juris tantum*. A rebuttable presumption of law may be as dangerous as one of fact simply. For instance, where there is a mortgage of record, no purchaser would be safe in relying on the naked assertion of the vendor that no interest had been paid by him for twenty years, or even by positive proof to that effect, for the mortgage might include other property, the owner of which may have kept down the interest by reason of some private arrangement to which the mortgagee was not a party, or there may have been some acknowledgment of the existence of the debt in another form. See Barnwell *v.* Harris, 1 Taunt. 439; Pratt *v.* Eby, 67 Penn. St. Rep. 376. A very strong illustration of the risk which would be run in presuming the payment of incumbrances is to be found in a case under the Pennsylvania Act of 1855, which provides that where no claim or demand has been made for a ground-rent, annuity, or charge for twenty-one years, nor any action brought, it shall be presumed to have been extinguished, and be thereafter irrecoverable; and it was proved that though no such claim or demand had been made on the actual terre-tenant of the land, during the statutory period, an action had been brought against the original covenantee; and it was held that the statute was no bar. Hiester *v.* Shaeffer, 45 Penn. St. 537. And yet this statute has been expressly held to be one of absolute limitation. Korn *v.* Browne, 64 Penn. St. 55.

As a rule, however, a title dependent on the statute of limitations is marketable—that is, where there has been an unquestioned, exclusive possession, with no circumstances to suggest a doubt of its lawful origin. In England a period of sixty years is usually insisted on, in order to cover exceptions from the statute, and exclude the risk of an outstanding life estate, or, as some think, by analogy to the limitation of the writ of right. See 2 Sugd.

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[1] Stockbridge *v.* West Stockbridge, 14 Mass. 257; Tarbox *v.* McAtee, 7 B. Mon. 279.

[2] Clements *v.* Macheboeuf, 92 U. S. 418; Marr *v.* Given, 23 Me. 55; Vail *v.* McKernan, 21 Ind. 421. See Doe *v.* Martin, 4 T. R. 39.

In Clements *v.* Macheboeuf, supra, it was said by Clifford, J.:—

"The rule is, that if the deed is apparently within the scope of the power, the presumption is, that the agent performed his duty to his principal. . . .

"Subject to certain exceptions, not applicable to this case, the general rule is, that the presumption in favor of the conveyance will be allowed to prevail in all cases where it was executed as matter of duty, either by an agent or trustee, if the instrument is regular on its face."

beneficial owner.[1] The same presumption has extended to the enrolment as a preliminary to the assignment of a term by A. to secure the payment of an annuity to B. of the annuity,[2] to the due execution of deeds and wills;[3] to the existence of the proper preliminaries to ancient deeds by land companies or other corporations;[4] to the passage of acts of the legislature, when constitutional and appropriate;[5] to the adoption of by-laws, when such by-laws are necessary to explain a usage of long standing;[6] and to the proof of death of remote ancestors without issue.[7] To tax and administration sales

Vend. & Pur. 132; Prosser *v.* Watts, 6 Madd. 59. A shorter period would probably be considered sufficient in those states in this country where there is a limitation to the exceptions to the statutes themselves. See Shober *v.* Dutton, 6 Phila. Rep. 185; Pratt *v.* Eby, 67 Penn. St. 371.

In concluding these observations, it is proper to say that their purpose has chiefly been to call attention to the frequent inapplicability of presumptive evidence to the title to land, which is controlled by rules which should, in the interest of the community, be fixed and simple. The ordinary controversies between men arise out of isolated acts, as to which presumptions are often as safe guides as direct proof. They neither follow nor make precedents. But the rights which belong to real estate partake of its permanency. The instinct of mankind that the evidence of the existence of these rights should, as far as possible, be unchanging, plain, and not dependent on casual inference, has shown itself in Statutes of Fraud and in Recording Acts. It is best in the interests of society that the policy which these represent should be maintained at the risk of occasional injustice.

[1] 3 Sugd. Vend. & Pur. 25; Best's Evidence, § 394; Keene *v.* Deardon, 8 East, 267; Marr *v.* Gilliam, 1 Coldw. 488; Wilson *v.* Allen, 1 Jac. & W. 620; Emery *v.* Grocock, 6 Madd. 54; Doe *v.* Cooke, 6 Bing. 180. And see, as illustrations of the principle that trustees will be presumed to have conveyed when it was their duty so to do, England *v.* Slade, 4 T. R. 682; Hillary *v.* Waller, 12 Ves. 239; Doe *v.* Lloyd, Pea. Ev. App. 41.

