







A  
*TREATISE*  
ON THE  
LAW  
OF  
OBLIGATIONS,  
OR  
*CONTRACTS.*

By M. POTHIER.

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TRANSLATED FROM THE FRENCH,  
WITH AN INTRODUCTION, APPENDIX, AND NOTES,  
ILLUSTRATIVE OF THE ENGLISH LAW ON THE SUBJECT.

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# A P P E N D I X

TO

## POTHIER ON OBLIGATIONS.

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### N U M B E R. I.

(Referred to, Vol. I. p. 28, 29.)

#### *Of Illegality in Contracts.*

**I**N adverting more particularly to contracts which are void as being illegal in their nature, I shall not at present dwell upon those exceptions which are personal to the immediate parties to the contract, as being founded upon fraud, extortion, or any undue advantage taken by one party of the necessities of the other, but (dismissing such with the general remark, that the *English* courts of law and equity will, in every case attended with those circumstances, decide according to the great principles of universal justice,) shall proceed to some observations respecting contracts, the illegality of which is founded upon reasons of public utility and moral rectitude. Wherever an engagement is entered into with a view to contravene the general policy of the law, no form of expression can remove the substantial defect inherent in the nature of the transaction; the law will investigate the real object of the contracting parties, and if that is repugnant to the principles established for the general benefit of society, it will vitiate the most regular instrument which ingenuity can contrive.

This subject was most ably discussed by Lord Ch. J. *Wilmot* in the case of *Collins v. Blantern*, 2 *Wilf.* 347. A bond in the usual form for payment of money was alleged to be given as an indemnity for a note entered into by the obligee for compounding a prosecution for perjury. In support of the bond it was contended that no averment should be admitted of its being given upon an illegal consideration not appearing on the face of it. In the course of his judgment the Chief Justice used the following expressions: "The manner of the transaction was to gild over and conceal the truth, and whenever courts of law see such attempts made to conceal

wicked deeds, they will brush away the cobweb varnish and shew the transactions in their true light. This is a contract to tempt a man to transgress the law, to do that which is injurious to the community—it is void by the common law, and the reason why the common law says such contracts are void is for the public good—you shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountain of justice.”—The whole of the judgment, from which these extracts are made, may be strongly recommended to the perusal of all who are engaged in juridical inquiries.

Many of the exceptions which fall within the scope of this division are contrary to the immediate justice which would prevail in a moral view between the contracting parties; but the public tribunals will not afford judicial assistance to those whose object is to infringe the general policy of the law, or to prejudice the rights and interests of others (a); and perhaps it is one of the greatest securities against transactions of this description, that the contracting parties can have no redress against each other, and that where they are equally guilty of an infraction of the law, the claims of either may be effectually resisted.

Upon this subject it can hardly be necessary to state, that transactions which have for their object the encouragement of manifest crimes, such as murder, theft, perjury, and personal outrage, can never receive the sanction of a court of judicature; and any engagement of a reward to abstain from such crimes is equally discountenanced, as it might effectively lead either to criminality or extortion.

(a) In the case of *Parsons v. Thompson*, 1 H. B. 322., in which it was decided that an agreement by one person to pay a compensation to another for retiring from a public office, provided the former was appointed to succeed him, was void; Lord Loughborough concluded his judgment as follows: “This agreement, resting on private contract and honour, may perhaps be fit to be executed by the parties, but can only be enforced by considerations which apply to their feelings, and is not the subject of an action. The law encourages no man to be unfaithful to his promise; but legal obligations are, from their nature, more circumscribed than moral duties.”

In another case, where the party to a contract objected to it as being a fraud on the revenue, Lord Mansfield said, the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake however that the objection is ever allowed; but it is founded on general principles of policy which the defendant has the advantage of, contrary to the real justice between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *Ex dolo malo non cititur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*. *Holman v. Johnson*, Cowp. 341.

There

There is a tradition that a suit was instituted by a highwayman against his companion to account for his share of the plunder, and a copy of the proceedings has been published as found amongst the papers of a deceased attorney. It was a bill in the Exchequer, which avoided stating in direct terms the criminality of the engagement, and is founded upon a supposed dealing as copartners in rings, watches, &c. but the mode of dealing may be manifestly inferred. The tradition receives some degree of authenticity, by the order of the court being such as would in all probability ensue from such an attempt. The order was, that the bill should be dismissed with costs for impertinence, and the solicitor fined 50*l*. The printed account is accompanied by a memorandum which states the particular times and places where the plaintiff and defendant were afterwards executed. *Europ. Mag.* 1787, vol. ii. p. 360. (a).

Contracts with a view to future prostitution are illegal; but an engagement by way of reparation for past seduction will be supported, if it is not accompanied with any purpose of future cohabitation. *Marchioness of Annandale v. Harris*, 2 *P. Wms.* 339. *Lady Cox's case*, 3 *P. Wms.* 339. *Walker v. Perkins*, 3 *Bur.* 1568. *Priest v. Parrott*, 2 *Vef.* 160.

(a) *John Eweret against Joseph Williams.* The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c. that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expences on the roads, and at inns, taverns, or ale-houses, or at markets or fairs. "And your orator and the said *Joseph Williams* proceeded jointly in the said business with good success on *Hounslow heath*, where they dealt with a gentleman for a gold watch, and afterwards the said *Joseph Williams* told your orator that *Fitchley* in the county of *Middlesex* was a good and convenient place to deal in, and that commodities were very plenty at *Fitchley* aforesaid, and it would be almost all clear gain to them: that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things: that about a month afterwards the said *Joseph Williams* informed your orator that there was a gentleman at *Blackheath* who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money; that they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, &c. that your orator and the said *Joseph Williams* continued their joint dealings together until *Michaelmas*, and dealt together in several places, *viz.* at *Bagshot* in *Surry*, *Salisbury* in *Wiltshire*, *Hampstead* in *Middlesex*, and elsewhere to the amount of 2000*l* and upwards"—The rest of the bill is in the ordinary form for a partnership account. 3d *October* 1725, on the motion of *Serjeant Girdler* the bill referred for scandal and impertinence. 29th *November*, Report of the bill as scandalous and impertinent confirmed; and order to attach *White* and *Wreathcock* the solicitors. 6th *December*, The solicitors brought into court and fined 50*l*. each; and ordered that *Jonathan Collins Esq.* the counsel who signed the bill, should pay the costs. The plaintiff was executed at *Tyburn* in 1730, the defendant at *Maldstone* in 1735. *Wreathcock* the solicitor was convicted of robbing *Dr. Lawcather*, in 1735, but reprieved and transported. *Lord Kenyon* in the case of *Riddley v. Moore*, Appendix to *Clifford's Report* of *Southwark Election*, has referred to this case. But, upon examining the office, the account is not supported. Taking the case as a supposititious one it sufficiently illustrates the general principle.

Every transaction the object of which is the violation of a public or private duty, is also void; such are bribes for appointing to offices of trust, private engagements that an office shall be held in trust for a person by whose interest it was procured, agreements to stifle a prosecution for any crime of a public nature, bonds to recompense the procuring a marriage (a). See *Parsons v. Thompson*, 2 H. B. 322.; *Garforth v. Fearon*, id. 327.; *Blackford v. Preston*, 8 T. R. 89.; *Collins v. Blantern*, 2 Willf. 347.

A person who contracted to keep horses for government, agreed with another who was under contract to supply him with forage, to commute a part of the forage for money; this was holden to be void as a fraud upon the public. *Wallis v. Baldwin*, Doug. 450. For the same reason the law will not support a promise to indemnify an officer for acting contrary to his duty, or in short any other engagement which falls within the scope of the general principle.

Upon the examination of a bankrupt respecting particular sums which he was charged with, having received, a person promised that if the assignees would forbear to proceed in having that examination taken, he would pay a sum of money for the benefit of the estate. This promise was ruled to be void, as it was the intention of the legislature that the creditors should have the full examination of the bankrupt, as to the state of his effects and the disposition of them, and the promise was to induce the assignees and commissioners to forbear doing their duty. *Nerot v. Wallace*, 3 T. R. 17.

An intention to defraud the public revenue is a frequent cause of vitiating contracts; but the law of one country does not interpose to protect the revenue of another; and therefore an engagement, valid in other respects, is not defeated by any contrivance to evade the revenue laws or special commercial regulations of a foreign country (b).

And even where goods were purchased abroad with an intention by the buyer to smuggle them into *England*; it was held that an action might be maintained for the price, although the seller was acquainted

(a) The cases respecting marriage-brokerage are collected in *Mr. Fonblanque's* notes to the *Treatise of Equity*, book i. ch. iv. §. 10. See also the cases of *Scribblebill v. Brett*, in the last edition of *Brown's Parl. Cases*, iv. 144.; *Booth v. Warrington* (2) ib. iv. 163. and *Murison v. Arubthnot* (Visc.) ibid. viii. 247. Appendix II.

(b) *Pothier* in his treatise on Insurance makes some observations in opposition to this principle, which are apparently very judicious. Having cited a judgment from *Valis*, in which it was held that, it was not forbidden to a *Frenchman* to carry on in a foreign country, a commerce prohibited by the laws of such country, and that therefore the risk of confiscation might be insured like other perils of the sea; he observes that this principle appears false; for that those who carry on commerce in any country, are obliged by the law of nations, and also by the law of nature, to conform, in respect to such commerce, to the laws of the country where they carry it on. Every sovereign has empire and jurisdiction over what-

ever

acquainted at the time with the illegal intention of the purchaser. But it was said that if the seller had any concern in running the goods into *England*, he would have been an offender against the laws of this country. *Holman v. Johnson, Cowp. 341. (a)*.

It is clearly settled that if any engagement is entered into for giving a fortune preparatory to an intended marriage, no private transaction to defeat the effect of it can prevail even as between the immediate parties. Were it otherwise there would be a constant opportunity of delusion, and consents to marriage might be obtained under the fallacious appearance of property which in fact did not exist.

The creditors of an insolvent person having agreed to accept a composition of their debts, one creditor refused to sign the deed of composition without having a note for the remainder of his debt, and the note was held to be void as being a fraud upon all the other creditors; for it prevented the debtor's being put in that situation which was the inducement to them to sign the deed and relinquish a part of their demands. *Cockbott v. Bennet, 2 T. R. 763*. And upon the same principle, where a person who could not raise money to purchase the goods in a house which he had taken, prevailed upon a friend to give for them what was represented to be the full price; but a promissory note was privately given for a further sum; this was held to be a gross fraud upon the person who was induced to advance his money under the supposition that it was the complete purchase money for the goods, and the note was therefore adjudged to be void. *Jackson v. Durham, 3 T. R. 551*. But where a composition was agreed to be taken by instalments, the insisting upon an additional security for the payment of those instalments was not deemed fraudulent, as there was no intention of exacting any greater satisfaction than was generally agreed upon. *Fiefe v. Ran-*

ever is done in the country where he has a right to command, and consequently he has a right to make laws respecting the commerce that takes place in his country, which shall be obligatory upon foreigners as well as upon his own subjects. It cannot be disputed that a sovereign has a right to retain in his territories certain merchandizes which are there, and to prohibit their exportation. To export them then without his orders, is to infringe his right of retaining them, and is consequently an injustice.

(a) See the extract from Lord Mansfield's opinion in this case, *ante*, p. 2. n. (a). See also the case of *Biggs v. Lawrence, 3 T. R. 454*. in which it was held, that no action could be maintained by four partners, three of whom lived in *England* and the other in *Guernsey*, upon a sale of goods made by the latter, and shipped in a manner adapted for smuggling. It has been since held, that even a foreigner could not recover in our courts the price of goods sold with a knowledge that they were intended to be smuggled into this country, and packed by him in a particular manner for that purpose. *Waymell v. Reed, 5 T. R. 599*. See also the case of *Lightfoot v. Tenant, 1 Bos. & Pull. 551*. in which it was held to be a good plea in an action upon a bond, that it was given by the defendant to the plaintiff for the price of goods sold by the latter to the former, to be by him shipped in *London* for *Osford*, to be there shipped for the *East Indies*, in which case Lord Ch. Justice *Eyre* considered with some particularity the degree of participation by the seller in the illegal conduct of the buyer, which might affect the validity of the contract.

*dall*, 6 T. R. 146. But see the case of *Leicester v. Rose*, 4. *Easb.* 172. In which (subsequent to this work going to the press), the obtaining such an additional security was under the circumstances ruled to be fraudulent, and the security consequently adjudged to be void.

Puffing at auctions is a fraud upon the purchasers, and therefore a person cannot have any legal assistance in recovering a satisfaction for his attendance for that purpose. *Treatise of Equity*, 24. and see *Walker v. Nightingale*, *Bro. Parl. Ca.* iv. 193. And it was held upon very full consideration that a person who employed an auctioneer could not maintain an action against him for selling the property under a certain price (the arguement, taking the intention that there should be a private bidder forgranted). *Bexwell v. Christie*, *Cowp* 395.

An engagement founded upon the oppression of a third person is equally destitute of legal efficacy, as if founded upon fraud. Such was the case where a sheriff's officer received a sum of money from a defendant for admitting him to bail, and agreed to pay the bail part of the money which was so exacted. *Stotesbury v. Smith*, 2 *Bur.* 924.

As the public are interested in the freedom of trade, any agreement for the unlimited restraint of a person in following his lawful occupation is utterly void; but an agreement not to follow an occupation within particular limits may be good, provided it is founded upon an adequate consideration. In a recent case it was decided that taking a person as an assistant in the business as a surgeon was a sufficient consideration for a bond not to exercise the same profession afterwards within a certain distance of the employer's place of residence. *Davis v. Mason*, 5 T. R. 118. It is the policy of the law to repress agreements in restraint of marriage; therefore a bond from a woman to a man to pay a sum of money if she married any other person was holden to be void, being essentially different from the legal contract of mutual promises to marry. *Low v. Peers*, 4 *Bur.* 2224.

Without entering into a more particular enumeration of the several grounds which affect the validity of contracts, whether by virtue of the general principles of rectitude, or by the particular policy and institutions of our own country (a), it will be proper to keep it in view as a leading proposition, that an illegality in the object of a contract will frustrate the strictest regularity in form and expression. A sale at an exorbitant price of some article of trifling value is a common cover to a bribe. A wager is also frequently

(a) Mr. *Fonblanque* gives an accurate summary of the law upon this subject, when he observes that considerations against the policy of the common law, or against the provisions of a statute, or against the policy of justice, or the rules and claims of decency, or the dictates of morality, are void in law and equity. *Treatise of Equity*, b. 1. c. 4. s. 4.

the disguise of an illegal transaction. But these contrivances are totally inefficacious, when the real intention can be sufficiently detected. Indeed wagers are void if they are of such a nature that they might have an illegal tendency, although they are not accompanied by an illegal intention in the particular instance; as a wager between two voters respecting the event of an election. *Allen v. Hearn*, 1 T. R. 56. and a contrary determination would be in effect a general protection to illicit transactions.

Where money has been paid on account of an illegal contract, *e. g.* procuring a place in the customs, the performance of which is incomplete, as for procuring an office, it has been held that the party might rescind the contract and recover back the money before the office was procured. *Walker v. Chapman*, cited *Doug.* 471. (a). And where a wager was laid upon an illegal subject, as a boxing match, it was decided that either of the parties might maintain an action for the money which he had deposited, before the wager was decided. *Cotton v. Thurland*, 5 T. R. 405.

And in a recent case it is stated as a determination of the Court of King's Bench, that a person who had lost an illegal wager might recover back his deposit. The Court are represented to have said that it was more consonant to the principles of sound policy and justice, that wherever money had been paid on an illegal consideration, it might be recovered back again by the party who improperly paid it, than by denying the remedy to give effect to the illegal contract, *Lacauflade v. White*, 7 Term Reports, 535. But there is evidently a mistake in the report of that case; for the plaintiff was in fact the winner of the wager, which related to a subject of public notoriety, the cessation of hostilities between *England* and *France*. And the primary object of the action was to recover the money which had been lost by that event not having taken place. The principal ground upon which the wager was held to be invalid, must (so long as wagers in general are considered as obligatory contracts,) be considered as possessing the character, rather of scholastic subtlety, than of juridical reason. It is, that a person by laying a wager on the event of peace or war, has a private interest which may affect his wishes in a manner repugnant to his public duty.

Where a contract is connected with circumstances of an illegal or immoral nature, or where there are two contracts having a connection or affinity, the one of which is affected by circumstances of

(e) In an essay on the action for money had and received I have ventured to question the propriety of this decision. It is essentially different from that which follows; for in the one the parties were personally engaged in a direct infraction of the law; in the other they had merely entered into an engagement destitute of legal efficacy, but not attended with any personal turpitude or criminality.

illegality; the influence of such circumstances upon the contract with which they are incidentally connected, is often a question of considerable nicety, and the cases which have occurred upon this subject, do not enable me to state with confidence any leading principle which can be referred to in the exposition of it. That a participation in carrying the illegal purpose into effect, vitiates every contract, whether primary or secondary, of which it constitutes the object, is a point upon which no difference of opinion can be entertained, but what shall be deemed a participation, is often in itself a question by no means easy to resolve. And certainly there are many cases in which a reference to an illegal subject, without any participation in it, will be fatal to a contract.

Where a person is guilty of trading in contravention of the law, the insurance upon such trade is so immediately connected with the illegal object as to be necessarily involved in the illegality, as is manifest from daily experience.

It is however astonishing to see how often this exception is taken advantage of by persons affecting fairness of reputation. There is no case to which the preceding general observation, of being "contrary to the immediate justice which would prevail in a moral point of view between the contracting parties," can more directly or immediately apply. Stock-jobbing, though prohibited and discountenanced by law, is extensively carried on, and a person would be held to act dishonorably who availed himself of the legal exception. A bet of 50*l.* at cards is paid, or the refusal to pay it is esteemed disgraceful. But an underwriter says, I have taken a premium to insure against a contingent loss, the loss has happened but some rule of legal policy enables me to evade my contract, though all the circumstances were known to me at the time of making it; I will therefore take advantage of the law, and refuse to execute my deliberate engagement, and at the same time I will keep the money which I received for entering into it. Such is the conduct daily presented to the public in the defences against contracts of insurance; and which, from its frequency, appears to pass current and without reproach.

But where two persons are engaged in a boxing match, and two others, perfectly unconnected with them, make a bet upon the event, that is also void, although it cannot have any tendency to promote the illegal act which is the subject of it. The law is the same if two persons bet upon the event of any illegal game in which others may be engaged; but as wagers, though admitted to be legal in general, are very much discountenanced, the cases decided respecting them will not always furnish a ground of analogy for the exposition of other subjects.

Where

Where two persons jointly engaged in an illegal stock-jobbing transaction with a third, and a loss having arisen, one of them paid the whole, and took the bond of the other for his proportion, the bond was decided to be good, for as between the two it was regarded as a mere loan of money, the lender of which was not concerned in the use made of it by the borrower, *Faikney v. Renous*, 4 Bur. 2069.; and in a subsequent case, where one of the partners, under similar circumstances, had paid the money with the consent, authority, and knowledge of the other, the majority of the court of *King's Bench*, contrary to the opinion of the chief justice, decided that an action might be maintained for a proportionate share : but without such consent it was agreed that it could not ; for, in consequence of the illegality of the transaction, there was no obligation to pay the money to the party with whom the contract was made. *Petrie v. Hannay*, 3 Term Reports, 418.