[2] Doe *v.* Mason, 3 Camp. 7, per Lord Ellenborough; Doe *v.* Bingham, 4 B. & A. 672, which was on 53 G. III. c. 141. See Lond. & Brigh. Ry. Co. *v.* Fairclough, 2 M. & Gr. 674.

[3] Supra, § 1313.

[4] Supra, § 1313. In Campbell *v.* Liverpool, L. R. 9 Eq. 570, where it appeared that by an act of Wm. III. certain corporation land was set apart for a burial-ground, and afterwards consecrated, it was held that a conveyance from the corporation might be presumed.

[5] Lopez *v.* Andrews, 3 Man. & R. 329; queried, however, in R. *v.* Exeter, 12 A. & E. 532; Atty.-Gen. *v.* Ewelme Hosp., 17 Beav. 366; compare Eldridge *v.* Knott, Cowp. 215; McCarty *v.* McCarty, 2 Strobh. 6.

[6] R. *v.* Powell, 3 E. & B. 377; May. of Hull *v.* Horner, 1 Cowp. 110, per Lord Mansfield.

[7] Roscommon's Claim, 6 Cl. & F. 97; Oldham *v.* Woolley, 8 B. & C. 22. See McComb *v.* Wright, 5 Johns. R. 263; Hays *v.* Gribble, 3 B. Mon. 106.

this presumption has been held applicable.[1] But there must be possession taken under the sale, or otherwise time exercises no curative effect.[2]

§ 1354. We have already noticed[3] that when a record is on its face complete and authoritative, the burden of proof is on the party by whom it is assailed. We have now to advance a step further, and to consider those titles in which, after a long possession, it is discovered, in making up the title, that one of its record links cannot be found. Is it not likely that such link once existed, but is now lost? The answer to this question depends upon the degree of care with which records, at the time under consideration, were kept, and the casualties to which they were exposed. And in determining the question of the existence of such link, and its subsequent loss, a very important point for consideration is the long acquiescence of adverse parties—an acquiescence not probable if the title was bad. Hence it is that the courts have assumed the existence and loss of such links, after a lapse of time varying with the conditions under which the records were placed.[4]

Links in record will in the same way be supplied.

§ 1355. It is otherwise (apart from the statute of limitations) when in judicial procedures the defects go to want of jurisdiction or other fatal blemish.[5] But ordinarily a title, sustained by uninterrupted enjoyment, will not be permitted to fail because the record does not set forth every minor detail necessary to make the proceedings perfect.[6] Thus, a deed of

Defects of form in this way cured.

[1] Austin *v.* Austin, 50 Me. 74; Colman *v.* Anderson, 10 Mass. 105; Pejobscot *v.* Ransom, 14 Mass. 145. See, however, as to Pennsylvania, Lackawanna Iron Co. *v.* Fales, 55 Penn. St. 90; Heft *v.* Gephart, 65 Penn. St. 510. And, as leading to a contrary conclusion, Blackwell on Tax Titles, pp. 91–3. See, as to presuming missing links, infra, § 1354.

[2] Coxe *v.* Deringer, 78 Penn. St. 271. See *S. C.* 3 Weekly Notes, 97.

[3] Supra, § 1304.

[4] Plowd. 411; Finch L. 399; Crane *v.* Morris, 6 Pet. 598; Reedy *v.* Scott, 23 Wall. 352; Sagee *v.* Thomas, 3 Blatch. 11; Battles *v.* Holly, 6 Greenl. 145; Freeman *v.* Thayer, 33 Me. 76; Winkley *v.* Kaime, 32 N. H. 268; Coxe *v.* Deringer, 78 Penn. St. 271; Plank Road *v.* Bruce, 6 Md. 457; Markel *v.* Evans, 47 Ind. 326; Breckenridge *v.* Waters, 4 Dana, 620; Alston *v.* Alston, 4 S. C. 116; Desverges *v.* Desverges, 31 Ga. 753; Wyatt *v.* Scott, 33 Ala. 313; Austin *v.* Jordan, 35 Ala. 642; State *v.* Williamson, 57 Mo. 192; Palmer *v.* Boling, 8 Cal. 384; Hillebrant *v.* Burton, 17 Tex. 138. As to sales by administrators, see Pejobscot *v.* Rausom, 14 Mass. 145.

[5] Hathaway *v.* Clark, 5 Pick. 490; Lytle *v.* Colts, 27 Penn. St. 193; Nichol *v.* McAlister, 52 Ind. 586.