“(a) Subsequent to this, one *Wilson* was employed by *Lesbley*, as a stock-broker, in a similar transaction, and having paid money for the differences, there was a dispute respecting the amount. This dispute was referred to *Steers* and others, who awarded a certain sum to be due ; for part of which *Wilson* drew a bill upon *Lesbley*, and after it was accepted, indorsed it over to *Steers* ; and it was decided that *Steers* was not entitled to recover against *Lesbley* on his acceptance. Lord *Kenyon* said, that if he had lent the money to *Lesbley* to pay the differences, and had afterwards received the bill in question for that sum ; then, according to the principle established in the preceding case, he might have recovered. But here the bill on which the action was brought, was given for those very differences, and therefore *Wilson* himself could not have enforced the payment of it ; and as *Steers* knew of the illegality of the contract between *Wilson* and *Lesbley*, he could not be permitted to recover on the bill in a court of law. Two of the judges were absent when this decision was made, and Mr. Justice *Asbhurst* does not appear to have expressed any opinion upon the subject,—6 Term Reports 61. This decision does not seem to be founded upon very satisfactory reasons : in the first place, it may be incidentally observed, that the award had created a new original duty, and could not, any more than a judgment, be impeached on account of the circumstances to which it related, furnishing no ground of action ; and therefore *Lesbley* was, at the time of accepting the bill, debtor, not upon the original consideration, but upon the award. I however do not mean to dwell upon this circumstance ; because the point was not made, and possibly what is called an award may have been merely the adjust-

(a) I have already published the passages between the inverted commas in an essay on bills of exchange.

ment of differences. But supposing the award out of the case; it is agreed that if *Steers* had lent the money to *Lesbley* for the payment of *Wilson*, it would have been a good ground of action: but in neither of the preceding cases was the money paid into the hands of the defendant; it was paid by his consent to the party entitled to the balance, (the illegality being waived,) which was regarded as amounting to an immediate loan. But surely the advancing money to *Wilson* upon *Lesbley*'s acceptance, was at least equivalent to that. If *Lesbley* had had a partner who drew the bill in favour of *Wilson*, and paid him the amount, the bill being accepted by *Lesbley*, which testified his request for the payment, such partner would have been entitled to recover under the immediate and express authority of the case against *Hannay*. Whatever inference might be drawn from notice of the transaction, would apply most directly and pointedly between those who immediately participated in it; and whatever distinction can be made, must be in favour of the person receiving such a bill for a valuable consideration, and no wife implicated in the illegal circumstances in respect of which the question arose. It was fairly argued at the bar, that the bill was good in the hands of the broker, for it certainly was an avowal of the money being paid by him at the request of the defendant; which brings the case within the broad principle of the decision in *Faikney* and *Renous*.

“In a subsequent case, the Court acting upon the authority of the case of *Steers* and *Lesbley*, refused a rule to shew cause in favour of the indorsee of a promissory note, given upon a settlement of differences; but the general argument was not entered into. *Brown v. Turner*, 7 *Term Reports* 630. If the observations suggested respecting the case of *Lesbley* and *Steers* are correct, and the discussion of the subject is not precluded by the authority of these adjudications; the last case, as it depends solely upon the preceding, cannot materially vary the course of reasoning upon the general proposition.

“In a case in Chancery before Lord *Loughborough*, his Lordship held, that a person was not bound by his acceptance of a bill for money laid out on his behalf in effecting a void insurance upon an *East India* voyage; and referring to the cases of *Faikney v. Renous*, and *Petrie v. Hannay*, said he was aware of those cases, but could not perfectly accede to them. What was called consent in those cases, was a confederacy to break a positive law, *ex parte Mather*, 3 *Ves.* 373. But with every respect to the great authorities who have dissented from the principle of those cases, that principle seems to be supported upon the strongest foundations of justice. Where parties agree to contravene a legal prohibition, it is a necessary consequence

sequence that from such agreement no legal obligation can arise; but where the act is not in itself criminal, there is an honorary obligation which the party is at liberty to fulfil, and against the voluntary performance of which there can be no exception. If then, admitting the force of the obligation, he evinces a disposition to perform it, but for his own convenience persuades another to advance the money on his behalf, it is to every substantial purpose, as much a loan of that money to himself, as if the money had been actually counted out to him, and he had paid it over. Having thus induced another to make an advance on his behalf, there is no more justice in permitting him afterwards to impeach that act, than if money had been advanced by his request to a person whom he wished to assist, but to whom he was under no obligation, either legal or honorary; and there is nothing in the policy of the law to relieve him from the undertaking to repay the money so advanced, when by the advancing it, no illegal object was intended to be promoted. The different illustrations of Lord *Mansfield* in *Falkney* and *Renous*, all proceed upon the principle of a loan of money, upon which the lender is not to be affected by the borrower's application.

“It has been decided at *Nisi Prius*, that a person, who at the request of a holder of a bill, has put his name upon it, and thereby been obliged to pay the contents to a *bona fide* holder, may recover the money paid, in an action on the bill, from any person whose name is on it, although he knew it was given on an illegal consideration. *Peake* 215, *Chitty* 53”.

In the case of *Holman v. Johnson*, which has been already twice referred to in the discussion of the present subject, the knowledge by the seller of the goods that an illegal use was intended to be made of them by the buyer, did not defeat his action for the price, as he had not any participation in the subsequent illegality; and it is perfectly familiar, that although the legislature has vacated securities for money lent to play with, the loan of the money is itself a valid contract. It will be difficult to find a satisfactory principle for the distinction, that money lent to a person to enable him to accomplish a future illegal purpose, shall create a valid obligation; but that money lent to him, or what is precisely the same thing for every rational purpose, money paid by his desire and upon his authority in order to satisfy an illegal contract already executed, should not; and that, after having prevailed upon another to advance his money in a manner by which no prospective illegal purpose could be facilitated, he should be encouraged to set up his own previous illegal conduct as a bar to the repayment of it.

It has been held, that letting lodgings to a person who had no other resource for payment than money acquired by prostitution, was invalid; and that no action could be maintained for the rent: but where it was set up as a defence to an action for washing cloaths, that some of the cloaths were for the purpose of enabling the defendant, who lived in a state of prostitution, to appear at public places, and that the others were night cloaths for the use of gentlemen who might visit her; it was held that the action might be maintained. Mr. Justice *Buller* observed, that the plaintiff was employed to wash the defendant's linen, and the use which the defendant made of it could not affect the contract. And speaking of one of the former cases respecting lodgings, he said he supposed the lodgings were hired for the express purpose of enabling the persons to meet there; which would certainly be unlawful. See *Lloyd v. Johnson*, 1 *Bos. & Pull.* 340. But if the purpose so referred to was merely a purpose personal to the defendant, if the plaintiff was to have no concurrence in promoting it, if his compensation was not made conditional upon the success of it, (the probability of not being able otherwise to obtain payment, is quite a different thing from such a condition,) it will not be easy to distinguish the case of the lodgings from that of the cloaths, or from the sale of the tea in the case of *Holman v. Johnson*. The contract of sale, the work and labour, the occupation, —are all perfect, independant, and complete; the illegality in the subsequent use is contingent and accidental. To induce a consistency of principle, the knowledge or the expectation that such subsequent use was intended by one party, should be universally allowed or universally disallowed as a bar to the rights, which the other would be legally entitled to upon the original contract if no such intention had existed. It never has been decided, and probably never will be, that if a person living with another in a state of concubinage hires a house for their common residence, the landlord, however clearly apprized of their situation, is without a remedy for his rent; but such a state of concubinage is not less repugnant to the principles of the law than a state of prostitution.

The following observations, which I have already published in an Essay on the Law of Insurances, are materially connected with the present subject.

“The general right of entering into any legal contract is restrained by a statute, which secures to the two companies of the *London Assurance* and the *Royal Exchange Assurance*, the exclusive right of insuring by a common fund; and all other insurances in co-partnership are declared to be void, and all sums underwritten thereon, are to be forfeited, half to the king, and half to the informer. 6 *Geo.* 3.

c. 18. A sum of money was paid to government for the benefit of this monopoly, the professed purpose of which was the stability of the security.

“All the decisions upon the construction of this statute are of a very modern date. The points which they have established are, that where a partnership is entered into in contravention of the prohibition that it contains, one of the partners has no claim upon the other for a proportion of the losses which he has paid. *Mitchell v. Cockburn*, 2. H. B. 379. where three persons were engaged as partners, and the policies were in the name of one of them, and another, together with a partner of his own, (to which partnership there is no legal objection,) were the brokers; the assignees of the person whose name was used were not allowed to recover from the brokers the premiums received. *Booth v. Hodgson*, 6. T. R. 405. It had previously to these cases been held by Lord Kenyon at *Nisi Prius*, that an underwriter who had paid a loss, could not recover from a broker the money which the broker had received from another person, who had agreed to take half the plaintiff's risk; his Lordship saying, that a party could not appeal to a court of justice to enforce a contract founded in a breach of the law. *Sullivan v. Greaves*, Park 8. But it has been since ruled by the Court of Common Pleas, that a broker to whom the underwriter had paid the loss on an illegal policy could not resist paying it over to the assured; and they even refused to grant a rule to shew cause why there should not be a new trial. Mr. Justice Buller said, “Is the man who has paid over money to another's use, to dispute the legality of the original consideration? Having once waived the illegality, the money can never come back to his hands again. Can the defendant then, in conscience, keep the money so paid? For what purpose should he retain it? To whom is he to pay it over? Who is entitled to it but the plaintiff?” Lord Chief Justice Eyre said, “The question is, whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot.” *Tenant v. Elliot*, 1 B. & P. 3. This decision certainly cannot in principle be reconciled with that before Lord Kenyon; and it cannot require much argument to shew that it is more consonant to the substantial principles of justice, and so connected with them, that nothing but the most authoritative provisions of the law should be sufficient to induce an opposite conclusion. The person who is interested in contesting the legality of a contract, waives the exception, and transmits the money which he has engaged to pay, and which he was under an honorary obligation to pay, by the hands of a third person, as he might have transmitted a mere donation; and

and the question is, whether a man who is only the instrument of such transmission shall be allowed to intercept the money in its course, and appropriate it to himself? The statement of such a question would seem sufficient to decide it. Even the case of *Booth* and *Hodgson*, in some degree, seems to be founded upon disputable reasoning. There were in that case, in truth, three contracts, or sets of contracts: 1st. The partnership for insurance, which was confessedly illegal: 2d. The contracts of insurance, which as between the plaintiff, the insurer, and the assured, were legal and obligatory, and in respect of which there was no dispute; and, 3d. The contract of service or commission between the insurer and the broker. When the broker, in pursuance of the last of these three contracts, had received money for the use of the insurer upon the second, it would have been very iniquitous to have retained that money upon the allegation, that the insurer had entered into the first contract respecting the subject matter with his partner, and which could not be enforced as between themselves; the insurer would singly have been liable to every loss, and would singly have had a right of action against the insured for the premiums. No contribution could have been claimed on either side; then the broker must either retain the money himself, or he must pay it to the insurer whose name was used, or to the insurer and his partners jointly. Against the first there should be every leaning and presumption, as much as in the case last discussed; and this, whether there was a broker merely engaged as such, or two brokers in co-partnership; one of whom was a member of the illegal partnership of insurance. The legal prohibition seems to attach upon the third case, leaving the second, in which the benefit would accrue to the party who had subjected himself to all the legal claims of the several persons assured. These suggestions, however, are by no means offered with the same degree of confidence as the objection to the broker being permitted to retain from one partner what he had actually received in execution of the engagement of the other.

“In a case before the Common Pleas, subsequent to those which are included in the preceding discussion, and which was not under my notice in the course of it, it appeared that the plaintiff had sent by the defendant, who was a carrier, to a third person, large quantities of counterfeited halfpence; the person to whom it was sent paid the defendant the money for which he had agreed to purchase it of the plaintiff, and the object of the action was to recover the money so paid. The evidence left it doubtful whether the defendant was or was not privy to the nature of the transaction at the time when it occurred. In case such privity had appeared, Lord Chief

Chief Justice *Eyre* intimated his opinion, that a demand necessarily arising out of an illegal contract, and tending to facilitate the execution of it, would be vitiated by that contract. But supposing that not to be the fact, his Lordship observed, after referring to the preceding case of *Tenant and Elliott*, (in which the broker was not allowed to retain the money paid to him by the underwriter, on behalf of the assured, upon an illegal insurance,) that the case was brought to this, that the money was got into the hands of a man who was not a party to the contract, who had no pretence to retain it, and to whom the law could not give it, by rescinding the contract. Though the Court would not suffer a party to demand a sum of money in order to fulfil an illegal contract, yet there was no reason why the money in that case should not be recovered, notwithstanding the original contract was void. Mr. Justice *Buller* was of opinion, that if the knowledge and participation had been made out, it would not have made any difference in that action, which was not founded upon the illegal contract, but on a ground totally distinct from it, and that, the defendant having received the money for the use of the plaintiff, it was immaterial whether the money was paid on a legal or on an illegal contract. He referred to the case of *Faikney and Renous*, and to a case of money lent to pay a bet at a horse-race. Mr. Justice *Heath* expressed himself of the same opinion. He said, he looked upon the matter in the same light as if the money had been paid into the hands of a banker, who could never be allowed to say that it was paid in on an illegal consideration; and he considered the case where a party was allowed to recover money lent to game withal as very strong. Mr. Justice *Rooke* enlarged very much upon the contrary opinion. The general effect of his observations is included in the proposition, "That a man who had been guilty of an indictable offence ought not to have the assistance of the law to recover the profits of his crime, and that whether his agents were innocent or criminal, privy or not privy, his claim against those agents was equally inadmissible in a court of law." The case was referred to a new trial, principally on account of the uncertainty of the fact, and the defendant afterwards paid the money. *Farmer v. Ruffel*, 1 B. & P. 296."

Retaining the sentiments which I have already submitted to the public, in the passage cited from the Essay on the Law of Insurance, the impressions of my mind strongly coincide with the doctrine of Mr. Justice *Buller* and Mr. Justice *Heath*. If *Gaius* lends *Titius* a sum of money, nobody will contend that *Titius* has a right to withhold the payment by impeaching the legality of the mode  
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in which *Gaius* acquired it (a), any more than a tenant can impeach the title of his landlord, by saying that the estate was the reward of an illegal action. And when a third person pays money to *Titius* as the money of *Gaius*, and with the intent of delivering it to *Gaius*, it is immaterial to *Titius* what was the nature of the motive for which the money was so given, whether an obligatory contract, a void contract, an illegal contract, or a gratuitous donation. The money has, to all substantial purposes, as much become the immediate property of the person for whom the payment was intended, as if it had gone through the circuitous course of being paid to himself and afterwards lent to another. The justice of the case as between the parties is too plain to admit of any argument, and the interest of the public seems to be sufficiently protected by withholding the remedies of the law in respect to the immediate subject which is a contravention of its authority, without pursuing that subject in its remote consequences and incidental effects.

The legislature having prohibited giving entertainments to electors after the test of a writ for the election of members of parliament, it was ruled in the case of *Ribbans v. Crickett*, 1 B. & P. 264. that an innkeeper could not recover the price of victuals furnished contrary to that prohibition. Supposing the innkeeper to have been instructed generally to furnish entertainments prohibited by the act, the case falls within the common principle of an illegal participation. But if an entertainment was given to particular designated persons, the question might arise how far the knowledge that such persons were of the prohibited description would affect the right to recover. The distinction between the two cases would certainly be very minute; but that must always be the case between the extreme points of legal and illegal contracts, wherever such extremes may happen to be. And I cannot but think that the principles which prevailed (and, if the opinion I have endeavoured to support is correct, wisely and justly prevailed,) in the case of *Faikney* and *Renous*, would support the demand; that it would be held that the innkeeper furnished the entertainment personally to the party ordering it, and that he was not concerned to examine the manner in which it was distributed.

Subsequent to the completion of this discussion, the case of *Edgar v. Fowler*, has been decided, in which it was held that a

(a) In the case of *Bird v. Appleton*, 8 T. R. 562. the underwriters upon goods from *Canton* to *Hamburg* contended that they were not liable for a loss, because the goods were purchased at *Canton* with the proceeds of a cargo brought there contrary to the *English* navigation laws; but the defence was not allowed. Mr. Justice *Lawrence* said, We cannot inquire into the means by which the merchant gains the money that is afterwards laid out in the purchase of goods; if the money were obtained by robbery on the highway, and laid out in the purchase of a cargo, I do not know why the cargo may not be legally insured.

broker who had effected a reinsurance, (a contract which the legislature for some reason, or for none, has been pleased to render invalid) and credited the insurer and debited the assured with the premium, was not subject to an action by the former for the amount, as that would be giving effect to the illegal contract. 3 *East*. 222. It does not seem to have been distinctly agreed what would have been the opinion of the court, if the premium had been actually paid; but it does not occur to me, that any difference could properly arise from that circumstance, as the plaintiff was authorized by the defendant to consider it as paid: and from what fell from the court, it seems probable that they would not have thought the assured, (in consequence of a notice from whom the broker had refused to pay) any better intitled to recover. It is obvious that the principle adopted in this case is opposite to that which I have endeavoured to support. It seems to be no less opposite to that of some of the cases which I have cited. Admitting the deference which to a certain extent is due to authority, and aware of the liability to prejudice in favour of an opinion, not the effect of momentary impression but of long and repeated consideration; I must acknowledge myself unable to reconcile the converse of that opinion in the present instance, to my ideas of the true principles of judicial propriety. I still adhere to the opinion, that the authority of the legislature is sufficiently supported by denying a legal efficacy to the contract, without empowering the hand, which is only an instrument of transference, to retain from the party who has made an engagement nowise criminal, inducing an honorary obligation, though destitute of legal efficacy, that consideration which the party stipulating for the benefit of such obligation, has consented to pay. It is not probable that my private sentiments will in practice be opposed to a judicial opinion of the court of King's Bench, but the object of my enquiries calls not only for a statement of the authorities of the law, but, so far as I am capable of giving it, an exposition of their principles. In attempting that exposition, I am perfectly conscious of my liability to error, but am not willing to make a tacit sacrifice of what I firmly and fairly consider as the truth, and that upon a subject which, to a mind not affected by technical habits, would seem incapable of raising a question.

It may frequently happen that a contract is composed of several parts, some objectionable, others not so. When that is the case, it becomes a question whether the illegality of a part infects and vitiates the whole. A distinction, as is observed by Lord Chief Justice *Wilmot*, in the before-mentioned case of *Collins v. Blantern*, has been made upon this subject, between contracts void at com-

mon law, and such as are void by statute; and it was said, that in the first case, if it be bad, or void in any part, it is void *in toto*; but that at common law it may be void in part, and good in part; the judges formerly thought an act of parliament might be eluded, if they did not make the whole void, if part was void (a); it is said the statute is like a tyrant, where he comes he makes *all* void; but the common law, like a nursing father, makes only void that part where the fault is, and preserves the rest. 1 Mod. 35, 36. But I conceive that wherever an agreement is single and entire, wherever there is one entire complex consideration (b), and an essential part of it is repugnant to the principles of the law, the whole contract is invalid, whether the objection is founded upon the common law or upon a statute; more especially if it is a case at all affected by the objection of moral turpitude. But where different engagements contained in the same act are separate and distinct, the mere invalidity of the one will not necessarily induce the destruction of the other.