[6] See cases cited supra, § 645.

apprenticeship, under which the parties acted, will be presumed to have been regularly executed;[1] and so defects in the recording of ancient deeds may be explained by parol.[2] Wherever, also, an administrative record is executed, such record will *primâ facie* be regarded as regular.[3]

License may be thus presumed.

§ 1356. A license to relieve a party from a check on a title may be thus presumed. Thus, in a case where ejectment was brought to recover a house and lot, which had been let for a long term of years, it appeared that the lease contained a covenant by the lessee that the house should not be used as a shop without the consent of the lessor, there being a proviso for reëntry on the breach of the covenant. It was held by the court that the jury could presume a license from proof of the uninterrupted user of the premises as a beer-shop for twenty years.[4]

Title in such case must be substantial.

§ 1357. A substantial title, however, is the pre-requisite to the invocation of the presumptions which have been just stated, for "no case can be put in which any presumption has been made, except when 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 existence of the fact directed to be presumed, and in such *case only*, has it ever been allowed."[5]

Presumption is rebuttable.

§ 1358. It need scarcely be added that the presumption of such conveyances is rebuttable by counter-proof, though a party by acquiescence in an imperfect title may be estopped from disputing it.[6]

[1] R. *v.* Hinckley, 12 East, 361; R. *v.* Whiston, 4 A. & E. 607; 6 N. & M. 65, *S. C.*; R. *v.* Whitney, 5 A. & E. 191; 6 N. & M. 552, *S. C.*; R. *v.* Stainforth, 11 Q. B. 66. See, also, R. *v.* St. Mary Magdalen, 2 E. & B. 809; R. *v.* Broadhempston, 28 L. J. M. C. 18; 1 E. & E. 154, *S. C.*

[2] Booge *v.* Parsons, 2 Vt. 456; Bettison *v.* Budd, 21 Ark. 578.

[3] Sumner *v.* Sebec, 3 Greenl. 223; Isbell *v.* R. R., 25 Conn. 556; Farr *v.* Swan, 2 Penn. St. 245; Byington *v.* Allen, 11 Iowa, 3. Supra, § 645.

[4] Gibson *v.* Doeg, 2 H. & N. 615. As to other presumptions of license, see Seneca *v.* Zalinski, 15 Hun, 571.

[5] Tindal, C. J., Doe *v.* Cooke, 6 Bin. 179; though see Little *v.* Wingfield, 11 Ir. L. R. (N. S.) 63 *et seq.*, as criticising above passage. Doe *v.* Gardiner, 12 C. B. 319; Richardson *v.* Dorr, 5 Vt. 9; Warner *v.* Henby, 48 Penn. St. 187. See, also, Burke *v.* Hammond, 76 Penn. St. 179; Winstan *v.* Prevost, 6 La. An. 164; and cases cited supra, §§ 1347 *et seq.*

[6] Lincoln *v.* French, 105 U. S. 614;

§ 1359. When a deed or will, or other attested document,[1] is thirty years old or upward, and is produced from the proper archives or other unsuspected depository, then such document proves itself, and the testimony of the subscribing witness is not necessary, though he may be called by the contesting party to dispute genuineness.[2] The same rule applies in the Roman law.[3] It has been argued that where a system of registry is established by law, no archives can be considered as giving the *primâ facie* genuineness, except those which the statute indicates. This distinction, however, cannot be maintained, as registration does not supersede the common law mode of proof, but merely dispenses with some of the requisites. And in any view, the question is one only of burden of proof. Documents so protected by age and safe-keeping are *primâ facie* receivable in evidence; and the burden is on him who would resist their admission. But when this duty has been discharged, then the question of admissibility is to be decided, as is already shown, on the proof and presumptions belonging to the concrete case.[4]

Burden on party assailing documents of over thirty years old.

VII. PRESUMPTION OF PAYMENT.

§ 1360. Aside from statutes of limitation, if a bond is permitted to remain without interest collected, or any recognition of indebtedness on the part of the debtor, for twenty years, the law presumes payment, and proceeds to throw the burden of proving non-payment on the creditor.[5] The same presumption applies to tax claims;[6] to judgments;[7] to mort-

Presumption of payment after twenty years.

Hurst *v.* McNiel, 1 Wash. C. C. 70; Nieto *v.* Carpenter, 21 Cal. 455; Chiles *v.* Conley, 2 Dana, 21; Irvin *v.* Fowler, 5 Robt. (N. Y.) 482; Nichols *v.* Gates, 1 Conn. 318; English *v.* Register, 7 Ga. 387.