A person cannot at the same time sue for the execution of an agreement, and contend that part of that agreement is illegal. It was agreed upon a sale of tobacco to take a particular parcel of bad copper in payment; the seller brought an action for the price of the tobacco, and insisted upon being paid in money, for that the contract to accept payment in bad money was illegal and void. But it was ruled by the court of King's Bench, that, supposing the agreement to be illegal, the plaintiff never could recover. It could not be said that the sale was good and the payment was bad; if it was an illegal contract, it was equally bad for the whole: it would be great injustice to permit the plaintiff to recover for the goods sold, for that would be permitting him to take advantage of a corrupt agreement, which is never allowed in cases where a party applies to the Court to set aside such agreements. *Alexander v. Owen*, 1 T. R. 225.

(a) 1 Lev. 209. Hard. 564.

(b) Where a person made a verbal promise to pay the debt of another (which is void by the statute of frauds), and also to do another act, it was ruled that the agreement was entire, and that the plaintiff could not separate it, and recover on one part of the agreement, the other being void. *Chater v. Beckett*, 7 T. R. 201. And in the case of *Bird v. Appleton*, 8 T. R. 562, which underwent a very frequent and attentive discussion, a policy effected upon an American vessel at and from Canton was admitted to be void, the vessel having brought goods from a British settlement to Canton, contrary to the navigation acts, and disposed of them there, so that during part of the time that the parties intended the policy should attach, namely, while the ship was at Canton, there was something illegal in the transaction. There is an old case in which a promise in consideration of 2s. and suffering an escape, was held void as to the whole. *Cro. Eliz.* 200.

## N U M B E R II.

(Referred to, Vol. I. p. 29.)

*Of the Consideration of Contracts.*

To the preceding discussion upon the invalidity of contracts as founded upon the illegality of their consideration, I shall now subjoin some observations concerning the necessity and sufficiency of a consideration according to the law of *England*; a subject very different from the preceding, as the objection founded upon the want of such consideration is merely negative, whereas the objection last considered is founded upon a positive wrong.

A gratuitous undertaking, seriously made, is certainly sufficient to form the basis of a moral and honorary obligation, and ought not to be receded from without some adequate reason; but in general a person does not intend to subject himself thereby to legal responsibility: and the object of law is rather to give effect to contracts founded upon the mutual exigencies of society, than to compel the execution of a voluntary engagement of mere donation. But in most countries there are certain legal solemnities which indicate the serious intention of contracting a valid and effectual obligation, and which dispense with the necessity of any actual consideration. They import deliberation, and are inconsistent with the nature of those promises that are in effect little more than the intimation of a present intention, and with regard to which, expressions only designed to indicate such intention may easily be perverted into those of absolute engagement.

The principal mode of engagement, which in the *Roman* law dispensed with an actual consideration, was a *stipulation*. The person, to whom the promise was to be made, proposed a question to him from whom it was to proceed, fully expressing the nature and extent of the engagement; and, the question so proposed being answered in the affirmative, the obligation was complete. It was essentially necessary that both parties should speak, (so that a dumb person could not enter into a stipulation) that the person making the promise should answer conformably to the specific question proposed, without any material interval of time, and with the intention of contracting an obligation. From the general use of this mode of contracting, the term *stipulation* has been introduced into common parlance, and in modern language frequently refers to any thing which forms a material article of an agreement; though it is applied more correctly, and more conformably to its original meaning, to denote the insisting upon and requiring any particular engagement.

The *nuda pacta*, which were those agreements that had neither any definite name, nor any cause of creating an obligation beyond the engagement itself, did not induce any legal right. Vinnius says, that the *Roman* jurisprudence refused to give a compulsory force to these engagements, that they might rest upon the mere integrity of the parties who contracted them, thinking it more honourable, and more conducive to the culture of virtue, to leave some things to the good faith and probity of mankind, than to subject every thing to the compulsory authority of the law. *Inst. Lib. III. tit. 14.*

According to the law of *England*, a deed sealed and delivered is in this respect analogous to the ancient stipulation. It is a solemn act, manifesting the intention of the party to contract a legal obligation, and the engagement which it contains cannot be impeached for the mere want of consideration; though, as has been already mentioned, an illegality of consideration is equally fatal to all engagements in whatever manner constituted. A promise without a consideration, unless contained in a deed, is void; and by the law of *England*, borrowing the expression of the *Roman* law, is termed *nudum pactum*.

In one case, two very celebrated judges intimated an opinion, that the objection of want of consideration could not be applied where the promise was in writing; and one of the same judges is stated to have said, that in commercial cases among merchants, the want of consideration is not an objection. *Van Mierop v. Pillans*, 3 *Bur.* 1663. But these observations are contradicted by the general current of authorities, both prior and subsequent. In a case which occurred before the House of Lords, recently after they were made, but which has only lately been published, it was urged that a promise, which appeared to be without consideration, might have been made in writing; which would remove the objection: but the Chief Baron of the Exchequer, in delivering the opinions of the judges, said, All contracts are by the law of *England* distinguished into agreements by specialty and agreements by parol; nor is there any such third class as the counsel have endeavoured to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved. *Rann v. Hughes*, 7 *T. R.* 350. *n.*

In fact, mere writing does not appear in the early periods of our law to have been much regarded. To write was an unusual qualification, the want of which reflected no disgrace even upon the higher classes of society; and distinct appropriate seals were used for the attestation of solemn instruments. Since the knowledge of writing has become more diffused, those appropriate seals have

fallen very much into disuse, the signature of a party being more notorious evidence.

That the want of consideration should be immaterial in mercantile transactions, is a proposition equally destitute of support; and, though it may never have been judicially contradicted in terms, is in effect inconsistent with several cases of daily occurrence. The extent and adequacy of a consideration in relation to the engagement with which it is connected, is allowed to be immaterial. The case of *Shulbrick v. Salmon*, 4 *Burr.* 1637, is an illustration of the principle that it is not requisite that the consideration should be commensurate with the promise, and that in case of mutual promises the engagement on the one side may be absolute, whilst that of the other is conditional. The defendant engaged that his ship should sail for *Winyaw* in *South Carolina* as soon as ready, the plaintiff engaging to load it there and pay a certain freight. There was a condition that if the ship did not arrive before the first of *March*, it should be in the option of the plaintiff to load the ship or not. The defendant alleged that by contrary winds, the ship was prevented from sailing within such a time, that it could possibly arrive before the first of *March*. And it was contended on his part, that as the plaintiff would not be under an obligation to lade it upon an arrival after the first of *March*, it was not incumbent on himself to go there. It was said, that the consideration failed, and it was a covenant on one side only. But it was evidently the opinion of the court, that the engagement of freighting in case of an arrival before the first of *March*, was an adequate consideration for the opposite engagement to go at all events. The decision more immediately turned upon the engagement being by deed, to which no consideration is necessary. Lord Chancellor *Loughborough*, in a case which affords one of the finest modern specimens of judicial eloquence, said, that a bargain without a consideration is a contradiction in terms, and cannot exist. *Middleton v. Lord Kenyon*, 2 *Ves. Jun.* 188.

The case which I first cited as containing two observations that could not be supported, furnishes the more correct principle, that any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make it binding; though no actual benefit accrues to the party undertaking. This principle was illustrated by the immediate point decided in the cause: for a person in *Rotterdam*, having paid the draft of another in *England* upon an offer of credit on a house in *London*; a letter from the partners of that house, that they would honour a bill which might be drawn, was adjudged to be obligatory, although the money had been advanced before the promise was made; as the merchant

in *Rotterdam*, by relying on that promise, might have been prevented from resorting for further security to the person who originally drew upon him.

And in general it may be stated, that any act by which the person making the promise has benefit, or the person to whom it is made has any labour or detriment, is a sufficient consideration.

A consideration, absolutely passed before a promise is made, will not be sufficient; for instance, a promise of reward in consideration of having bailed a servant from prison. *Dyer* 272. 1 *Roll. Abr.* 11. *Hayes v. Warren*, 2 *Str.* 933. But if an act is incomplete, the continuance and completion of it may support a promise to make a compensation for the whole that is done both prior and subsequent: as, if the assignees under a commission of bankrupt promise the book-keeper of the bankrupt that, if he will continue to settle and arrange the books, they will pay him the arrears of his wages. See several cases upon this subject, *Comyns*, Action of Assumpsit, B. 12. Where the act which is the consideration of the promise is founded upon a preceding request, it is sufficient. See *Williams n. Osborne*, v. *Rogers*, 1 *Saund.* 264.

Any preceding moral duty is also a sufficient consideration; as, if one person should pay the expence of nursing the child of another, or if medical assistance has been given to the pauper of a parish, a promise of payment by the father or overseer would be obligatory. *Scott v. Nelson*, N. P. *Esq.* Dig. *Watson v. Turner*, *Bull. N. P.* 147.

An engagement to pay a debt contracted during infancy, or barred by bankruptcy and certificate, is in general rather the waiver of an exception than an original contract; but under particular circumstances they may form the ground of a specific and positive obligation.

A promise, made to a person who is a stranger to the consideration, cannot be sustained except under particular circumstances; as where, upon a service being performed by a father, he stipulated for a reward to his daughter; and it was held that the daughter might sustain an action upon this engagement. See *Dutton v. Poole*, 1 *Ventr.* 318. Sir T. Jones, 103. Vi. No. IV. *post.*

Where a person, who is already under an engagement of a limited nature, promises to perform that engagement, no new duty arises from the promise, nor is the obligation rendered more extensive unless it is founded upon some fresh consideration, as forbearance to sue, a remission of part of the obligation, &c. Therefore an executor promising to pay a debt of his testator, *Rann v. Hughes*, 7 *T. R.* 350. n. or a husband promising to pay the debt of his wife,  
*Mitchinson*

*Mitchinson v. Hewson*, 7 T. R. 348. does not render himself personally liable, and is only chargeable to the amount of his assets in the first case, or jointly with his wife in the other, as if no such promise had been made: the former of these points was established in the case before the House of Lords that has been already mentioned. The Chief Baron stated the position in the following terms: The being indebted is of itself a sufficient consideration to ground a promise; but the promise must be co-extensive with the consideration, unless some particular consideration of fact can be found to warrant the extension of it. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him in the later right. But in this case the executor derives no advantage or convenience from the promise here made; for, if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from the promise, and therefore there is not a sufficient consideration for it.

A doubtful right may be compromised, and that compromise may be the consideration of a valid promise. But if one person has a right of action against another, and a satisfaction is agreed upon, the agreement is of no effect unless it is executed. It can furnish no defence to the original demand on the one side, and is no foundation for a promise on the other. See *Lynn v. Bruce*, 2 H. B. 317. and the cases there cited,—a rule which is rather founded upon precedent and authority, than upon any principles of reason. But a bond or a negotiable instrument, which furnish in themselves a direct cause of action, are a sufficient execution of an accord and a defence against the original demand. See *Kearlake v. Morgan*, 5 T. R. 513, and the cases there cited.

Though a person, who gratuitously engages to perform any act for another, is not liable in law to any action for not performing his promise, he is answerable for any injury occasioned by his negligence in the performance. This is the point decided in the important case of *Coggs v. Bernard*, 2 Lord Raym. 909. and is a principal subject of Sir *William Jones's* Essay on the Law of Bailments.

The civil law has adopted a rule respecting the non-performance of such a gratuitous commission, which appears highly reasonable, but has not (I conceive) been adopted in the law of *England*: That the commission must be renounced in suitable time. *Vinnius*, in his commentary upon a passage in the institutes to this effect, says, a renunciation is either timely, that is, whilst the person for whose use the commission is undertaken retains a perfect opportunity of transacting the same business with equal advantage;

or untimely, that is, when he can no longer transact the same business either by himself or by means of any other person; and that the person undertaking the commission is answerable for any damage which may be incurred by an untimely renunciation, unless there is some just cause for it: for instance, if the party whose business is undertaken becomes insolvent, so that the other will not be able to recover the expence which he may incur. Sir *William Jones* argues very forcibly, that the law of *England* ought to admit an action for the nonperformance of a gratuitous undertaking (or mandate) when special damage is occasioned thereby. The case of *Elfee v. Gatward*, 5 T. R. 143. is a determination to the contrary, but the particular point and the reasoning connected with it were very slightly adverted to; the case being wholly referred to mere legal precedents, upon the general proposition that an action cannot be maintained for the non-performance of a gratuitous promise. It is remarkable, that, whilst the reasoning of Lord Ch. *Holt*, in *Coggs* and *Bernard*, is generally cited with admiration, and the case itself is looked up to as of the first authority, so little recourse has been had in subsequent cases to the grand sources from which that reasoning is derived; that the mode of reasoning and investigation which has been so much approved should have been so little pursued.

Where a contract is entered into, which is not executed on the one side at the time, but there is a mutual engagement to be performed at a future period, the promise of the one party is a consideration for the promise of the other, and the engagement must become obligatory upon both parties at the same instant; so that a promise, however strongly made, may be retracted until it has received validity from the assent of the other party; and if there is no other consideration than the mutual promises, a condition leaving one of the parties an unqualified right to dissent, may be taken advantage of by the other. This is confirmed by a decision which took place a few years ago in the King's Bench. *Oxley* agreed to sell goods to *Cooke*, if he would purchase them, and give notice by four in the afternoon; he gave the notice, but as the engagement in the mean time was all on one side, the seller was held to be at liberty to recede. 3 T. R. 653. But this mutuality only refers to the complete intention of the parties, and not to those exceptions which are introduced by the law for the benefit or protection of one of them; and of which that party has a right to take advantage in avoidance of the transaction. Thus in case a mutual contract is entered into between a minor and a person of full age, the one may take advantage of his minority, and resist the completion of the agreement; but that right cannot be urged by the other, to

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shew that, as there was not a mutual legal obligation, there was not an adequate consideration for his engagement. *Holt v. Ward, Clarencieux*, 2 Str. 973.

The case of a married woman is materially different, for she is under a legal disability to contract, and not merely entitled to a protection.

If one party to a contract has defrauded the other, it may be shewn against him as a bar to the performance; but it is manifest that he would never be admitted to alledge his own fraudulent conduct as an excuse.

But it may not be necessary in every instance that the mutual promise shall be directly proved, provided it may be fairly presumed; as, if a woman sues upon a promise of marriage, it has been held that she might recover though no actual promise from herself should be shewn, provided she has testified her assent by the general tenor of her conduct. *Hutton v. Mansell*, 3 Salk. 16. The case referred to is in a book of very inferior authority, but seems founded upon a fair and reasonable principle.

The case of Bills of Exchange and Promissory Notes affords, in some degree, an exception to the general rule which has been under discussion. When they are indorsed over for a valuable consideration, the want of consideration between the original parties is immaterial; as between the immediate parties a consideration is presumed, but if the contrary is shewn, it is a sufficient defence. It will not be necessary at present to enlarge upon the doctrine connected with these principles.

### N U M B E R . III.

(Referred to, Vol. I. p. 32.)

#### *Of Persons capable or incapable of Contracting.*

The power of tutors or curators to contract on behalf of the persons under their charge, is not recognized by the law of *England*. The committee of a lunatic's estate has, under the authority of the Lord Chancellor, the management of his property; but cannot, as I conceive, enter into any contract which shall be regarded as obligatory upon the person intrusted to his care.

Some important observations were made respecting partial and general derangement of mind, by Lord *Thurlow*, in the case of the Attorney General v. *Parnter*, 3 Bro. Ch. Rep. 441. which it will be desirable to cite. "There is" (he said) "an infinite, nay an almost unfur-

unfurmoutable difficulty in laying down abstract propositions upon a subject which depends upon such a variety of circumstances, as the legal competency of the mind to the act in which it is engaged; if its competency be impeached by positive evidence of anterior derangement, or affected by circumstances of bodily debility sufficiently strong to lead to a suspicion of intellectual incapacity. General rules are easily framed, but the application of them creates considerable difficulty in all cases, in which the rule is not sufficiently comprehensive to meet each circumstance, which may enter into and materially affect the particular case. There can be no difficulty in saying, that if a mind be possessed of itself, at the period of time such mind acted, it ought to act efficiently. But this rule goes a very little way towards that point which is necessary to the present subject; for though it be true, that a mind in such possession of itself ought, when acting, to act efficiently; yet it is extremely difficult to lay down with tolerable precision the rules, by which such state of mind can be tried. The course of procedure for the purpose of trying the state of any party's mind allows of rules. If derangement be alledged, it is clearly incumbent on the party alledging it to prove such derangement. If such derangement be proved or admitted to have existed at any particular period, but a lucid interval be alledged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alledging such lucid interval, who must shew sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance, that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong, and as demonstrative of such fact, as where the object of the proof is to establish derangement. The evidence in such a case, applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental view of any individual, or to the degree of self-possession in any particular act; for from an act with reference to certain circumstances, and which does not of itself mark the restoration of that mind which is deemed necessary in general to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general, as that the party who had confessedly before laboured under a mental derangement was capable of doing acts binding on himself and others".

The whole of this doctrine was laid down near a century before by M. *D'Aguesseau*, as advocate-general in the parliament of *Paris* (the duty of which office in civil causes is that of assessor to the court), in the case of the Prince *De Conti*; a translation of which

I propose laying before the public, as containing a view of several important topics of general jurisprudence discussed with the most consummate knowledge, and the most commanding eloquence. His description of the nature of a lucid interval is as follows: "It must not be a superficial tranquillity, a shadow of repose, but on the contrary a profound tranquillity, a real repose; not a mere ray of reason which only serves to render its absence more manifest as soon as it is dissipated, not a flash of lightning which pierces through the darkness only to render it more thick and dismal, not a glimmering twilight which connects the day with the night, but a perfect light, a lively and continued radiance, a full and entire day separating the two nights of the madness which precedes and that which follows it; and, to adopt another image, it is not a deceitful and faithless stillness, which follows or forbodes a tempest, but a sure and steady peace for a certain time, a real calm and a perfect serenity; in short, without looking for so many different images to represent our idea, it must not be a simple diminution, a remission of the malady, but a kind of temporary cure, an intermission so clearly marked that it is entirely similar to the restoration of health. And, as it is impossible to judge in a moment of the quality of an interval, it is necessary that it should last sufficiently long to give an entire assurance of the temporary re-establishment of reason; this period it is not possible to define in general, and it depends upon the different kinds of madness. But it is always certain that there must be a time, and that time considerable. These reflections are not only written by the hand of nature on the minds of all men, the law also adds its characters in order to engrave them more profoundly in the heart of judges." (a)

In the sequel of his judgment, the Lord Chancellor referred to the case of *Greenwood* and *Greenwool*, in which a question turned upon this, "whether a mind sound to general purposes, being influenced by a false imagination, an unreasonable persuasion, in the doing a particular act, was not sufficient to avoid such act," and observed, "that a question of so great extent involved serious consideration." In that particular case there were contradictory verdicts, and the dispute was probably settled by compromise. I cannot but think that a mental disorder, operating upon particular subjects, should, with regard to those subjects, be attended with the same effects as a total deprivation of reason; and that, on the other hand, such a partial disorder, operating only upon particular sub-

(a) Here he cited some passages from the civil law in support of his observation.

jects, should not in its legal effects have an influence more extensive than the subjects to which it applies; and that every question should be reduced to the point, whether the act under consideration proceeded from a mind fully capable, in respect of that act, of exercising a free, sound, and discriminating judgment: but in case the infirmity is established to exist, the tendency of it to direct or fetter the operations of the mind should be in general regarded as sufficient presumptive evidence, without requiring a direct and positive proof of its actual operation. Where the existence of derangement is shewn in general, the partiality of its operation in the particular instance should be manifestly and incontestably proved, in order to prevent the application of its general effect.

There are several old authorities in the *English* law, that a person shall not be allowed to stultify himself; or, in other words, that he shall not be permitted to allege that his solemn acts are void, as having been done whilst in a state of mental incapacity; but that advantage could only be taken of the defect by his representatives. Modern decisions seem to have exploded this distinction, than which nothing could be more absurd; for it is always a question of fact, whether a given act is imputable to a given individual; and where the nature of the act requires a mind capable of rational assent, the want of such capacity is a negation of the act imputed. An ample account of the principles which prevail in our courts of justice upon the subject of insanity is given in Mr. *Fonblanque's* valuable notes to the treatise of equity.

With respect to drunkenness, Lord *Hardwicke* refused to set aside an agreement on account of one of the parties being drunk when it was made, as there did not appear to have been any unfair advantage taken, and the agreement was reasonable in itself. 1 *Ves.* 19. But in a former case Lord Ch. Justice *Holt* held that a person might shew in opposition to the validity of a bond, that he was made to sign it when he was so drunk that he did not know what he did. *Bull. N. P.* 192.

But though the mere circumstance of being in a state of intoxication is not sufficient to vitiate an agreement, it would be evidently improper to consider any act as binding which might be done by a person who (to use the language of the *Treatise of Equity*) is so excessively drunk that he is utterly deprived of reason or understanding; for it can by no means be a serious and deliberate consent, and without this no contract can be binding by the law of nature.

Mere weakness of understanding, or a harassed and uneasy state of mind, not amounting to a positive derangement of intellect,  
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does not furnish a substantive objection to the validity of a contract, but in conjunction with other circumstances, especially with the exercise of an improper influence, may be often very material in tainting a contract with fraud.

Mere infants cannot contract on account of the want of that understanding which is necessary to exercise a consent; but besides this, there is in almost every system of law a period, during which persons are under a legal protection, on account of the judgment not being sufficiently matured: and though the mind, individually speaking, may be fully capable of exercising an adequate judgment, the law which acts upon general principles, will not permit a valid engagement to be contracted within that period. The particular age of acquiring a legal capacity, must be in a great measure arbitrary. In *England* the age at which it is acquired is twenty-one, but there are gradations of age under that period at which a person acquires a legal capacity for particular purposes, as marriage, making a will, until a late statute acting as an executor. All persons under twenty-one are, in the technical language of the law, called infants.

To the general disability of infants to contract, there is an exception in the case of necessaries. What shall be deemed necessaries is a question of considerable latitude, but the term must in every case be applied with reference to the rank and fortune of the person to whom the articles are supplied; and necessaries to a person's wife or child born in wedlock, are necessaries to himself. Money advanced for the purpose of buying necessaries cannot be recovered, because it may be misapplied; but if money is lent to pay a debt contracted for necessaries, and it is applied accordingly, the court of chancery will give the lender relief by placing him in the situation of the original creditor.

There are also several other cases in which the acts of infants will be supported if in their nature beneficial to themselves, as agreements made by female infants previous to marriage, and with the approbation of their friends and guardians, or where the rule of law might operate the most fatal prejudice to the very interests it is intended to protect. For the detailed examination of these points, I shall refer to the notes already mentioned of Mr. *Fonblanque*.

It has long been settled, that an infant cannot even for necessaries enter into a bond with a penalty, though he may give a single bill, an instrument which has now fallen into disuse. It has also been determined, that an infant cannot bind himself by stating an account which was formerly deemed a conclusive act, so that the items of it  
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could not afterwards be contested, 1 T. R. 40. In the same case it became a matter of discussion whether he could bind himself by a negotiable promissory note given for necessaries, but the decision of the other point rendered an opinion upon that unnecessary. I am very far from concurring with the gentleman to whom I have just referred, in thinking that the case affords an inference that an action would lie on a promissory note or other negotiable security given by an infant for necessaries, though in such action, by a third person he would be precluded from impeaching the consideration of it. Whether a proof that the note was given for necessaries would support an action against an infant upon the note itself, is a question upon which I do not offer to enquire; but to decide, that by giving a note or bill he should incur an obligation more extensive than his original liability for the necessaries supplied, would be subversive of his legal protection altogether. In a former case it had been held, that an infant was not liable upon bill of exchange given in the course of trade. *Carth. 160.*

But it seems to be now established as a general position, that the deeds of infants are not void but only voidable, or in other words, that they are not necessarily and absolutely inoperative, although an exception may be taken to their validity by the infants themselves, or others succeeding to their rights: and, as a consequence of this rule, the acts of infants will admit of subsequent confirmation by which the exception may be waived, whereas acts absolutely void cannot derive any greater effect from confirmation. To use the expression of *Pothier*, infants are rather incapable of obliging themselves by their contracts, than incapable of contracting; the principles of law respecting the acts of infants being void or voidable, are examined at length by Lord *Mansfield* in the case of *Zouch v. Parsons*, 3 Bur. 1794. A warrant of attorney is an excepted case from the general rule, and is absolutely void. 2 H. Bl. 75.

Upon the moral justice of taking advantage of the exception of infancy, Mr. *Paley* has the following observations, nearly coinciding with a preceding passage in *Pothier*. "To preserve youth from the practices and impositions to which their inexperience exposes them, the law compels the payment of no debts incurred within a certain age, nor the performance of any engagements except for such necessaries as are suited to their condition and fortunes. If a young man, therefore, perceive that he has been practised or imposed upon, he may honestly avail himself of the privilege of his non-age to defeat the circumvention; but if he shelter himself under this privilege to avoid a fair obligation or an equitable contract, he extends the privilege to a case, in which it is not allowed by intention

tion of law, and in which consequently it does not in natural justice exist."

Married women are by the Law of *England* incapable of making any valid contract, and this is not as in the case of infants, merely a protection, but an absolute disability. Their contracts are not voidable, but void. A husband is answerable for necessaries supplied to his wife suitable to his rank and fortune, but this is the contract of the husband by the intervention of the wife, and not the personal contract of the wife. There are some excepted cases to the general rule, that a married woman has no capacity to contract. The earliest exception is in the case of the husband having abjured the realm; the cases of the husband being an alien enemy, or being banished by act of parliament, or even transported for seven years, have since been added; and it has lately been determined, that the wife of a person living in a foreign country, was from the necessity of the case enabled to oblige herself by her contracts. *De Guillon v. L'Aigle.* 1 *Bos.* 357.

Property may be settled in various ways so as to be subject to the disposition of married women, but this is by no means inconsistent with a general incapacity to contract; it is to be regarded merely as a modification of the particular property, and is not attended with those circumstances of personal liability which the act of contracting naturally implies.

In some modern cases it has been held that where a married woman by agreement lives separate from her husband, and has a separate maintenance settled upon her, her general disability is removed, and that her contracts are equally obligatory with those of other persons.

The court of King's Bench assuredly assumed in those decisions an authority which reached the extreme limits of judicial discretion. In later cases the courts evinced a great aversion to extend the doctrine further, and accordingly it was decided that a married woman by cloping from her husband and living in adultery, or by carrying on a separate trade, or by having an allowance of alimony during a suit in the spiritual court, does not acquire any special power to contract, which prevents the application of the general rule of law. And finally, upon solemn argument before all the judges, it was determined that a contract made by a married woman is void, notwithstanding a separate maintenance. By this decision, the authority of the cases introducing a contrary doctrine is exploded, and the law is restored to its ancient channel. *Marshall v. Rutton*, 8 *T. R.* 545.

By particular custom, as in *London*, a wife may carry on trade separately

separately from her husband, and with respect to such separate trade, she is subject to the same liabilities as if single.

#### N U M B E R IV.

(Referred to Vol. I. p. 34.)

*Of the Rule, that a person can only stipulate or promise for himself.*

THE text of the Institutes upon this subject says, that if one man promises that another shall give or do any thing he is not bound, as if he undertakes that *Titius* shall give five pounds, but if he engages to procure *Titius* to give five pounds, he is bound. *Si quis alium daturum facturumve promiserit non obligabitur, veluti si spondeat Titium quinque aureos daturum; quod si effecturum se ut Titius daret sponderit, obligatur.* *Vinnius* in commenting upon this passage, observes, *Nostris et multorum aliorum moribus qui factum alienum promittit, tacite intelligitur promittere se curaturum aut effecturum ut alius det aut faciat.* I conceive that the rule itself is no where formally adopted in the law of *England*, and can have no other effect than as it necessarily results from the natural reason of the thing; and that if one man engages that an act shall be done by another, he is liable to damages in case it is not done, provided there are the other requisites for an obligatory contract. The distinction, however, is in a great measure verbal, as according to all the systems of jurisprudence, it becomes finally a question of intention, whether the party engaged personally that the act should be done, and meant to subject himself to the same responsibility in case of non-performance, as if the engagement related to an act of his own. With respect to one person receiving a promise for the benefit of another, it has been held that an action might be maintained by a daughter for non-performance of a promise made to her father for her benefit upon a consideration moving from the father. *Dutton v. Poole*, 1 *Ventris* 318. 332. *T. Jones* 103. the nearness of the relation between the father and the daughter was held sufficient to entitle her to maintain the action upon the promise to her father. *Lord Mansfield* has said, that it was difficult to conceive how a doubt could be entertained upon the point (*Cowp.* 837, *Doug.* 146,) but the decision was certainly very anomalous; and in other cases it has been held, that a person, for whose benefit a promise was made to another, could not maintain an action for the non-performance of it. 1 *Ventris* 6. 1 *Str.* 592. But I conceive, that according to the law

**Numb. IV.] Of a Person stipulating or promising for another. 33**

of England, (differing in this respect from the civil law,) an action may be maintained by the person to whom the promise was made, although the benefit resulting from it was intended for another.

In the case of *Marchington v. Vernon*, at nisi prius, T. 27 Geo. 3. B. R. 1 Bos. & P. 101. n. where the holder of a bill recovered against the assignees of the drawee, upon their promise of payment made to the drawer, it was said by *Buller*, that, independent of the rules which prevail in mercantile transactions, if a person makes a promise to another for the benefit of a third, that third person may maintain an action upon it. The reporters last mentioned truly observe, vol. 3. 149. n. that with respect to the right of a third person, to sue upon a parol promise made to another for his benefit, there is great contradiction amongst the older cases, all of which are collected, 1 *Vin. ab. fo.* 333 to 337. *Action of Assumpsit.* See *Feltmakers', Comp. v. Davis*, 1 Bos. 98. In *Pigot v. Thompson*, 3 Bos. 147. it was decided, that upon an agreement made with the commissioners of a turnpike road, to take the toll at a certain rent to be paid to the treasurer, no action could be maintained by the treasurer, but that decision was rather founded upon a construction of the intention, than upon the application of any general rule, as to the right of one person to sue upon the promise made for his benefit to another.

In *Martyn v. Hinde*, Cowp. 437. it was contended that a certificate given by a rector to the bishop, upon the appointment of curate, undertaking to continue him at a certain salary until otherwise provided for, was merely a contract with the bishop, and for his indemnity, upon which no action could be maintained by the curate; but it was truly answered by the court, that this was not a contract with the bishop, but a certificate and assurance to him of a matter of fact, *i. e.* it was evidence of an actual contract with, and promise to the curate.

Where an engagement is made by deed, or otherwise, to A, for the benefit and on the behalf of B, and the action is brought by A, or the engagement is performed to him, the consequent obligations between A and B depend upon principles unconnected with, and irrelevant to the present discussion; which is confined to the obligation, and responsibility of the original debtor.

In equity, it is a leading principle, that all the persons concerned in interest must be parties in the suit, and an arrangement is made according to the substance of the transaction, and the real interests of the persons entitled, without reference to the mode or circumstances of the contract, which are only regarded as instrumental to the interest; and it is the peculiar pro-

vince and characteristic distinction of those courts, to obviate the technical difficulties which might arise from the mode and form of the transaction in a court of law.

The remaining topic of consideration, is the recognition sometimes admitted by courts of law, of the real and substantial interest in the suit, and of the character of the person actually interested, as distinct from the person who institutes the suit, as upon an engagement made to himself.

Where a bond was made to A for the benefit of B, it was held that the latter could neither sue upon it, nor release it. *Offley v. Ward*, 1 *Lev.* 235. The same rule would apply in the case of an assignment of a bond, by the obligee to a third person: the action must be brought in the name of the original obligee. In these cases, if the obligee released the obligor, it might be pleaded as a defence by the obligor, and I apprehend that in general it could be no answer to state upon the record the original trust or the subsequent assignment, but in the exercise of the summary jurisdiction which the courts possess over the proceedings before them, where the obligee by collusion with the obligor gave him a release, it was held that it might be set aside, and also that the obligor could not be allowed to plead payment to the obligee. *Legb v. Legb*, 1 *Bos.* 447. I conceive, that if there is a release from, or satisfaction to the party actually interested, the court in the summary exercise of its discretionary power, will stay the proceedings of the person nominally entitled.

In *Bottomley and Brook*, and *Rudge v. Birch*, cited 7 *T. R.* 664, it was held, that a defendant might plead that the bond on which he was sued was given to the obligee in trust for another person, which other person was indebted in a larger amount to the defendant.

In *Winch v. Kelly*, 1 *T. R.* 619, it was pleaded that the plaintiff had become a bankrupt; to which he replied that he had previously assigned over his debt to another person for a valuable consideration, and the replication was held to be good. The same principle must apply to the case of an engagement being originally made to one person for the benefit of another.

Where a contract is made with a factor, an action may be brought upon it, either in his own name, or in the name of the principal. In the latter case, it is considered as the transaction of the principal throughout, and no particular observations are applicable to it, connected with the present discussion. With respect to actions in the name of the factor, it was pleaded to a declaration on a policy of insurance, that the persons interested were alien enemies; to this it was replied, that the policies were effected before

before the war, and that the parties interested were indebted to the plaintiff, who had a lien on the monies to be recovered in the action, to a greater amount than the sum claimed, and judgment was given for the defendant. *Brandon v Nesbett*, 6 T. R. 23. But this case proceeding upon principles of public policy, is no authority in respect to general cases not affected by the same consideration, and does not establish any general proposition, that a personal disability in the party beneficially entitled, is a bar to an action instituted on his behalf, by another to whom an engagement is nominally made.

An action was brought in the name of a consignee of goods as factor, against a carrier for damage occasioned by neglect. A letter written by the plaintiff was adduced in exculpation of the defendant: the effect of this was objected to, as it appeared by the same letter that other persons were the real owners of the goods, and that they had indemnified the plaintiff; and it was argued that the persons interested ought not to be prejudiced by the admission of their agent; but it was held that the admission of the plaintiff on the record must be evidence in the cause. *Bauerman v. Radenius*, 7 T. R. 663.

Lord *Kenyon* in that case made several valuable observations, as to the impropriety of innovating upon the settled principles of the law, in order to meet the exigencies of particular convenience.

I hope that I shall be excused for having extended this discussion so far beyond the limits of the subject which immediately occasioned it.

## N U M B E R V.

(Referred to, Vol. I. p. 53.)

### *Of the Interpretation of Agreements.*

As every contract derives its effect from the intention of the parties, that intention, as expressed or inferred, must be the ground and principle of every decision respecting its operation and extent, and the grand object of consideration in every question with regard to its construction.

Mr. *Powell* defines *construction* to be the drawing an inference by the act of reason, as to the intent of an *instrument*, from given circumstances, upon principles deduced from men's general motives, conduct, and action.

This definition may perhaps not be sufficiently complete, inasmuch as the term *instrument* generally implies something reduced into writing, whereas *construction* is equally necessary to ascertain the

meaning of engagements merely verbal. In other respects it appears to be perfectly accurate. The Treatise of Equity defines *interpretation* to be the collection of the meaning out of signs most probable.

Where an agreement is of known and general nature, it is unnecessary to express the circumstances which are commonly incident to it; these are necessarily presumed to be in the contemplation of the parties, and if any variation is intended, that must be particularly mentioned; long and uninterrupted usage may afford certainty to expressions which are vague and inaccurate in themselves, and give effect to instruments which would be otherwise unintelligible and void. This is the case with regard to policies of insurance, which modern judges have agreed in considering as very inaccurate, and imperfect in their original structure, but as having acquired a definite signification from the long period during which the same form has subsisted, and the general adoption which it has received.

But, in ascribing the true construction to contracts of a detached and independent nature, or to those variations which are occasionally and specially introduced in regard to contracts in general use, and of definite signification, considerable difficulties frequently arise, the solution of which must chiefly depend upon considering the principal object of the contracting parties, the greater subserviency to that object in adopting the one or the other construction of ambiguous phrase; the mutual relation of the different parts, with the mutual illustration which they may contribute or receive; and in cases where a manifest absurdity or repugnance may result from a literal construction of the terms employed by restraining or extending their general signification, according to the evident reason and justice of the subject, and the intention which may from thence be reasonably inferred.

Wherever a special agreement is entered into, it is of importance distinctly to express the object which is in view, not resting too much upon the force and efficacy of a general expression applied to an unusual subject; and also to consider and provide for the different contingencies which may eventually arise.

The want of this caution has often been productive of considerable confusion, and Lord *Mansfield* has in several instances taken notice of the want of accuracy in describing the intended import of special agreements, or in superadding particular clauses in mercantile transactions; though it is agreed that they ought to have a liberal interpretation, and are not restricted to any technical expressions. Speaking of the effect of the common agreement in a policy to return part of the premium, if the ship sails with convey,

voy, and arrives, after mentioning the general inaccuracy which has been already adverted to, he said, "It is amazing, that when additional clauses are introduced, the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition being made, which has not created doubts on the construction of it." *Simond v. Boydell*, *Doug.* 255.

A full description of the intention is very different from an unnecessary multiplication of words, which is in itself a source of considerable confusion, both in private transactions and in acts of public authority. Speaking of the charter-parties of the East India Company, Lord *Mansfield* said, the charter-party is an old instrument, unformal, and by the introduction of different clauses, at different times, inaccurate, and sometimes contradictory. Like all mercantile contracts, it ought to have a liberal interpretation. Many of the difficulties which have been raised are occasioned by the multiplicity of unnecessary words, introduced with a view to be more explicit, an effect which often arises from the same cause in acts of parliament. *Hotham v. East India Company*, *Doug.* 272. Upon any addition being made to, or any alteration being introduced in accustomed form, its effect and tendency upon the whole should be attentively considered, so that the remaining parts of the form may be properly adapted to the new provisions, in order to avoid those inconsistencies and contradictions, which for want of such attention frequently arise.

If the language of an agreement is not attended with any real ambiguity or uncertainty, and is not controuled or affected by an established usage or general principle of law, it is not reasonable to recur to an arbitrary construction founded upon an uncertain supposition of the intention of the contracting parties, or upon the course which they would probably have pursued if an accidental contingency had been foreseen (a). Thus, where two successive tenants of a farm, having each a dispute with a third respecting the condition in which they had respectively left the hedges, it was agreed to refer all the disputes to arbitration, and the two jointly and severally promised to perform the award; it was contended, that as the two had no joint interest in respect of that part of the subject to which the award related, it was therefore an agreement in three parts, for which one was not answerable for the other. But Lord *Kenyon* said, this is rather a hard case; perhaps if it had been stated to the two tenants at the time of the

(a) Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est. *Co. Lit.* 147. a. Divinatio non interpretatio est, quæ omnino recedit a literâ. 3 *H.* 6. f. 20. *Baron.*

agreement, that each of them was to be answerable for the other, they would have hesitated before they signed the agreement; but the words of the agreement are too strong to be got over. It was reasonable that each should make satisfaction for the time that each occupied; but by the terms of this agreement they have promised jointly and severally, which makes them responsible, the one for the other. *Mansell v. Burredge*, 7 T. R. 352.