[1] Best Ev. § 362.

[2] Burling *v.* Patterson, 9 C. & P. 570; Talbot *v.* Hudson, 7 Taunt. 251; S. P. Stockbridge *v.* W. Stockbridge, 14 Mass. 256. See fully supra, § 732.

[3] Endemann's Beweislehre, §§ 86, 87. See supra, §§ 194, 703, 732.

[4] See fully supra, §§ 194, 703, 732, 733.

[5] Jackson *v.* Wood, 12 Johns. R. 242; Bird *v.* Inslee, 23 N. J. Eq. 363; Delaney *v.* Robinson, 2 Whart. 503; Morrison *v.* Funk, 23 Penn. St. 421; Eby *v.* Eby, 5 Barr, 435; King *v.* Coulter, 2 Grant, 77; Reed *v.* Reed, 46 Penn. St. 242; Stockton *v.* Johnson, 6 B. Mon. 409; Hale *v.* Pack, 10 W. Va. 145; Wellingham *v.* Chick, 14 S. C. 93. See Whart. on Contracts, § 685.

[6] Hopkinton *v.* Springfield, 12 N. H. 328.

[7] Kinsler *v.* Holmes, 2 S. C. 483. See, however, Daly *v.* Erricson, 45 N. Y. 786.

gages;[1] and to other liens;[2] but not to administration bonds.[3] Whether payment can be inferred, within twenty years, is to be determined by all the evidence in the case.[4] It is so improbable that a creditor would permit an unpaid bond to lie fruitless for eighteen or nineteen years, that slight circumstances, in connection with such proof, will be sufficient as a presumption of fact to justify a jury in a conclusion of payment,[5] though the mere lapse of time not amounting to twenty years, will not itself be a bar.[6] It should be remembered that the period of twenty years may be made to give way to a positive statute defining limits.[7]

[1] Jarvis *v.* Albro, 67 Me. 310; Inches *v.* Leonard, 12 Mass. 379; Barned *v.* Barned, 21 N. J. Eq. 245.

[2] Boyd *v.* Harris, 2 Md. Ch. 210; Buchanan *v.* Rowland, 5 N. J. L. 721; Doe *v.* Gildart, 6 Miss. 606; Drysdale's Appeal, 14 Penn. St. 531.

[3] Potter *v.* Titcomb, 7 Greenl. 302.

[4] Sadler *v.* Kennedy, 11 W. Va. 187.

[5] Denniston *v.* McKeen, 2 McLean, 253; Rodman *v.* Hoops, 1 Dall. 85; Didlake *v.* Robb, 1 Woods, 680; Hopkins *v.* Page, 2 Brock. 20; Inches *v.* Leonard, 12 Mass. 379; Clark *v.* Hopkins, 7 Johns. R. 556; Gray *v.* Gray, 2 Lansing, 173; Brubaker *v.* Taylor, 76 Penn. St. 83; Usher *v.* Gaither, 2 Har. & M. 457; Carroll *v.* Bovin, 7 Gill, 34; Boyd *v.* Harris, 2 Md. Ch. 210; Mileage *v.* Gardner, 33 Ga. 397; Downs *v.* Scott, 3 La. An. 278; Lyon *v.* Guild, 5 Heisk. 175.

[6] Ibid.; Born *v.* Pierpont, 28 N. J. Eq. 7. No presumption of payment of legacies is raised by the lapse of seven years from the time of their payment. See Gould *v.* White, 26 N. H. 178; Strohn's Appeal, 23 Penn. St. 351; Brubaker *v.* Taylor, 76 Penn. St. 83.

[7] Grafton Bank *v.* Doe, 19 Vt. 463.

"A legal presumption of payment does not, indeed, arise short of twenty years; yet it has been often held that a less period, with persuasive circumstances tending to support it, may be submitted to the jury as ground for a presumption of fact. 'When less than twenty years has intervened,' says Chief Justice Gibson, 'no legal presumption arises, and the case, not being within the rule, is determined on all the circumstances; among which the actual lapse of time, as it is of a greater or less extent, will have a greater or less operation.' Henderson *v.* Lewis, 9 S. & R. 384. In Ross *v.* McJunkin, 14 S. & R. 369, fourteen years was treated as having this effect. In Diamond *v.* Tobias, 2 Jones, 312, a time short of twenty years was allowed with circumstances, Mr. Justice Coulter remarking: 'But exactly what these circumstances may be never has been and never will be defined by the law. There must be some circumstances, and when there are any it is safe to leave them to the jury.' In Webb *v.* Dean, 9 Harris, 29, the period fell short of sixteen years; in Hughes *v.* Hughes, 4 P. F. Smith, 240, of nineteen years." Sharswood, J., Moore *v.* Smith, 81 Penn. St. 182. In this case, where an affidavit of defence set forth that there had been a sheriff's sale of the defendant's property, and distribution by the sheriff, in which distribution plaintiffs had participated, although the defendant was not able to specify with certainty what amount plaintiffs had received, because he had not been able to inspect