The same principle was acted upon in a case which underwent a very great and repeated consideration respecting the effect of the common clause in a policy of insurance, that corn, fruit, &c. are warranted free from average, unless general, or the ship stranded. The ship was stranded in the course of the voyage, and also sustained an average loss; but such loss was not occasioned by that circumstance, but by another accident of a different nature. On the one hand it was said, that the introduction of the clause was occasioned by the perishable nature of the commodities enumerated, and because it could not be distinguished whether the loss was occasioned by that circumstance or by the accidents of navigation; that therefore the indemnity was restrained to an accident, in its nature so notorious as stranding. On the other hand, the grammatical construction was insisted upon, and the clause was considered as a mutual concession to avoid enquiries into the particular facts or causes of the deterioration, to disclaim all average loss if there was no stranding, and to attribute the loss conclusively to it if there was. The court decided that the insurers were liable, and lord *Kenyon*, in the course of his judgment, said, if a general provision is made in any deed or instrument, and it is there said that certain things shall be excepted, unless another thing happen, which gives effect to the general operation of the deed; if that other thing does happen, it destroys the exception altogether. Without inquiring into the reasons for introducing this exception, on the grammatical construction of the whole I have no doubt. If it had been intended that the underwriters shall be only answerable for the damage that arises in consequence of stranding, a small variation of expression would have removed all difficulty. *Barnet v. Kensington*, 7 T. R. 222. And in a subsequent case also arising upon policy of insurance, he said, the words here used are not equivocal, and we ought not to depart from them; it would be attended with great mischief and inconvenience, if in construing contracts of this kind we were not to decide according to the words used by the contracting parties; the grammatical construction of the words is the safest rule to go by. *Boehm v. Sterling*, T. R. 423.

And in a question respecting the construction of a lease, he said,  
if

if I were to indulge in conjecture and speculation as to any supposed intention of the parties not expressed in the deed, I should have as little doubt (as upon the words); but I disclaim proceeding upon any such ground. It is sufficient for me to say, that the lessee has not entered into the covenant insisted upon by the lessor; the parties have met here upon the construction of a solemn instrument, in which their respective rights and duties are clearly prescribed; and we cannot substitute any other contract in lieu of that into which they have entered. *Gerard v. Clifton*, 7 T. R. 676.

This subject has also been very well considered in a case before the supreme court of the United States of *America*, respecting the construction of the treaty of peace with *Great Britain*. During the war the State of *Virginia* made a law, that all persons indebted to *British* subjects might pay the amount into the loan-office, which should be a good discharge. By the treaty of peace it was provided that "creditors of either side should meet with no lawful impediments for the recovery of their debts." The defendant had paid the money into the loan-office; but it was held that in consequence of the treaty of peace he was liable to the plaintiff. Judge *Chace*, in giving his opinion to that effect, said, "In the construction of contracts, words are to be taken in their natural and obvious meaning, unless some good reason be assigned to shew that they should be understood in a different sense. The universality of the terms is equal to an express specification on the treaty, and indeed includes it. For it is fair and conclusive reasoning, that if any description of debtors or class of cases was intended to be excepted it would have been specified. The indefinite and sweeping words made use of by the parties exclude the idea of any class of cases having been intended to be excepted, and explode the doctrine of constructive discrimination. The article appears to come within the first general maxim of interpretation laid down by *Vattel*: "It is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to endeavour to elude it. If this dangerous method be once admitted, there will be no act which it will not render useless. Let the brightest light shine on all the parts of the piece, let it be expressed in terms the most clear and determinate; all this shall be of no use, if it be allowed to search for foreign reasons in order to maintain what cannot be found in the sense it naturally presents." *Vatt. B. 2. c. 17. § 263. Ware v. Hylton*, 3 *Dallas' Reports*,

*Reports*, 199. The whole of this case, and also of a case of *Hamyltons v. Eaton, Martin*, 79. in which the same point was decided by the circuit court of *North Carolina*, very well deserve attention, as containing a clear and instructive view of the nature and effects of treaties.

## NUMBER VI.

(Intended to have been referred to, Vol. I. p. 72. N<sup>o</sup> 121.)

### *Of Injuries and Neglects.*

The doctrine, that fathers and others shall be responsible for the acts of children under their care, which it was in their power to prevent, appears highly reasonable; but I am not aware of any case in which it is adopted in the *English* law.

With respect to the responsibility of masters for the acts of their servants, a singular distinction has been taken, that the master is only responsible for the injuries of his servant, which arise from negligence, and not for those which proceed from his wilful wrong. *Salk.* 441. *Day v. Edwards*, 6 T. R. 648. *M<sup>c</sup>Manus v. Crickett*, 1 East, 106. (a). An action cannot be maintained against a servant, who hires labourers for his master on account of acts done by them; it must be either against the persons committing the injury, or the master for whom the act was done. *Stone v. Cartwright*, 6 T. R. 412.

It seems extremely clear that with respect to acts committed by servants, without reference to the functions in which they are employed, no responsibility attaches to the masters. Mr. Justice *Buller*, speaking in illustration of the question, how far a man was bound by the act of an agent executing his commission, said "There is a class of cases which have been thought to bear extremely hard upon masters, who are held liable for the misfeasance of their servants, in driving their carriages against those of third persons; but those cases must have been determined on the ground, that it must be presumed that the servants have acted under the orders of their masters. But suppose a master ordered his servant not to take his horses and carriage out of the stable, and the latter went in defiance of his master's orders, there is no authority which says that the master shall be liable for any injury done to another, by such act of the servant, though indeed if the master had ordered the servant to go a particular journey, and in

(a) In this case, a very full and accurate view of the law upon the subject is taken by Lord *Ker*.

the course of it the latter did an injury to some third person, the authorities say that the master is liable; *Fenn v. Hamson*, 3 T. R. 717. In *Middleton v. Fowler*, Salk. 282, it is laid down by Lord Ch. Justice Holt as a general position, that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him: and Lord Kenyon having cited that opinion on the case above alluded to, of *M' Manus v. Crickett*, says; "Now when a servant quits sight of the object for which he is employed, and without having in view his masters orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act."

A different principle was adopted in a case at the Exchequer Sittings, in which it was held that a servant of a glass-house nowise employed in filling the pots, and not having any thing to do with the management of them, who threw in some broken glass for the purpose of secreting it from the master, subjected the master to a penalty imposed upon putting materials into a pot without notice to the officer. The jury were told generally that the master was answerable for the acts of all the servants employed in the manufactory, without adverting to the distinction of the act's being totally foreign to the functions to which they were engaged. *Attorney General v. Perrin*, sittings after Michaelmas 1798. As to the liability of a sheriff for the acts of his officers, see *Woodgate v. Knatchbull*, 2 T. R. 148.

## N U M B E R VII.

(Referred to, Vol. I. p. 122.)

### *Of Mutual Agreements.*

Where there are mutual agreements, it often becomes a question of importance whether they are mutual and independent, in which case either party is entitled to claim a performance from the other, or to recover damages for the non-performance, and it is no excuse to allege that he has himself been guilty of a breach in the performance of the agreement? 2d Whether they are conditions, and dependent, in which case the performance of the one, depends upon the prior performance of the other? Or, 3dly Whether they are mutual, and to be performed at the same time, and in which, if one party is ready and offers to perform his part, he may maintain an action for the default of the other, although it is not certain that

that either is obliged to perform the first act? See *Bromley v. Smith*, cited *Doug.* 690.

In this, as in all other respects, the intention of the parties may be positively expressed, and then there is no room for construction, as if a horse is sold on the first of *May*, to be paid for on the first of *June*. But supposing there to be no distinct and absolute agreement upon the subject, the dependence or independence of the respective engagements is to be collected from the evident sense and meaning of the parties, and however the covenants may be transposed, their precedency must depend upon the order of time in which the intent of the transaction requires their performance.

Each of these divisions may be illustrated by familiar instances. A landlord and tenant enter into reciprocal engagements; the tenant agrees to pay the rent, to plant a certain number of trees, to repair the fences; the landlord agrees to repair the house, to erect a barn, to pay the taxes. If the tenant brings an action against the landlord for not building the barn, it is no answer that the tenant has not planted the trees. If the landlord brings an action for the rent, the tenant cannot insist that the house is out of repair. 2d, If a carrier engages to convey a bale of goods for a certain sum, he cannot demand the money until he has brought the goods to the place appointed; a weaver cannot demand his wages until he has completed his piece. 3d, If a horse is sold for 20*l.* to be paid on delivery, one party cannot demand the horse, without paying the money, nor the other the money, without delivering the horse. In some of the older cases upon this subject, we meet with decisions apparently contrary to these principles, and which are founded rather upon too minute an attention to words, than upon considering the nature of things. Modern determinations have marked the true distinctions resulting from the purpose and object of the contracting parties. Lord *Mansfield*, who stated the threefold division already mentioned, has also furnished us with the proper rule for the application of it. The distinction is very clear: where mutual covenants go to the whole of the consideration on both sides; they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy in his covenant, and shall not plead it as a condition precedent. The case to which that distinction was referred, was a conveyance of the reversion of a plantation with the negroes upon it, in consideration of a sum of money, and an annuity. And it was held that the purchaser could not withhold the payment

ment of the annuity, on account of the feller not being legally possessed of the negroes, otherwise any one negro, not being the property of the feller, would be a defence, *Boon v. Eyre*, 1 *H. B. Bl. Rep.* 273. and upon the same principles it has been since decided, that if a person having a patent, agrees to let another have the free use of the invention, and to instruct him with all possible expedition in the use of it, for which the other promises to pay 500*l.* upon a particular day, it is no excuse for refusing to pay the money, to say that he has not been completely instructed. *Campbell, v. Jones*, 6 *T. R.* 571.

In general, where it is a single act that is to be performed upon each side, the rule that one party can only claim a performance of the other's engagement, by offering to perform his own, manifestly applies; such are all executory contracts of sale without special provision to the contrary; *Goodison v. Nunn*, 4 *T. R.* 671. *Morton v. Lamb*, 7 *T. R.* 125. *Glazebrook v. Woodrow*, 8 *T. R.* 366. The rule has been so far relaxed, that it has been held sufficient for the purchaser to aver, that he was ready and willing to pay for the article sold, and ready and willing to receive it, but that the feller refused to deliver it. Lord *Kenyon* observed, that the plaintiff was bound to prove that he was prepared to pay or tender the money; if the defendant had been ready to receive it, and to deliver the goods. *Rawson v. Johnson*, 1 *East. Rep.* 203. confirmed by *Waterhouse v. Skinner*, 2 *Bos. & Pul.* 447. This relaxation was certainly very judicious, as it prevented the party from being injured of his right, for the want of making a formal tender, the necessity of which would only occur to the mind of a person habituated to legal studies; but in order to support the allegation, I conceive it is essentially requisite to prove an actual and positive refusal, and that a mere non-feazance would not be sufficient; in case of such actual refusal being proved, I do not think it would be proper to exact very rigid proofs, that the person who came to demand the execution of a sale was prepared with money for the payment; for if the fact appeared to be no more than a refusal to deliver without immediate payment, the allegation would not be supported; and if the refusal was absolute, the person who had wholly disclaimed an intention of performance on his own part, would not be very favourably heard in requiring a proof of the power of performance in the other party.

The question, whether an agreement is mutual, so that neither of the parties can demand a performance of the engagement of the other, without a performance or readiness to perform his own, is essentially different from that which turns upon what shall be admitted as readiness, and whether the act, of which the non-performance

ance is objected does or does not constitute an essential part of the engagement, the performance of which is admitted to be requisite for enforcing the reciprocal obligation: as to which, see the before mentioned case of *Boon and Eyre*, the observations thereon in *Glazebrook* and *Woodrow*, and *Duke of St. Albans v. Shore*, 1 *H. Bl.* 270. cited vol. 1. p. 116. note (a). All the cases upon this subject are accurately collected, and the result of them judiciously stated by Mr. Serjeant *Williams*; in his notes to *Portage v. Cole*. 1 *Saund.* 320. *Hunlock v. Blacklow*, 2 *Saund.* 157. *Peters v. Opie*. 2 *Saund.* 350.

Where the act of one party is a condition precedent to the obligation of the other, it has been held, that he must do every thing which can be done without the concurrence of the other, before the obligation can attach, and in some instances this rule has been applied with very great strictness, *Lancashire v. Killingworth*, 2 *Salk.* 623. But it is now settled, that if the party who is under the conditional engagement, discharges the other from the performance of the condition, the obligation is complete and absolute. *Jones v. Barkley*, *Doug.* 684. cited vol. 1. p. 122. note (c).

## N U M B E R VIII.

(Referred to, Vol. I. p. 124.)

### *Of Apportionment.*

The law concerning apportionments may be divided into two principal heads: 1st, As it refers to cases of a certain property, being unequally divided between different persons, subject to a certain charge, as in the case of an estate devised to A. for life, with remainder to B. in fee subject to a mortgage, or where a leasehold estate is divided to A. for a particular interest and to B. for the residue, and a fine is paid for the renewal for their common benefit. In these cases, the whole mortgage or fine is paid, and the question arises as to the manner of dividing the charge amongst those entitled to the benefit, it being certain that an apportionment must in some manner be made. For the rules upon this subject, see *Nightingale v. Lawson*, 1 *Bro. Ch.* 440. *Stone v. Theed*, 2 *Bro. Ch.* 243, and the cases there cited, *White v. White*, 4 *Ves.* 24.

The 2d head, which is alone connected with the subject under discussion in the text, relates to certain claims or duties due in entire sums, and involves the general rule, that where the whole duty does not attach, the whole of it fails, and is lost, notwithstanding

standing the occurrence of part of the condition (in which description I include a partial efflux of time) upon which it is to arise.

It is a general rule, that a personal contract cannot be severed or apportioned; and upon this principle it was held, that where A. appointed C. to receive his rents at a certain annual salary, and at the end of three quarters of the year A. the master died; nothing was due without a full year's service, and it was in the nature of a condition precedent; *Countess of Plymouth v. Throgmorton*, 1 Salk. 65. In 3 *Viner's* Abridgement, p. 8. title *Apportionment*, there is a letter from that industrious compiler, to Sir John *Strange* (afterwards Master of the Rolls), respecting a cause of *Worth* and *Viner* at *nisi prius*, which Sir John had at the trial (tauntingly, as it seems) recommended to be published in the abridgement; desiring a statement of that case, and that Sir John (who had succeeded in persuading the jury to give a proportionate part of wages upon a yearly *hiring*), would point out some cases, or a single case at least, out of the year books, *Fitzherbert* or *Brook*, or any book of reports since, wherein it had been adjudged that a contract for wages is apportionable. He adds, that a gentleman having called to inform him that Sir John could not furnish any such report: "Whereupon I told the gentleman of the other part of my letter, and mentioned that I had never yet met with any case that would support such apportionment: nor could I find any gentleman at the bar that had, though I asked several; that I thought every gentleman ought to do the best he could for his client, as far as was consistent with justice, but he ought to stop there; that any proceeding further, and so procuring injustice to the other side, was utterly unjustifiable; and that if there was no case to support such apportionment, the verdict was against law." He adds, that the direction of the court was in that case in favour of the defendant, and that the jury was guided by the counsel and not by the court.

But the law is now understood to be according to the verdict, and certainly that is conformable to the real intention of the parties; nevertheless it is regarded as a special and excepted case, and in the case next to be cited, the right of a common hired servant having been adduced by way of argument, Mr. Justice *Lawrence* said, that such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during a whole year.

The case referred to, was an action by the personal representative of a seaman, who had sailed from *Jamaica* upon an undertaking;

taking, to pay him 30*l.* provided he continued on board, and did his duty until the arrival of the ship at *Liverpool*. He having died upon his passage, it was held that his representative could not recover a proportionable part of the wages, on a *quantum meruit* for work and labour. It appeared, that if there had been no special contract, the wages due for the voyage upon a *quantum meruit*, would have only been about 8*l.* And Lord *Kenyon* observed, that he stipulated to receive the larger sum if the whole duty were performed; and nothing unless the whole of that duty were performed; it was a kind of insurance. Mr Justice *Lawrence* said, If we are to determine this case according to the terms of the instrument alone, the plaintiff is not entitled to recover, because it is an entire contract. *Cutler v. Powell*, 6. T. R. 320.

In *Cook v. Jennings*, 7 T. R. 381. it was agreed by charter-party to pay freight at the rate of seven pounds *per* standard hundred, for deals delivered at *Liverpool*. The ship before her arrival was wrecked, and became incapable of proceeding on her voyage, and the deals were put a-shore and taken by the freighter. The owner claimed a proportionate part of the freight; but it was ruled that he could not enforce payment of any part of the money under the contract, not having carried the goods to *Liverpool*, and the defendant having only agreed to pay on a delivery at *Liverpool*.

In a much older case, which was cited in the preceding, a merchant covenanted with the master of a vessel, that if he would bring his freight to such a port he would pay him such a sum; and the master showed that part of the goods were taken away by pirates, and the residue brought to the place appointed; and the court were of opinion that the merchant was not to pay the money. *Bright v. Cowper, Brownlow*, 21.

Mr. *Abbot* observes, that upon reading this report it is not quite clear what the real question before the court was; but it seems that the plaintiff claimed his whole freight, to which it might be very properly held he was not entitled, as he had not performed the whole contract; if he claimed a part only of the freight, and was held by the court not to be entitled to any thing, it may be that, by the particular terms of the contract, the payment of freight was made to depend upon the delivery of the entire cargo.

Concise as the report is, I cannot think it imperfect, for it appears to be decided merely upon the plaintiff's allegation, without reference to any question dependent upon a farther view of the subject; it is not hinted that any thing turned upon the mode or form of the allegation. According to the common course of declaring, it would be stated that the defendant had not paid the money, or any part of it, and I rather think that upon such an allegation, the court would hold the declaration to be sufficient

to entitle the plaintiff to a verdict *pro rata*, provided he was so entitled by virtue of the contract itself. In the decision, that he was not entitled to any thing, though the case is attended with hardship, there appears to be nothing inconsistent with the general doctrine of apportionment.

There are however several cases, in which it has been held that if a ship breaks ground, and is afterwards incapacitated from the performance of the voyage, there being no special contract or undertaking, freight is due *per rata itineris*, but there are also authorities which import that in case of such inability, the master has by the marine law a right to refit his ship, or engage another, which implies an obligation on his part to do so, if required by the shipper, before he can found any demand upon the agreement. For the cases upon the subject, see Mr. *Abbott's* Treatise on the Law of Shipping, Part iii. chap. 7. But certainly any rule, that a person undertaking to carry goods to a certain port, to be paid an entire freight upon the delivery of them, shall be entitled to a proportion of the freight, from whatever cause they are not delivered, except a prevention by the act of the party who is to pay, is in opposition to the general principle of the *English* law, that an entire contract cannot be apportioned.