§ 1361. We must also observe that the presumption that a bond or specialty has been paid after a lapse of twenty years "is in its nature essentially different from the bar imposed by the statute to the recovery of a simple contract debt. The latter is a prohibition of the action; the former, *primâ facie*, obliterates the debt. The bar (of the statute) is substantially removed by nothing less than a promise to pay, or an acknowledgment consistent with such a promise. The presumption is rebutted, or, to speak more accurately, does not arise, when there is affirmative proof, beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor. . . . The statute of limitations is a bar, whether the debt is paid or not. Not so where suit is brought on a sealed instrument. The fact of indebtedness is then in controversy, and the legal presumption of payment from lapse of time is nothing more than a transfer of the *onus* of proof from the debtor to the creditor. Within twenty years the law presumes the debt has remained unpaid, and throws the burden of proving payment upon the debtor. After twenty years the creditor is bound to show, by something more than his bond, that the debt has not been paid, and this he may do, because the presumption raises only a *primâ facie* case against him."[1]

Presumption from lapse of time to be distinguished from stay by limitation.

§ 1362. Payment, as has been already incidentally noticed, may be shown by extrinsic facts.[2] Among inferences which have been allowed weight in this connection, even after the lapse of comparatively short periods, are, the payment of intermediate debts; as where tradesmen's bills, or tax bills, or claims for interest, or rent, of later date, are proved to have been paid,[3] and the possession of the document by which the debt

Payment may be inferred from facts.

the docket of the sheriff who made the sale and distribution; it was held that, in connection with the lapse of time which had passed, there was enough to send the case to a jury.

[1] Strong, J., in Reed *v.* Reed, 46 Penn. St. 242. See Connelly *v.* McKean, 64 Penn. St. 113; Birkey *v.* McMakin, 64 Penn. St. 343.

[2] See Connecticut Trust Co. *v.* Melendy, 119 Mass. 449; Moore *v.* Smith, 81 Penn. St. 182; Doty *v.* James, 28 Wis. 319; Whisler *v.* Drake, 35 Iowa, 103; Garnier *v.* Renner, 51 Ind. 372.

[3] 1 Gilb. Ev. 309; Colsell *v.* Budd, 1 Camp. 27; Hodgdon *v.* Wight, 36 Me. 326; Brewer *v.* Knapp, 1 Pick. 337; Attleboro *v.* Middleboro, 10 Pick. 378; Robbins *v.* Townsend, 20 Pick. 345; Crompton *v.* Pratt, 105 Mass. 255;

is expressed.[1] It has been doubted whether the presumption arising from possession of the document applies to bills produced by acceptors without proof that they have been in circulation;[2] but the better view is that such proof is not necessary to give a *primâ facie* case to the acceptor producing the bill.[3] Possession of a note by the maker, however, when the maker has access to the papers of the payee, is not by itself proof of payment.[4]

Decker *v.* Livingston, 15 Johns. R. 479. See Walton *v.* Eldridge, 1 Allen, 293, as showing rebuttability of such presumptions.

[1] Gibbon *v.* Featherston, 1 Stark R. 225; Shepherd *v.* Currie, 1 Stark. R. 454; Brembridge *v.* Osborne, 1 Stark. R. 300; Egg *v.* Barnett, 3 Esp. 196; Mills *v.* Hyde, 19 Vt. 59; Baring *v.* Clark, 19 Pick. 220; Garlock *v.* Goertner, 7 Wend. 198; Alvord *v.* Baker, 9 Wend. 323; Weidner *v.* Schweigart, 9 S. & R. 385; Zeigler *v.* Gray, 12 S. & R. 42; Rubey *v.* Culbertson, 35 Iowa, 264; Somervail *v.* Gillies, 31 Wis. 152; Penn *v.* Edwards, 50 Ala. 63; Lane *v.* Farmer, 13 Ark. 63; Union Canal Co. *v.* Loyd, 4 Watts & S. 393; Carroll *v.* Bowie, 7 Gill, 34; Ross *v.* Darby, 4 Munf. (Va.) 428. As limiting such presumption, see Bender *v.* Montgomery, 8 Lea, 586. See Page *v.* Page, 15 Pick. 368; and see supra, §§ 1225, 1236. In Ritter *v.* Schenck, 101 Ill. 387, it was held that possession of a note by the payee is *primâ facie* evidence of payment. In Heald *v.* Davis, 11 Cush. 319, it was rightly held that, where there are two joint promisors, the possession of the security by one is not evidence in favor of the other.

[2] Pfiel *v.* Vanbatenberg, 2 Camp. 439; 2 Greenl. on Ev. § 439.

[3] Connelly *v.* McKean, 64 Penn. St. 118. In this case it was said by Sharswood, J.: "It was expressly held by Lord Kenyon, in Egg *v.* Barnett, 3 Esp. Rep. 196, that to prove payment of a debt due by the defendant to the plaintiff, a check on a banker to his favor and indorsed by him was evidence to go to the jury of payment. Lord Kenyon said: 'This is not merely using the name of the body of the draft, which is arbitrary and would of itself be certainly no evidence, but here the money has been actually received by the plaintiff and his servant, for their names are put on the backs of the checks as receiving the money. This is evidence to go to the jury.' See Gibbons *v.* Featherstonhaugh, 1 Starkie, 225; Brembridge *v.* Osborne, Ibid. 300; Shepherd *v.* Currie, Ibid. 454; Patton *v.* Ash, 7 S. & R. 116; Weidner *v.* Schweigart, 9 Ibid. 385; Garlock *v.* Geortner, 7 Wend. 198; Alvord *v.* Baker, 9 Wend. 323; Hill *v.* Gayle, 1 Alabama, 275."

[4] Grey *v.* Grey, 47 N. Y. 552. The point is thus argued by Peckham, J.: "The question is then simply, is the production of this note by the defendant, under the facts of this case, evidence of its discharge, when it is proved not to have been paid or satisfied? I think it is not. We have been referred by the defendant's counsel to 1 Pothier on Obligations, 573, as precisely in point. He says that Boiseau holds that possession of the note affords a presumption of its payment, but if he allege a release he must prove it; for a release is a donation, and a donation ought not to be presumed. Pothier differs, and thinks it should be presumed, unless the creditor shows the contrary. But Pothier

Where the question is whether a particular workman has been paid his back wages, it is admissible to prove that other workmen employed by the defendant were paid by him every week, and that the defendant was never heard to complain of non-payment.[1] The same presumption may be drawn from other habits of payment.[2]

From reception of money or securities.

§ 1363. Payment, also, *pro tanto*, may be inferred from the fact that money or securities were paid by the debtor to the creditor.[3] Such presumption may be rebutted

agrees with Boiseau, 'that if the debtor were the general agent or clerk of the creditor, *having access to his papers*, possession alone might not be a sufficient presumption of payment or release; so if he was a neighbor, into whose house the effects of the creditor had been removed on account of a fire.' This latter proposition seems applicable to this case. Here the case shows without contradiction that the defendant, living at home with his father, had a key that fitted his father's desk, where this note was kept. See, to the same effect, Kenney *v.* Pub. Ad., 2 Brad. 319. The two cases cited by the defendant's counsel, of Beach *v.* Endress, 51 Ibid. 470, and Edwards *v.* Campbell, 23 Barb. 423, were both cases of instruments delivered up as having been paid and to be cancelled. The circumstances of the surrender in each case were proved. In the latter case the surrender of the note was made by the payee, eight days before her death, to a third person, to be delivered to the maker, saying, 'he had boarded him, etc., and he ought to have it, for it would not be more than right for him to have it.' Though the plaintiff had possession of the note at the trial, the Supreme Court held he was not entitled to recover, and reversed the judgment he had obtained." Peckham, J., Grey *v.* Grey, 47 N. Y. 554. See Bowman *v.* Teall, 23 Wend. 306; Allaire *v.* Whitney, 1 Hill, 484; Waydell *v.* Luer, 5 Hill, 448; *S. C.*, 3 Den. 410; Hill *v.* Beebe, 13 N. Y. 556; Nesbitt *v.* Lockman, 34 N. Y. 169; Bedell *v.* Carll, 33 N. Y. 581.