As to the apportionment of rent in a lease, where a tenant is evicted of part, and the distinction between the actions of debt and of covenant, and the case of the original lessee and an assignee. See the case of *Stevenson v. Lombard, 2 East, 575.*

At common law, if a tenant for life made a lease, and died before the rent day, the rent was lost, and the tenant had the enjoyment without making any compensation; but by statute 11 G. 2. c. 19. if the tenant for life die before the rent from his sublessee becomes due, upon any lands held for his life, his executors are entitled to recover a rateable proportion for the time that such tenant lived. It is to be observed, that this act stops short of its probable object, in not including the case of a tenant for the life of another person whose estate determines by the death of such other person. If an ecclesiastical person makes a lease and vacates his preferment by the acceptance of another, I conceive that there can be no apportionment. The equity of the statute, 11 G. 2. is held to extend to tenants in tail. *Pagett v. George, Ambler, 198 2 Bro. Ch. 659.*

Where a settlement is made to a person for life, with remainder over, and with power to make leases, and a lease is made conformable to the power, the rent is not to be apportioned, but belongs to the remainder man. *Prec. ch. 555. 1 P. Williams, 177.* There are several cases in which it has been held, with respect to money

invested in the funds, that the dividends are not apportionable, but go to the party entitled in remainder, 3 *Atk.* 260. 582. 2 *Ves.* 672. 3 *Bro. Ch.* 99.

Wherever an annuity is left payable at certain times, it seems clear that there can be claim to an apportionment; but where a person is entitled to interest of money on a mortgage or other security, the interest becomes due from day to day, and is to be apportioned: *Edwards v. Countess of Warwick*, 2 *P. Williams* 172.

In some cases, if money is paid upon consideration of a contract which fails, the right of a total or partial return depends upon the *entirety* of the contract as connected with the total or partial failure.

This may be illustrated by the common obligation to return the premium of a policy of insurance, if the risk does not attach. Thus, where a ship was insured for a year against capture only, and was lost by the perils of the sea in a month, it was held that the assured had not any right to a proportionate return of premium for the time unexpired; it being an entire contract for a gross sum. *Tyrie v. Fletcher*, *Cowp.* 666. *Loraine v. Thomlinson*, *Doug.* 585. So when an insurance was made at and from *Harfleur* to *Angola*, at and from *Angola* to *St. Domingo*, at and from *St. Domingo*, to *Harfleur*; after a deviation which rendered the policy void, the vessel was lost between *Angola* and *St. Domingo*, this was held to be an entire risk, and nothing was due by way of return upon the proportion between *St. Domingo* and *Harfleur*.

But where a divisibility in the object of the contract can be implied, the consideration may be apportioned; as where a vessel was insured from *London* to *Halifax*, warranted to depart with convoy from *Spithead*, and the convoy had failed from *Spithead* before her arrival, it was held that there was a right to demand a return of premium, making a deduction for the risk from *London* to *Spithead*, but there was a usage of trade in favour of this decision, and the risks to and from *Spithead* were considered as distinct. *Stevenson v. Snow*, 3 *Bur.* 1237. The cases of *Meyer v. Gregson*, *Park.* 389. *Long v. Allen*, *Park.* 390. *Rothwell v. Cooke*, 1 *B. & P.* 172. also relate to this subject, but a more particular detail of them would be foreign to the present purpose.

The following observations have already been laid before the public, in an Essay on the action for money had and received.

“In a case which arose early in the 18th century, the Court of Chancery decreed one hundred guineas, as part of an apprentice fee, to be paid back to the father of the apprentice, his master having died within three weeks after the sealing of the articles,

though it was expressly provided by the articles, that if the master should die within the year, only sixty pounds should be returned. *Vern.* 460. Lord *Kenyon*, when Master of the Rolls, observed that this decision carried the authority of the court as far as could be. 3 *Bro. Ch. Rep.* 480. And Mr. *Fonblanque* observes, that if it be a rule of equity, as in many cases it is stated to be, that equity will not alter or extend the agreement of the parties; the decree seems irreconcilable with such rule. *B. 1. c. 5. f. 8.* A suit in equity must, in respect to this subject, be considered as being merely equivalent to an action for money had and received, and there can be no pretence for referring the decree to any other principle than that of money paid upon a consideration which has happened to fail; and the court, in decreeing the apprentice-fee to be refunded, seems to have thought the consideration for which it was given, was the entire performance of the articles, whereas it was the fact of contracting the relation, and the entering into consequent engagements. In that view, the consideration was complete and entire, and could not partially fail. I much doubt whether the precedent would now be followed, but think it certainly would not be allowed by analogy to govern any other case.

There are some cases in which courts of equity will relieve against the strict necessity of performing the whole of an agreement, where a sufficient compensation can be made. Thus, where an agreement is made for the sale of an estate as free from incumbrances, which appears to be subject to a small quit rent, the performance of the agreement may be enforced, making a proportionate deduction from the purchase money. So where it appears that there is a want of title to a small part of the property purchased, *Calcraft v. Roebuck*, 1 *Ves. Jun.* 221, or where there is a slight and immaterial lapse of time (a). *Ormrod v. Hardman*, 5 *Ves.* 722. 732. But I cannot, from any printed authorities which I have met with, give a distinct statement of the extent to which this principle, which is familiar in practice, is applied. It may often be extremely difficult to ascertain the materiality of a particular circumstance as connected with the object and views of a contracting party; and perhaps it may be found that the less deviation is allowed from the strict and literal execution of a condition required by the common law, and the less latitude is assumed of introducing an exception referable to no accurate standard or criterion, the more extensively will the general purposes of distributive justice be accomplished.

(a) Courts of equity formerly carried the principle of giving relief against lapse of time to a very great extent, but this has been corrected by the modern cases of *Lloyd v. Collett*, 4 *Bro. Ch. Rep.* 469, 4 *Ves.* 689. *Ferrell v. Elwes*, 4 *Ves.* 498.

A cause is often mentioned, of which I do not recollect to have ever seen a full account in any professional publication, but which Lord *Kenyon* has referred to at nisi prius. Where it appeared that a person had agreed for the purchase of an estate, having a wharf adjoining to a navigable river, principally with a view to the benefit of the wharf, and there being no title to the wharf, he was compelled to take the purchase of the rest of the estate. His lordship said, that he heard the decision pronounced when he was a young man; that he thought it an abominable decision at the time, and he continued to think so still. An opinion in which the present editor most unequivocally accords.

And in a case which has occurred since writing the preceding remarks, Lord Ch. *Elliott* said, it was certainly to be observed, that under the head of specific performance, contracts, substantially different from those entered into, have been enforced. In the case of a contract for a house and wharf, the object of the purchaser being to carry on his business at the wharf, it was considered that this court was specifically performing that man's contract by giving him the house without the wharf. *Vi. Drewe v. Hanson*, 6 *Ves.* 675, and the cases there cited.

## NUMBER IX.

(Referred to, Vol. I. p. 134.)

### *Of the Computation of Time.*

This seems to be the most favourable opportunity for presenting the following particulars respecting the rules adopted in the law of England as to the computation of time.

The expression *from such a day* may, as the law is now settled, be construed exclusively, or inclusively, as may be best adapted to the intention of the parties, and the subject matter of the contract. Accordingly, where a lease was made for twenty-one years from the day of the date, which would have been void if construed exclusively, it was held to mean inclusively. *Pugh v. Duke of Leeds*, *Cowp.* 714. But the propriety of this determination, and its consistency with former authorities, has been very ably assailed by Mr. *Powell*, in his Treatise on Powers. If there is nothing in the nature of the contract which particularly affects the construction, I apprehend it to be clear that the term is to be construed exclusively. And if an act was to be done within one year *from the thirty-first of December* 1799, the term would elapse on the 31st *Dec.* 1800. *Anon.* 1 Lord *Raym.* 180. But if the day is not mentioned, or referred to, and the promise is to be performed within a year, the first day is included,

included, and the act must be done *before* the recurrence of that day in the following year.

It is laid down, that where the computation is to be made from an act done, the day when such act was done is included; accordingly, it has been held, that where a bill was payable at a certain period after fight, where an action was to be commenced against the hundred within one year after a robbery, or a sheriff was excused from returning a writ unless ruled to do so within six months after going out of office, the day of presenting the bill, of the robbery, and of going out of office, were included. *Vi. the King v. Adderley. Doug. 463*, and the cases there cited. Also, where an action was not to be brought until one calendar month next after notice, the day of giving notice was held inclusive, and the notice having been given on the 28th of *April*, the action was not commenced too soon on the 28th of *May. Castle v. Burditt, 3 T. R. 623*. And it is a general rule, that one day is to be taken inclusively, and the other exclusively.

Our law has for many purposes introduced the term of a year and a day, which includes the recurrence of the same day in the subsequent year.

The law makes no fraction of a day, and upon this principle it has been held, that a person born at any time on the 1st *January, 1780*, is of age on the 31st *December, 1800. Herbert v. Tarbol. Keb. 589. Sid. 162. Raym. 84. cited 1 Lord Raym. 480. 2 ditto, 1094. 3 Wils. 274*. But where different acts or occurrences take place on the same day, the priority of which it is material to distinguish, the rule does not apply: where the heir stated himself to be entitled on the same day that his ancestor died, it was contended that in fiction of law the ancestor was alive the whole of that day, and therefore the title of the heir did not commence until the day following. But it was truly answered by the court of Common Pleas, that if my ancestor die at five o'clock in the morning, I enter at six, and make a lease at seven, it is a good lease: there being no fraction of a day is a fiction of law, which ought not to be allowed, and this is seen in all matters where the law operates by relation and division of an instant, which are fictions of law [of which several cases are cited.] By fiction in law, the whole term, the whole time of the assizes, and the whole session of parliament, may be and are sometimes considered as one day, yet the matter of fact shall overturn the fiction, in order to do justice between the parties. *Roe v. Hersey. 3 Wils, 274*. And by Lord Mansfield, *Combe v. Pitt, 3 Bur. 1423*: though the law in general does not allow the fraction of a day, yet it admits it in cases where it is necessary to distinguish, and I do not see why the very hour may not be so too,

where it is necessary, and can be done; for it is not like a mathematical point, which cannot be divided.

In some other special cases the rule of there being no fraction of a day, does not apply. The *stat.* 26 G. 3. c. 39. s. 30. 35, directs, that the permits for the removal of wine shall express the time within which it shall be removed from one stock, and received into the other. A permit was granted at nine o'clock in the morning of the 18th *July*, to be in force for one hour for the removal, and two days more for the delivery, and it was held that the two days expired at 10 o'clock on the morning of the 20th. *Cooke v. Sholl*, 5 *T. R.* 255.

A month is in general construed as a lunar month of twenty-eight days, but a calendar month may be understood from the nature of any particular transaction, and the common course of business, as in case of bills of exchange. In ecclesiastical proceedings, the computation is by calendar months; twelve months are only twelve lunar months, but the aggregate denomination, a twelvemonth, is synonymous with a year.

## N U M B E R X.

(Referred to, Vol. I. p. 136.)

### *Of Alternative Obligations.*

In the case of *Layton v. Pierce*, *Doug.* 14, which was an action for a penalty upon an illegal insurance in the lottery, it appeared that the insurer engaged upon a certain event to pay 20*l.* or an undrawn ticket, and it was said by Lord *Mansfield*, that though the practice may be that the insured shall have the option, in point of law, the person who is to perform one of two things, in the alternative, has the right to elect, and that this had been established in many cases.

The declaration in that case, which was an action for the penalty incurred by the insurance, having stated in one count the contract as for paying 20*l.* and in another, as for giving an undrawn ticket without stating it alternatively agreeably to the fact, this was ruled to be a fatal variance, which was the principal point in the case.

There is a case in which a husband gave a bond, that in case he sold certain lands of his wife, he would in his life-time purchase lands of equal value for her and her heirs, or else should leave her as his executrix, or by legacy, or otherwise, as much money as he had received by the sale. The sale having taken place, the wife died first, and afterwards the husband died, not having made the purchase, and it was held that the bond was discharged, and according

According to Lord *Coke's* report, the reason of the judgment was, that where the condition of an obligation consists of two parts in the disjunctive, and one of them becomes impossible by the act of God, the obligor is not bound to perform the other part; for the condition is for the benefit of the obligor, and shall be construed most beneficially for him, and he had an election to perform the one part or the other to serve the penalty of the obligation, and when one part became impossible by the act of God, it shall be as beneficial to him as if that separate part had been the sole condition of the obligation, and so when that part becomes impossible by the act of God, so that it could not by any industry be performed, the obligation is saved, although he does not perform the other. *Laughter's case*, 5. c. 21. *Cro. Eliz.* 716. 814. *Moor*, 645.

But in the case of *Studholme v. Mandell*, 1 Lord *Raymond*, 279, where the defendant covenanted to leave the stones of a mill in as good condition as he found them, or pay the plaintiff as much as they should be damnified, the damage to be estimated by A and B, who viewed them when the defendant entered them, and gave a bond for the performance of the covenants; the plaintiff brought an action on the bond (a), and assigned for breach that the defendant had left the mill-stones damnified, and had not made satisfaction. To which the defendant pleaded, that A and B had not estimated the damage, and upon demurrer it was argued for the defendant, that this was a condition disjunctive, and therefore the leaving the mill-stones damnified, would not be a breach, because at the time of the covenant he had election to perform the one or the other part; therefore, according to *Laughter's case*, without estimation by A and B of the damage, the defendant was excused from the performance, because it was impossible for him to make the adjudication, or to compel A and B to do it, and till that was done, the defendant could not be liable, no more than if A enters into a bond to perform the award of B and C, and B and C will not make any award. To this it was answered, that these covenants were part of the condition of the bond, and since the latter part of the disjunctive covenant was for the safety of the defendant, it belonged to him to procure this estimation, or otherwise he should be liable, and of this opinion was the whole court, and they said that the rule and reason of *Laughter's case* ought not to be taken so largely as *Coke* had reported it, but according to the nature of the case. And *Treby*, C. J. put this case: A, in consideration of 300*l.* bound himself in a bond with condition to make a lease for

(a) The report states this to be an action of covenant, but from the context of the case, and the pleadings which are contained in 3d Lord *Raymond*, 186, it appears, as above stated, to be an action on the bond.

the life of the obligee before such a day, or to pay him 100*l.*; the obligee died before the day: yet in the time when *St. John* was Ch. J. of the Common Pleas, it was adjudged that the obligor should pay the hundred pounds, and *St. John* then declared, that he well knew some of the judges who gave the resolution in *Laughter's* case, and that they denied that they laid down such a rule as *Coke* had reported: yet the whole court held that the principal case of *Laughter* was good law. The reporter, Lord *Raymond*, observes by way of note, that the last case put by *Treby* seems to be indistinguishable in reason from *Laughter's* case. It has been suggested, (3. *Mod.* 233) that the intent in *Laughter's* case was to provide a security for the wife, so that she dying before the husband, the non-performance could hurt nobody, there being no necessity that any thing should be done in order to it after her decease; this reason would reduce *Laughter's* case (I conceive with justice) to a point of construction upon an implied condition, that the wife should survive the husband.

But it has been held in many cases, that where there are two acts in the alternative and in the election of the obligor, (or person who is to perform them) and one is prevented by the act or fault of the obligee, the law discharges the obligor from the other, as the benefit of election shall not be taken from the obligor by the act of the obligee.

The cases are collected in *Viner's* Abridgement, vol. 5, 210. In the most recent there was a bond, with condition to settle on the obligee, *within six months, as his counsel should advise*, an annuity of 20*l.* for life, or to pay within six months, 300*l.* the obligor pleaded, that the obligee had not tendered any grant of an annuity within the six months, and it was adjudged to be a good defence.

But though the general principle is founded in justice, and in the case cited there was a good legal defence, a court of equity, so far as regarded the performance of an agreement, (and relieving from all penalties of non-performance) would in this, as in other cases, dispense with an absolute strictness in point of time, and compel the obligor at his own election to settle the annuity, or pay the money.

## N U M B E R XI.

(Referred to, Vol. I. p. 145.)

*Of Joint and Several Obligations.*§ I. *In Favour of several Persons.*

Obligations in solido, between several creditors, which *Pothier* mentions as being very rare in *France*, are I conceive wholly unknown to the law of *England*. An obligation may be joint, in which case all the persons, in whose favour it is contracted, must join in an action founded upon it; or it may be several, in which case each must bring a separate action with reference to his own separate interest: or perhaps, where the interest in a subject is joint, an engagement may be specially framed, enabling them to proceed either jointly or separately at their discretion. If one contract was made with several persons, indicating a right in each to make a claim for the whole, it seems that the operation of it would, notwithstanding these expressions, be that of a joint obligation.

I do not see any legal incompetence in the giving separate engagements to each of two joint creditors, with a condition, that a payment to one should operate as a discharge from the claim of the other; in which case, the effect of the two engagements would only constitute one obligation, nearly similar in its nature to the obligation in solido; but I am not aware of any instance of such engagements having been the subject of judicial attention, and I am not prepared to state how far the legal consequences arising from any such, which might occur, would coincide with those which are stated by *Pothier*, as applicable to obligations in solido.

Instances are not unfrequent of dispositions with a discretionary power, in respect of the objects in whose favour they are to be executed, but these are not accompanied by the effects ascribed by *Pothier*, to obligations in solido; it is not competent to any of the objects, to enforce an exclusive claim in their own favour by priority of demand; the person charged with the obligation can be compelled to execute it in favour of some of the objects, subject however to the discretion originally intended; but the courts will take care to guard against such discretion being perverted into an abuse.

In cases of contracts with factors, a right of action may be maintained, either on the behalf of the factor or his principal, and a payment to either will be a sufficient discharge, except in cases where

the factor has a lien on the debt, on account of his demands against the principal. An obligation thus contracted, has in many of its effects a resemblance to an obligation in solido, but is specifically distinct from it, and is not intended at present to be the subject of particular examination, although I have thought it proper to allude to it.

The general position of *Pothier*, that regularly when a person contracts an obligation of one and the same thing, in favour of several others, each of them is only creditor for his own share, is the direct reverse of that which it seems proper to state, as applicable to the *English* law, by which a general obligation in favour of several persons, is a joint obligation to them all, unless the nature of the subject, or the particularity of the expressions leads to a different conclusion; and even where the expressions appear to denote a separate obligation to each, the legal effect has been held to be a joint obligation in favour of all; in which case an action can only be maintained by them jointly during their joint lives; after the death of any, the right accrues to the survivors, and finally to the representatives of the last survivor, so far as respects the enforcing the claim against the opposite party. The consequent obligations which may result between the survivors and the representatives of the deceased, is a different subject of consideration.

In case of partners in trade, the right is exercised by the survivors for the benefit of themselves, and the representatives of the deceased: in other cases not attended with any special circumstances, I apprehend it may be stated as the general rule, that the beneficial right, as well as the legal power of enforcing redress, devolves upon the survivors.

In *Slingsby's* case, 5 Co. 18. *Beckwith* covenanted with *Ravafour*, *Slingsby*, and *Harvey*, and with each, and every of them, that he had a lawful title to certain premises, and an action having been brought by *Slingsby* alone, it was held that it was not maintainable, for that the other covenantees ought to have joined, and this notwithstanding the words, *with each and every of them*; as to which this diversity was agreed, that where it appears by the declaration, that each of the covenantees has, or is to have a several interest or estate, and a covenant is made with them, and with each of them; the words *with each of them*, make the covenant several in respect of their several interest, as if a man demises black acre to A, and white acre to B, and green acre to C, and covenants with them and each of them, that he is the lawful owner of all the said premises, the covenant is several. But if he demises the said acres to them jointly, then the words *with each of them*, are void; for a man cannot by his covenant, (except in respect of several interests,

terests) make it in the first place joint, and then by the addition of these words make it several. For however persons may bind themselves, and each of them, so that the obligation will be joint or several at the election of the obligee, no man can bind himself to three and each of them, so as to make this joint or several, at the election of several persons for one cause: for the court would be uncertain for which of them to give judgment, which the law will not allow as was holden, in 3 H. 6. 44. where a person brought a replevin against two for one beast, and they made several avowries, each in his own right; and by the advice of all the judges, both the avowries were abated for the inconvenience, that if both the issues should be found for the avowants, the court could not give judgment to them severally for the same thing. So, the covenantor in the principal case would be twice charged with the same thing, and therefore the words *with each of them*, are only an amplification and redundancy, and cannot sever the joint cause of action. It was also resolved, that an interest cannot be granted jointly and severally; as if a man grant the next advowson, or make a lease to two jointly and severally, the words *and severally*, are void, and they are jointly intitled. So, if a man makes a feoffment in fee to three, and warrants the land to them, and each of them, this warranty is joint, and not several; but in such a case, if their estates were several, their warranty would be several accordingly.

And in a recent case, where *Martindale* covenanted with *Anderson*, his executors, administrators, and assigns, and also with *Wyatt*, and her assigns, that he would pay an annuity to *Anderson*, during the life of *Wyatt*; it was held that the covenant was joint, and that, *Wyatt* having survived, the action ought to be brought by her, and could not be brought by the representatives of *Anderson*. Lord *Kenyon* said, that it had been assumed in the argument, that each of the covenantees had different interests; but that was not so, for the covenant was to each of them for the same thing, and though the benefit were only to one of them, yet both had a legal interest in the performance of it, and therefore the legal interest being joint during the lives of both, on the death of one it survived to the other. *If indeed the covenant had been to each by two different deeds, though for the same duty (a)*, there could not have been a joinder in action: but here the parties claim by the same title, and therefore the law coincides with the justice and convenience of the case. *Anderson v. Martindale. 1 East. 497.*

(a) This would constitute a real obligation in solido, as described by *Pothier*.

Another strong instance of persons having a joint legal interest, although for the benefit of one of them separately, occurred in the case of *Scott v. Goodwin*, 1 *Bos. & P.* 67. The defendant, as tenant, covenanted with *Grice* his landlord, his heirs and assigns; and the premises having been conveyed to *John Scott* the plaintiff, and *Robert Scott* (but as to the estate of *Robert* in trust for *John*) it was held that *John* could not alone maintain an action on the covenant. And Lord Chief Justice *Eyre* said, that as the operation of law upon the deeds, was to constitute *John* and *Robert* joint assignees, the effect of it was that the defendant's covenants became also, by operation of law, contracts with *John* and *Robert* jointly. "There is an essential difference between the cases, where the objection is that other persons ought to be made co-defendants, and where it is that there are not the proper parties plaintiffs in the suit. Many plaintiffs can have but one right, having but one interest, and one cause of action, which ought to be, and is, indivisible, admitting of but one satisfaction. But if in the nature of the thing, if on principles of law or authorities, it could be, that a man should derive a several interest, out of a joint obligation to himself and others, and that plaintiffs could sue separately for their portions of one right, it is most obvious that it must vex and harass defendants extremely. I take it to have been solemnly adjudged in several cases, and to be the known received law, that one co-covenantee, one co-obligee, or one joint contractor by parol, cannot sue alone. A breach of a joint contract with two or more, cannot be joint and several."

In the preceding cases, we have seen that the courts consider obligations, which in their expressions were several, to be joint in their effect, on account of the joint interest to which they referred.

In *Wyndham's case*, 5 *Co.* 7. it is shewn that joint words may by construction of law be taken respectively and severally. 1st, Sometimes in respect of the several interests of the grantors, as if two tenants in common, or several tenants join in the grant of a rent charge, yet in point of law this grant will be several, although the words are joint, as Sir *Robert Catlyn*, Chief Justice, held in *Browning's case* in *Plowden*. 2d, Sometimes in respect of the several interests of the grantees, as 16 *H. c.* 63, 64. a warranty made to two of certain lands, shall enure as several warranties in respect that they are severally seized, the one of one part of the lands, and the other of the residue in severalty. 3d, Sometimes in respect that the grant can only take effect at several times, as in case of a remainder being limited to the right heirs of *J. N.* and *J. S.* (*J. N.* and *J. S.* being alive) in which case the words are joint,  
and

and yet the heirs shall take severally, for they shall not join in action. 4th, Sometimes in respect of the incapacity and impossibility of the grantees to take jointly, as a lease made to an abbot, and a secular person, or a grant made to two men, or two women, and the heirs of their two bodies, the inheritance is several, 7 H. 4. 17. 5th, Sometimes in respect of the cause of the grant, or *ratione subiectæ materie*, as 15 H. 7. 14. where one co-parcener granted a rent to two other co-parceners for equality of partition; although the words are joint, yet the cause of the grant will be regarded, and the rent will be of the quality of the land, and therefore they will have the rent in the degree and quality of co-parceners, and not jointly. And *Knivet*, Chief Justice and Chancellor, said, in 38 Edward, 3. 26, that if two co-parceners make a feoffment in fee, rendering rent to them and their heirs; the heirs of the one and the other shall inherit, for that their right in the land was several, 22 E. 4. 25. & 2. H. 3. 18. a joint submission to arbitration was taken severally in respect of the several causes.

The case of *Eccleston* versus *Clipsbam*, 1. Saund. 153, affords an instance of the same agreement being considered as joint in one part, and several in another. *Taylor*, *Clipsbam*, & *Castle*, having contracted with the commissioners of prize goods, to buy all prize brandies at a certain rate, they entered into an agreement with each other, by which it was declared that all the parties had an equal interest in the contract, and therefore each of them for himself, and not for the other, covenanted with the other, and others of them respectively, that all prize brandies should be bought by them in partnership upon their joint account, and that none of them should trade in brandy wines by himself, or in company with any other, but only on the same joint account; that no brandies which should come to the hands of any of the parties, should be sold by him without the assent of the others; that all monies received by any of the partners should be paid by the person receiving it, to *Kynton* a Goldsmith, on the joint account that there should be no benefit of survivorship, but that the executors of any of the parties who should die, should have the same benefit as the party himself might have had if living, and that an account should be given to such executors, of the brandies and debts due for them, within twenty days after the decease of the party dying. An action being brought by the executors of *Castle* against *Clipsbam*, for selling brandies without the assent of *Taylor* and *Castle*, and for trading on his own account, and for not paying to *Kynton* monies received on the joint account; and for not giving an account to the plaintiffs within twenty days after the death of the testator; after judgment by default and entire damages, given upon a writ of enquiry,

*Saunders* excepted as to the breaches for the defendants selling without assent, and trading on his own account, and not paying to *Kynton*, that the covenant was joint with the testator, and with *Taylor* who had survived him : for though the covenant be joint and several by the words, yet the interest and cause of action in this case is joint only, for it is an equal damage to *Castle* the testator, and to *Taylor*, if the defendant has broken these covenants as by the declaration is supposed, and therefore they ought to have joined in the action ; and *Castle*, the plaintiff's testator, being dead, the action has survived to *Taylor* ; as in *Slyngsby's* case above cited. But the covenant, that the defendant would render an account to the executors of the party dying, is a good several covenant, and well suable by the plaintiffs, only because the plaintiffs have a several interest, and cause of action in this, but not in the others ; upon which objection, and another point not connected with the present discussion, judgment was stayed.

A bond to A, and payable, the one moiety to A, and the other moiety to B, is a several obligation ; and the release of one shall not prejudice the other, nor can one bar the other of his action. 2. *Sid.* 61. *Mo.* 64.

As the interest of tenants in common is several, though the possession is joint, it seems clear that a covenant made to them generally, and much more a covenant made with them, and each of them, may be construed as several ; so that each may bring an action on account of his own separate damage, and in many cases they seem to have an election to consider the covenant as joint or several. In *Martin v. Crompe*, 1 *Lord Raymond*, 340. it was said by *Holt*, Chief Justice, that if there are two tenants in common of a reversion, expectant upon a lease for years upon which a rent is reserved, they may join in debt for the rent, or sever.

In *Harrison v. Barnby*, 5 *T. R.* 246, it was held, that one tenant in common might distrain and avow for his moiety of the rent, the defendant having, after notice to the contrary, paid the whole of the rent to the other ; and *Lord Kenyon* observed, that it was clear, from the authority of *Lyttleton*, that tenants in common ought to avow for their separate portions, though they might join in actions on joint contracts, as in covenant, where the covenant is entered into with both, or in debt for rent, &c. In *Cutting v. Derby*, 2 *Bl. Rep.* 1075. it is said by the court, that where one entire injury is done to tenants in common, they shall all have one entire remedy, but where the injury is separate, they may have several actions ; and it was there decided, that one tenant in common, might maintain an action against a tenant on the *Stat.* 4 *G.* 2.

c. 28. for his share of double the annual value, against a tenant not quitting possession.

Where the right of action is joint, as founded on a joint contract, the objection, that it is brought by one of several who ought to have sued jointly, or by the executors of a party deceased, when it ought to have been brought by the survivor, may be taken advantage of by demurrer, or in arrest of judgment, or by writ of error, if it appears on the record; and if the contract is alleged as several, and appears by the evidence to be joint, it is a fatal variance, and the defendant is entitled to a verdict. If two persons were jointly entitled, the declaration by one must shew the death of the other, which cannot be presumed, *Scott v. Goodwin, ubi. supra.* And if an action is brought by the executors of one, it is necessary to aver that the testator survived the other; it not being requisite, as it is in the case of persons jointly liable, that the exception should be taken by plea in abatement.

But if one of several tenants in common, or as it should seem, of several joint tenants, brings an action alone for an injury; it may be objected by plea in abatement, (a) but not otherwise, that the others should have joined, *Addison v. Overend, 6 T. R. 766.* And if one has sued alone, and recovered, the defendant, not having availed himself of such plea, cannot plead to the action of the second, that the first, who has already recovered a satisfaction, ought to have joined; and even where there are more than two, Mr. Justice *Lawrence* has expressed his opinion, that if there had been several remaining tenants in common, the defendant could never have objected to the severance of the actions, after omitting to plead in abatement in the first action. *Sedgeworth v. Overend, 7 T. R. 279.*

It is clearly established, and is a necessary consequence of the doctrine involved in several of the preceding decisions, that a release of one of several who are intitled under a joint contract, is a discharge from the others, *2 Rol. abr. 410,* but it seems highly reasonable, that a person who has defeated his companions of their right, should be answerable to them for the loss arising therefrom.

(a) A plea in abatement is that which, without denying that the plaintiff has such a cause of action as is alleged, asserts that in some incidental respect the action is improperly brought, and the object of it is not to defeat the claim, but to delay the prosecution of it. The character generally ascribed to it is, that it must give the plaintiff a better writ, but this, although generally, is not universally true: for sometimes the right of delaying the claim by a plea in abatement, is founded on a temporary disability of the plaintiff to sue, as that he is an outlaw or an alien enemy. There are several rules by which these pleas are held to much greater strictness, than those which go to the merits of the action; but a more particular exposition of their nature and effects would be foreign to the present purpose.

For the cases in which several persons, having a joint interest, may join in the same action, see Mr. Serjeant *Williams's* note to *Coryton v. Littleby*, 2 *Saund.* 116.

§ II. *Of Joint and Several Obligations, against several Persons.*

Although the appellation of obligations in solido, is scarcely known to the *English* law, the obligations themselves, as described by *Pothier*, are of not unfrequent occurrence. The most usual instance, is that of a bond or covenant expressed to be made jointly and severally, in which case it is, at the option of the creditor, to proceed against all in one joint action, or in separate actions against each or any of them; but the obligation must be treated as wholly joint, or as wholly separate, for an action cannot be maintained against two or more of a greater number, provided the exception is properly taken, nor can a commission of bankrupt be maintained against two upon a joint debt, or consequently upon a joint and several debt of three. *Vide Allan v. Hartley, Co. B. L. 7.*

But there are many other cases which fall within the definition of *Pothier*, of an obligation in solido, as contracted by several persons, each of whom is obliged for the whole, but so that a payment made by one liberates the others, as against the creditor.

The most familiar instance of this is the case of bills of exchange, with respect to which the drawer, acceptor, and indorsers, are all liable for the whole amount to the holder, and a payment made by any one of them, is as against him a discharge of all the others: and it is only the discharge as against the creditor which is contemplated by *Pothier*, when he speaks of a payment by one liberating the others: the consequent obligation between themselves forming a material part of his discussion.

Two persons, each indebted in a hundred pounds, or jointly indebted in 200*l.* may each give their separate bonds or notes for the whole: two persons may give their separate bonds for the fidelity of a third: two separate policies may be made for the insurance of the same risk: the original landlord or tenant, and their respective assignees, are liable to a covenant founded on privity of estate; and in all these cases the legal effect is that above ascribed to obligations in solido, that each of the parties obliged is liable for the whole claim, but a satisfaction made by any one is as against the creditor a liberation of all the others. But in all these cases the obligation is separate in respect of the right of action; and one joint action cannot be maintained against the drawer and acceptor of a note, against the insurers on two separate policies, against the persons

persons engaging by two several bonds or notes, against the landlord or tenant, and their respective assignees.

There is certainly no objection to an obligation in solido, being contracted by the different parties in different manners, or by one absolutely, and the other conditionally. If the case of bills of exchange is admitted, as I think upon principle it must be, as a legitimate instance of an obligation in solido, it is also an exemplification of this position, the acceptor being bound absolutely and unconditionally, the other parties only subject to the obligation upon the condition of due diligence having been used by the holder. One person may engage to pay within a month, and another within a month following, in case of the failure of the first; it is the unity of the thing which is to be performed, and the right to demand the performance of it from any one of several debtors, which constitutes the essence of this kind of obligation, and which is wholly independent of the mode or form in which the obligation is contracted.

In respect to the general construction of contracts, I conceive that the rule of the *English* law is in respect of several debtors, as well as in respect to several creditors, the reverse of that stated by *Pothier*; and that an obligation contracted generally by several persons is a joint obligation, unless there is something in the nature of the subject to induce a different construction, and render it several, in respect of the separate interests of the contracting parties, according to the principles in *Wyndham's* case, which has been already cited, as shewing where joint words were to be construed as several in respect of several creditors.

A joint obligation is essentially different from an obligation in solido, as the creditor has not a right to proceed against each, or any of the parties individually, but can only prosecute his claim against them jointly. But if a creditor sues one of several joint debtors, the objection, that the others ought to be joined, can only be taken by plea in abatement (a), and this notwithstanding it appears by the

(a) As to the nature of such plea see ante p. 61. n. (a) Where a commission of bankrupt was taken out against two of three joint traders; the other being an infant, it was ruled that it could not be supported. It was said in argument, that though it was true that an action might be brought against the three partners, including the infant who must plead his infancy, yet if the fact was that the whole demand was against the three, and the contract of partnership was avoided as to one by his infancy, it remained the contract of the two. The infant having a right to insist that he was not bound by any contract he had made, the demand would be against the two in effect, and the infant pleading his infancy, the judgment would be against the two in the action. The Lord Chancellor said that the action not only might, but it must be imagined, be brought against the three. But Mr. Justice *Le Blanc*, in a case before him in *Bank at Lancaster*, summer assizes 1799, determined upon demurrer that a replication, stating that the partner mentioned in the plea in abatement

the plaintiff's own shewing that more are liable (a). See *Williams's* note to *Cabell v. Vaughan*, 1 *Saund.* 291. If two are sued upon a joint and several obligation of three, it seems also that the exception can only be taken in the same manner, though some cases have proceeded upon the contrary doctrine, *id. ibid.* Subject to the right of exception by plea in abatement: I conceive it to be clear that separate actions may be maintained against each of several joint debtors, in like manner as if they were debtors in solido (b).

One of the instances above cited, from *Wyndam's* case of joint words inducing a separate obligation, is that of a joint submission to arbitration; but where it is clearly expressed that the engagement is joint as well as several, as (in a case already cited upon a former subject), where *Burredge* was the preceding, and *Roberts* the succeeding tenant to *Mansell*, and by an agreement between *Burredge* of the first part, *Roberts* of the second part, and *Mansell* of the third part, the parties agreed to refer all the disputes respecting repairs to *Simcocks*, and *B*, and *R*, jointly and severally, promised to perform his award, and the arbitrator having directed each of them to pay a certain sum, they were held to be jointly answerable for the whole. Lord *Kenyon* observed, that it was rather a hard case, and perhaps if it was stated to them at the time of the agreement, that each was to become answerable for the other, they would have hesitated before they signed the agreement, but the words were too strong to be got over.

In a case cited in the preceding, H and G covenanted for themselves and for each of them, to receive the rents due to L, and that

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abatement was an infant, was a good answer to the plea, and I think that this was evidently the right decision. In case an action had been brought against the infant and the adult, the defence of infancy need not necessarily have been taken by plea, but might have been used as a defence at the trial, and then the verdict against the other defendant only would have been error on the record. There is certainly no authority to warrant a special entry, and the giving any effect to the defence of infancy, would be a negation of the joint contract declared upon, as would likewise a plea of infancy. This case is essentially different from those of a plea of bankruptcy, or the prosecution of one defendant to outlawry; for, in both these cases, the whole proceeding is founded upon the supposition of an original joint contract, although the personal exemption of one defendant, in the first case, exempts him from the liability and the outlawry, in the other is an excuse to the plaintiff for a separate proceeding, but in both cases a joint original liability is assumed, and I conceive must necessarily be proved; whereas the defence of infancy excludes the supposition of such joint liability having ever existed; and it will be an intolerable hardship and a palpable injustice, if a plaintiff who sued the debtor who was adult, should by plea in abatement be compelled to proceed against the other, and having done so should be defeated, for want of substantiating that joint contract and joint responsibility, which is requisite to maintain his declaration.

(a) The law, as we have seen above, is otherwise with respect to an action by one of several joint creditors.

(b) In all cases of joint actions, the defendants are so far obliged in solido, that execution may be levied against any of them for the whole.

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they and each of them would pay the same, and it was held that an action might be maintained against *H*, for the receipts of *G*. *Lilly v. Hodges*, 7 T. R. 352.

In a lease of a coal-mine to *Errington* and *Ward*, the lessees covenanted jointly and severally for the payment of the rent, and for the proper working of the mine. After which, there was a covenant by the lessor to make a certain allowance; it was then agreed, that the lessees might get inferior coals, paying 15*s.* a ton; and it was further agreed, that an account should be settled monthly, and the monies appearing due, paid by *Errington* and *Ward*. An action being brought against the executor of *Errington*, for not paying the 15*s.* a ton upon the coal got by *Ward*, and the money due on an account settled with *Ward*, after *Errington's* death, it was contended, that the two later covenants being subsequent to the covenant of the lessor, could not be connected with the preceding, and were therefore not joint and several, but only joint, and upon which the survivor only was chargeable; but it was held, that the general words introductory to the covenants of the lessees were sufficient to extend to all the subsequent covenants on their part, unless there was something in the nature of the subject to restrain them. *Duke of Northumberland v. Errington*, 5 T. R. 522.