The possession of a lease by the lessor with the seals cut off is no evidence of a surrender by written instrument according to the statute of frauds. Doe *v.* Thomas, 9 B. & C. 288.

[1] Lucas *v.* Novosilieski, 1 Esp. 296; Sellen *v.* Norman, 4 C. & P. 80.

[2] Evans *v.* Birch, 3 Camp. 10.

[3] Welch *v.* Seaborn, 1 Stark. R. 474; Aubert *v.* Walsh, 4 Taunt. 293; Boswell *v.* Smith, 6 C. & P. 60; Graham *v.* Cox, 2 C. & Kir. 702; Mountford *v.* Harper, 16 M. & W. 825; Risher *v.* The Frolic, 1 Woods, 92; First Nat. Bank *v.* Leach, 52 N. Y. 350; Patton *v.* Ash, 7 Serg. & R. 116; First Nat. Bank *v.* McManigle, 69 Penn. St. 156; Shinkle *v.* Bank, 22 Ohio St. 516; Pope *v.* Dodson, 58 Ill. 361; Fuller *v.* Smith, 5 Jones (N. C.) Eq. 192; Carson *v.* Lineburger, 70 N. C. 173; Robinson *v.* Allison, 36 Ala. 525; Vimont *v.* Welsh, 2 A. K. Marsh. 110; Wood *v.* Hardy, 11 La. An. 760. See Rockwell *v.* Taylor, 41 Conn. 55; Swain *v.* Ettling, 32 Penn. St. 486. In Mountford *v.* Harper, 16 M. & W. 825, the drawing of a check by A. in favor of B. and payment of it to B. was held to show *primâ facie* payment by A. to B., without showing that A. gave it to B. "The strength of the evidence," says Mr. Roscoe (Ev. 13th ed. 40), "must necessarily vary with the character of the debt, the mode in

by proof that the payment was on other accounts.[1] The prevalent opinion, however, is, that the mere acceptance of negotiable paper by a creditor from a debtor, unless under circumstances affording a presumption that payment was meant, does not itself extinguish an antecedent debt.[2] A presumption of payment has been made from the drawing of lines across the instrument proving indebtedness;[3] from an entry of credit on such instrument;[4] from an intermediate settlement of accounts;[5] and from a remittance by

which it has been contracted, the position of the parties, and other similar circumstances." See Phillips *v.* Warren, 14 M. & W. 379.

[1] Haines *v.* Pearce, 41 Md. 221; Mechanics *v.* Wright, 53 Mo. 153. See Waite *v.* Vose, 62 Me. 184.

[2] Ward *v.* Evans, Lord Raym. 938; Mussen *v.* Price, 4 East, 197; Peter *v.* Beverly, 10 Pet. 532; Wallace *v.* Agry, 4 Mason, 336; Ward *v.* Howe, 38 N. H. 35; Nail *v.* Foster, 4 Comst. 312; Jewett *v.* Plack, 43 Ind. 368; Matteson *v.* Ellsworth, 33 Wis. 488; Lawhorn *v.* Carter, 11 Bush, 7; May *v.* Gamble, 14 Fla. 467.

In Maine, Vermont, and Massachusetts, however, the tendency is to hold that the acceptance of a negotiable note or bill of exchange by the creditor for a preëxisting debt is a payment of such debt, unless a contrary intention is shown. "The reason assigned for this presumption of fact is, that a creditor may indorse such paper, and, if he could compel payment of the original debt, the debtor might be afterwards obliged to pay the note to the indorsee, and thus be twice charged, without any remedy at law." Dickerson, J., Strang *v.* Hirst, 61 Me. 14; citing Perrin *v.* Keen, 19 Me. 355; Paine *v.* Dwinel, 53 Me. 53; Thatcher *v.* Dinsmore, 5 Mass. 299; Pomeroy *v.* Rice, 16 Pick. 22; Milledge *v.* Iron Co., 5 Cush. 168; Varner *v.* Nobleboro, 2 Greenl. 121; Wemet *v.* Lime Co., 46 Vt. 458. See Perkins *v.* Cady, 111 Mass. 318.

"The courts in these states also hold that the presumption of payment is rebutted, and the creditor may repudiate the security taken and rely upon the original contract, when there is any fraud in giving it, or it is accepted under an ignorance of the facts, or a misapprehension of the rights of the parties. French *v.* Price, 24 Pick. 21; Paine *v.* Dwinel, 53 Me. 53. (See, to same point, Wemet *v.* Lime Co., 46 Vt. 458.)

"Where a creditor accepts a note or bill of exchange for a debt, there is a presumption of fact that there is an agreement between the drawer and the drawee that it will be accepted. The parties are presumed to act in good faith toward each other, and the tendering of such paper, without such understanding, is a breach of good faith. This may be done to obtain delay, or to deceive the creditor, by the delusive hope that in accepting the paper offered he gets additional security for his debt. Besides, the giving of such paper may have influenced the creditor to part with his property." Dickerson, J., Strang *v.* Hirst, 61 Me. 14. See De Forest *v.* Bloomingdale, 5 Denio, 304.

[3] Pitcher *v.* Patrick, 1 Stew. & P. 478.

[4] Graves *v.* Moore, 7 T. B. Mon. 341. See supra, §§ 229, 1115.

[5] Hedrick *v.* Bannister, 12 La. An. 373.

mail when such mode of payment is authorized by the creditor, though not otherwise.[1] So payment of a debt, after the death of the parties, may be presumed from the fact that at the time of maturity the debtor was in opulence, and the creditor in needy circumstances.[2]

§ 1364. On the other hand, in order to rebut the presumption of payment, it is admissible for the creditor to prove the debtor's poverty;[3] circumstances making it inconvenient to the parties to pay or receive the debt;[4] any immediate recognition by the debtor;[5] mistake in the acceptance of a security;[6] or any other facts from which non-payment can be inferred, though these facts, in order to rebut the presumption, must be such as to give a preponderance of proof to the theory of non-payment.[7]

Presumption of payment only *primâ facie* and may be rebutted.

§ 1365. Receipts, if for the same debt, or in full of all demands, are *primâ facie* evidence of payment;[8] though whether they are for the same debt, when they are on their face indefinite, is to be determined from all the evidence in the case.[9] That a receipt may be rebutted by proof of fraud, or mistake, or of an understanding between the parties that it should be provisional, is now settled.[10]

Receipts proof of payment, but may be rebutted.

[1] See Boyd *v.* Reed, 6 Heisk. 63. See supra, § 1323.

[2] Levers *v.* Van Buskirk, 4 Barr, 309; Henderson *v.* Lewis, 9 S. & R. 379; Lesley *v.* Nones, 7 S. & R. 410; Diamond *v.* Tobias, 12 Penn. St. 312; Conelly *v.* McKean, 64 Penn. St. 113; Ross *v.* Darley, 4 Munf. 428.

[3] Farmers' Bk. *v.* Leonard, 4 Harr. (Del.) 536.

[4] McLellan *v.* Crofton, 6 Greenl. 307; Crooker *v.* Crooker, 49 Me. 416; Eustace *v.* Coskins, 1 Wash. (Va.) 188.

[5] Delaney *v.* Robinson, 2 Whart. R. 503; Eby *v.* Eby, 5 Penn. St. 435; Reed *v.* Reed, 46 Penn. St. 242.

[6] Wement *v.* Lime Co., 46 Vt. 458. See cases cited supra, § 1363.

[7] Foulk *v.* Brown, 2 Watts, 209; Strohm's Appeal, 23 Penn. St. 351.

[8] Supra, §§ 1064, 1130; Rollins *v.* Dyer, 16 Me. 475; Obart *v.* Letson, 17 N. J. L. 78; Marston *v.* Wilcox, 2 Ill. 270; Underwood *v.* Hoosack, 38 Ill. 203; Prov. Ins. Co. *v.* Fennell, 49 Ill. 180.

[9] Reed *v.* Phillips, 5 Ill. 39; Daniels *v.* Burso, 40 Ill. 307; Greenlee *v.* McDowell, 3 Jones (N. C.) L. 325; Wooten *v.* Nall, 18 Ga. 609; Hollingsworth *v.* Martin, 23 Ala. 591.

[10] Skaife *v.* Jackson, 3 B. & C. 421; Graves *v.* Key, 3 B. & Ad. 313; Bowes *v.* Foster, 2 H. & N. 779; Farrar *v.* Hutchinson, 9 Ad. & E. 641; Rollins *v.* Dyer, 16 Me. 475; Pitt *v.* Berkshire Ins. Co., 100 Mass. 500; Sheldon *v.* Ins. Co., 26 N. Y. 460; Baker *v.* Ins. Co., 43 N. Y. 383; Penns. Ins. Co. *v.* Smith, 3 Whart. R. 520; Byrne *v.* Schwing, 6 B. Mon. 199. See more fully supra, §§ 1064, 1130.

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