Debts contracted by partners in trade are joint debts, for which an action can only be maintained against all the partners, or the surviving partners jointly, provided the exception is taken by plea in abatement. And if several persons jointly engage in a particular purchase, it is attended with all the effects of a partnership; but where several different persons separately employed a broker to make purchases of tea at the *India House*; and the broker, upon payment of the usual deposit, took joint warrants for the whole, which he pledged to a banker for monies advanced; it was held, that this did not constitute any partnership in the respective employers, so as to render them liable for the whole loan: the defendants in the particular case did not owe any thing in respect of their own shares: whether the act of the broker would have rendered them liable to the banker for the money borrowed as to their own proportion, was not therefore taken into consideration. *Hoare v. Dawes*, *Doug.* 371. With respect to a contract made by one person for the purchase of goods, and a sub-contract made by him with others, for taking particular shares of them, and which was held not to constitute a partnership: see *Coope v. Eyre*, 1 H. Bl. 37.

A creditor upon a joint and several obligation may, as we have seen, elect to consider the debt as joint or as several, and may either proceed against all the debtors jointly, or against each or any of them separately; but it is held that he cannot proceed in both ways

at the same time, and that in case he does so, the pendency of one suit may be pleaded in abatement to the other. So, if there are joint and several estates under a commission of bankruptcy, the creditor may take a dividend at his election upon the joint estate, or upon each of the separate estates, but he cannot have both. *Ex parte Rowlandson*, 3 P. Wms. 405.

But where three persons were jointly liable as partners, and one of them had likewise given his separate bond, it was held that the creditor was entitled to a dividend, both upon the joint estate and upon the separate estate of the particular obligor. *Ex parte Vaughan*, cited *ibid.*

Where one of several joint debtors dies, the creditor has only a legal remedy against the survivors, and finally against the representatives of the last survivor; but there are several cases in which courts of equity have granted relief upon a joint bond, as if it had been joint and several, against the representatives of the party first dying; such being collected from the circumstances of the case to be the intention of the parties, and it being held that the bond was made joint, instead of joint and several by mistake. See *Primrose v. Bromley*, 1 Atk. 89. *Simpson v. Vaughan*, 2 Atk. 31.—*Bishop v. Church*, 2 Vesey, 100. 371. in which the relief was given against the heir. *Burn v. Burn*, 3 Ves. jun. 573. in which it was given as upon a specialty to the prejudice of simple contract creditors, upon a deficiency of assets. But there is no general rule that a creditor has a right in equity against the representatives of a joint debtor, who, in consequence of the survivorship of the other, are not liable at law, or that any such right can arise in consequence of the insolvency of the survivor. See *Home v. Contencin*, 1 Bro. Ch. 27.

I apprehend it may be stated as a general principle, that trustees, executors and assignees of bankrupts, are only chargeable respectively with their own acts and receipts; but, in many cases, their concurrence in the acts of the others renders them personally responsible; but it is not my intention at present to enter into a particular examination of that subject.

In cases of injuries, there is certainly, as in the civil law, a right of action for the whole damage against any one of the persons liable. Sometimes a plaintiff has an election to consider his demand as founded upon a contract, or upon an injury, in which case, if he treats it as a contract, it is subject to all the consequences of a joint cause of action, and an exception may be taken by plea in abatement, if he proceeds against any of the persons liable separately. Treating it as an injury, he has the same right against each separately, as in the case of other injuries.

In cases of contracts, if an action is brought against several, and it cannot be supported against all, it wholly fails, because the contract proved differs from that declared upon; but in actions for injuries, a verdict may be given for some defendants, and against others. And in a very late case, where a declaration stated that three had the loading of a hoghead of treacle, for a reasonable reward, to be paid by the plaintiff, and that they conducted themselves so negligently and unskilfully, that the treacle was lost; it was held, that the action being founded on a neglect of duty, and not upon a breach of promise, the acquittal of one defendant did not affect the plaintiff's right to have his judgment upon the verdict against the others. *Govett v. Radnidge*. 3 East, 62.

Where an obligation entered into by several persons, in one instrument, is merely several, so that each of them is only answerable for his respective share, the obligation has no other effects than if it consisted of so many distinct contracts perfectly separate from each other.

In the *English* as in the civil law, the pursuit of one or more of several debtors, who are each respectively liable for the whole, does not affect or prejudice the right against the others, which continues entire, until the creditor has obtained an actual satisfaction for his demand.

Where there is a joint and several engagement, an acknowledgement by one of the debtors is sufficient to take the case out of the statute of limitations as against the others, and is regarded as an acknowledgement by themselves. *Whitcomb v. Whiting*, *Doug.* 651. and even a payment of a dividend by the assignees of one of the makers of a joint and several promissory note, who had become bankrupt, was held to take the case out of the statute as against the other. *Jackson v. Fairbank*, *H. B.* 340, which was certainly going a great way indeed. In both these cases the action was brought separately against the party, who had not made the acknowledgement. But where the engagement of two persons is made by separate instruments, and arises from separate contracts made with each, I do not conceive that any act by the one can increase or continue the obligation of the other. The argument that one person would derive a benefit from the payment of another, and that therefore he ought *e converso* to be charged by his acknowledgements, is often more plausible than correct; for the liberation, in the one case, is founded upon the general principle of equity, which does not allow a person to receive more than one satisfaction for the same duty, though he may have many ways of enforcing the performance of that duty; whereas no man ought to be charged by any contract with a greater obligation than he personally intended

to subject himself to. I also take it to be clear, that the commencement of an action against one debtor, upon a joint and several engagement, is not available against the others, as a proceeding within the time of limitation.

I am not aware of any authority, that if one debtor has actually set off a separate debt of his own against a joint and several debt of himself and others, that this could be taken advantage of by the others, in any action instituted against them; although it is certainly reasonable, that such a set-off should in all respects be regarded as a payment, and this observation applies more forcibly to the case where the creditor has set off the joint and several debt against a demand due from himself to one of the debtors. It is quite certain that one of the debtors cannot in other cases take advantage in a suit against himself, of a debt owing from the creditor to any of the others.

It has long been settled, that if two persons are bound jointly and severally, a release to one is a discharge to all (a); and this rule applies

(a) The following note, by Lord *Nightingham*, upon the subject, is inserted in *M. Hargrave's* edition of *Co. Lit.* 232 a.—26 *H. 6. T. Barre*, 37. Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards; the other obligor pleads this in bar, and it was adjudged a good plea in bar. Note. Each was bound in the entirety, therefore it was joint and several. 34 *H. 6.* So in the case of the *King*, if he releases to one of the obligors, the other shall take advantage 5 *Rep.* 56. *contra*. And as a release in deed to one obligor discharges the other, so of a release in law, as 8 *Rep.* 136. *Newham's* case. A woman obligee marries the obligor, that is another sort of discharge, 264. b \*. But 17 *Car. B. R.* two were bound jointly and severally. The plaintiff sued both, and afterwards entered a *retraxit* against one; whether that discharged the other was the question; *Berkely* said it was, for it amounts to a release in law, as the plaintiff confesses thereby, that he had not cause of action, and therefore he cannot have judgment, as in *Hickmot's* case, 9 *R. p.* and *retraxit* is a bar to an action; and the plaintiff, by his own act, has altered the deed from joint to several, and therefore the other shall have advantage of it. *Croke Jusf. contra*; for a *retraxit* is only in the nature of an estoppel, and therefore, the other shall not have advantage; neither is it a release, though it be in the nature of a release; and if the obligee sues both, and then covenants with one not to sue further, that is in the nature of a release, but the other shall not take advantage of it; and in 21 *H. 6.* it is said, that there must be an actual release to one obligor, to discharge the other. See *March Rep.* 165. *Paf.* 18 *Car. Hannau v. Roll*. The obligee releases to one obligor; the other, in consideration of the forbearance, undertakes to pay; and in an action upon the case, the matter was found specially,

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\* In *Waukford v. Waukford*, 1 *Salk.* 299. it was ruled, that if the creditor makes one of two joint debtors his executor, the debt is extinguished at law, and there can never be any legal remedy against the other; but in *Errington and Evans, v. Dickens*, 457, Lord *Thurlow*, with a due regard to the principles of equity and justice, said, that where the obligee makes one of the obligors executors, and takes no notice of the bond, but devises the residue of the estate to others, he was clear it was not an extinguishment of the debt, though at law it would be so, and he decreed accordingly.

Where one of two joint debtors marries the creditor, or one of two joint creditors marries the debtor, nothing can be more obvious, than that in justice and equity relief should be given against or for the other in respect of his proportion.

applies in equity as well as at law. *Bower v. Swadlin*, 1 *Atkins*, 294. But the same rule does not apply in every case of a personal discharge. For instance, if a creditor covenants never to sue a debtor; this covenant may be pleaded by the debtor by way of discharge; but if two be bound jointly and severally, and the creditor covenants with one of them not to sue him, it has been held, that that shall not be a release, but a covenant only; for the covenant is not a release in its nature, but only by construction, to avoid circuity of action; for where he covenants not to sue one, he has still a remedy, and then it shall be construed as a covenant, and no more. *Fitzgerald v. Trant*, 11 *Mod.* 254. *Lacy v. Kinnafton*, 1 *Lord Raymond*, 690. 12 *Mod.* 551; and in a late case where the creditor joined in a deed of composition with the other creditors of one of two obligors, by a joint and several bond, it was accordingly held that the other obligor could not avail himself of this as a release. The last preceding case being cited, Lord *Kenyon* said, that to be sure it removed all difficulty on the subject, and was a direct authority in favour of the plaintiff; he had only been doubting in his own mind on the strict law of the case, for that the honesty and justice of it were with the plaintiff could not be doubted, and even if the defendant had succeeded at law, a court of equity would have given the plaintiff full relief. *Dean v. Newall*; 8 *T. R.* 168.

In another recent case, it appeared that *Pasbley* and *Dennis* were indebted as partners to *Popplewell*. That *Dennis* compounded with his creditors for 10s. in the pound, and *Popplewell* executed the agreement for the composition. Afterwards, a commission of bankruptcy issued against *Pasbley*, under which *Popplewell* was admitted to prove his debt, and afterwards he received the composition, and a petition was presented, that the debt might be expunged, in support of which, the counsel cited the case of *Bower v. Swadlin*, 1 *Atk.* above referred to. On the other side, it was said that without doubt a release to one of two joint debtors is a release to both, according to the case cited; but that is upon technical reasons; and courts of equity have always lamented the necessity of following the law in that. It was impossible to suppose

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specially, and *Rolls* argued, that the debt was not absolutely discharged, but only *sub modo*, viz. if the other can have the release to plead, and because the forbearance was a good consideration. But the Court was of opinion, that the debt was absolutely discharged, and therefore the consideration was insufficient. See *Hobart Rep.* 7. c. *Parker v. Sir John Lawrence*. In trespass against three they divided on the pleading. Judgment against one. Then he entered a *noni prosequi* against the two others; it was held to be no discharge to him against whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not subject to the damages recovered against him; but a *noni prosequi*, or nonsuit, before judgment against one, would discharge all.

any intention to discharge this man upon receiving 10s. in the pound from the other. The Lord Chancellor made the order according to the prayer of the petition. *Ex parte Slater*, 6 *Ves.* 146.

This decision appears to be directly contrary to that in the preceding case of *Dean v. Newall*, and it may be reasonably supposed, that if the Lord Chancellor had been apprised of a case so immediately applicable, and at the same time consistent with the real principles of justice, and with the intention of the parties, he would have been very willing to have acceded to the authority of it. In the case cited of *Bower v. Swadlin*, the observation, which is only made *obiter*, that a release to one is a release to all in equity, as well as at law, may be fairly understood, *sub modo*, viz. that if a person by his own act relinquishes a right so as to render himself incapable of prosecuting it at law, a court of equity will not interpose in his favour; but I do not find any decided authority, that a court of equity will carry such an act beyond its legal operation. It is certainly reasonable, that it should interpose, to prevent such an act operating to the prejudice of the joint debtor; but there is no equitable reason for carrying its authority further.

Whether the doctrine that a release to one of two persons, who enter into a joint and several obligation, enures to the benefit of all, extends to all kinds of contracts, does not seem to be fully settled; and in the case of *Clayton v. Kinnaston*, 2 *Salk.* 574, Lord Chief Justice Holt said, that the Court did not determine that on a covenant where the joint remedy failed, there could not be a several remedy.

There is a very old case, that if two receive for me a sum of money jointly, and afterwards each of them binds himself to account for the whole, and afterwards I bring a writ of account against them, by divers *precipes*, and count severally against them, as my receivers of the said sum, my release made to one of them of all debts and accounts shall be a release of the other also. 2 *E.* 3. 40. b. 2 *Roll. Ab.* 412. 18 *Viner*, 353.

There are very numerous authorities, that if several persons commit a joint trespass, a release to one is a discharge to all the others. *Co. Lit.* 232. *Hob.* 66. 2 *Roll.* 412. 18 *Viner*, 352.

Where one of two joint or joint and several obligors only engages as surety for another, the giving time to the principal is in equity a discharge of the surety. *Nisbet v. Smith*, 2 *Brown*, Ch. 578. *Rees v. Berrington*, 2 *Ves. jun.* 540. (a)

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(a) In this case, Lord Kennington said, that the creditor, by taking notes and giving further time to the principal, does a material injury to the surety, who has a right, the day after

As the acceptor of a bill of exchange is the person primarily liable, any composition with him discharges the indorsers; and if he has effects of the drawer, it discharges the drawer likewise. But the holder of a bill, accepted by a person having no effects, does not relinquish his right against the drawer, by taking security from the acceptor, and giving him time. *Ex parte Smith*, 5. Bro. Cha. 1. *Ex parte Holden*, *Cooke's Bankrupt Law*.

And it has since been held, that the holder of a bill who took the acceptor of a bill of exchange in execution, and afterwards discharged him from custody, upon payment of part of the amount, and giving security for the remainder, with a small exception, thereby exonerated the preceding parties. *English v. Darley*, 2 Bof. 61.

The report of a former case of *Hayling v. Maybull*, 2 Bl. 1235, which appears by the marginal abstract of it contrary to this decision, was truly observed by Lord Eldon, upon examination of the contents of it, not to be so. The corollary necessarily resulting from these cases, is, that a forbearance given to the person who as between the parties themselves is chargeable with the debt as principal, and whom the creditor is bound to recognize as such, is a

after the bond is due, to come into equity\*, and insist upon its being put in suit; the creditor has suspended that till the time contained in the notes runs out; therefore, he has disabled himself to do that equity to the surety which he has a right to demand. If the application was proved, it is a duty to comply with it. The creditor has put it out of his power to perform that which the nature of the relation between the surety and the person with whom he is bound requires. It is a breach of the obligation, in conscience and honesty, and it is not too much to say of that obligation, in point of law. The Court cannot try the cause by enquiring what mischief it might have done, for that would go into a vast variety of speculation, upon which no sound principle could be built. This produces no inconvenience to any one; for it only amounts to this, that there shall be no transaction with the principal debtor, without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction, without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own), without consulting him. You must let him judge, whether he will give that indulgence contrary to the nature of his engagement.

See also the case of *Low v. East India Company*, 4 Ves. §24. which was in a great measure decided upon its particular circumstances, but from which it may be proper to extract the following observations of the Master of the Rolls: "It cannot be concluded upon any principle that prevails with regard to principal and surety, that where the principal has left a sufficient fund in the hands of the creditor, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can ever be called upon."—"There is no doubt that upon a joint and several bond each obligor is a principal at law; but a Court of equity makes a wide difference between principals and sureties."—"Where any act has been done by the obligor that may injure the surety, the Court is very glad to lay hold of it in favour of the surety."

\* But quære whether this can be done without an immediate offer of paying what is due? See *Gannon v. Stone*, *post*, p. 76.

discharge of the others, who are only to be regarded as his sureties; but that a discharge to a person, who is in effect only liable as a surety, does not affect the claim against the party, who having alone received the benefit of the contract, is as between the several debtors finally chargeable as the principal.

In the case of *Stock v. Mawson*, 1 *Bos.* 286, it appeared that the plaintiff being indebted to the defendant, gave him a bill of exchange, which was accepted but not paid when due; the defendant afterwards agreed with the other creditors of the plaintiff, in accepting a composition of eight shillings in the pound, and afterwards received the amount of the bill from the acceptor, considering himself as a trustee for the plaintiff for all that he so received above twelve shillings in the pound: and it was held that he was liable to pay to the plaintiff the whole money which he had received from the acceptor. The principle upon which the Court seems to have proceeded, was, that the effects of the plaintiff, in the hands of the acceptor, were to be considered as a part of the plaintiff's property. I have, however, seldom met with a case which I have considered as more difficult to reconcile with the principles of justice. After a debtor has accepted a bill, it is a fallacy to suppose that the effects in his hands are to be considered as the effects of the drawer, for the engagement which is made by the acceptance is, as between the acceptor and the drawer, tantamount to a payment, and the only remaining obligation is to satisfy the bill, the former obligation no longer subsisting. The same effect arises between the drawer of the bill and the person to whom it is given; such bill, until dishonoured, is a payment of the debt; the direct obligation which then subsists is that of the acceptor to pay the bill, the drawer being only subject to an accessory obligation (in the nature of a surety), in case the acceptor fails in the performance of the principal obligation, and due diligence is exercised by the holder; but when, from the non-performance of the principal obligation, the liability of the surety attaches, there is surely no injustice in releasing the surety, upon the acceptance of a partial satisfaction, without relinquishing the right of claiming a satisfaction from the principal, provided the surety is not thereby prejudiced in his claim against the principal; if the surety (the drawer) paid the whole, he might recover the whole from the principal (the acceptor), and he has in the like manner a proportionate right upon the payment of a part; and in case the creditor receives the whole from the principal, he is accountable to the surety for what he has before received from him. If a creditor receives a pledge for his debt, there is no inconsistency in his discharging the personal responsibility without relinquishing the benefit of the pledge; and if such discharge is accompanied with a partial satisfaction,

tion, the pledge continues available for the residue. It can hardly be supposed to be the actual intention of the creditor, in liberating the surety, to liberate also the principal debtor, or in discharging the personal responsibility, to abandon the pledge which is given for the assurance of the same duty; for the principle of the Roman law, that *nemo presumitur donare*, is not a narrow rule of positive institution, but a natural inference of reason and justice, any intention in opposition to that principle ought therefore to be distinctly and unequivocally expressed, and the implication of such intention can only arise from the subtilties of technical reasoning (a). The case afterwards came before the Court of Chancery, 6 *Ves.* 300, where the decision turned upon principles not immediately applicable to the present discussion; both courts seemed to have entertained the supposition, that if bills were accepted without effects, it would be unreasonable that the drawer, after having compounded with the holder, should be liable to the acceptor, and taking that for granted, they infer that there is no difference, if there are effects, for that then the discharging the acceptor from the debt to the drawer, would amount to the same thing, and be a prejudice to him, but I conceive that the holder of a bill is at all times, or at least generally, and unless affected by notice, or other special circumstances, well founded in regarding the acceptor as having that character which appears upon the face of the instrument, as the principal debtor, and that although in some cases the drawer may be referred to as such principal, this deviation from the general rule is always for the benefit, and ought never to operate to the prejudice of the holder.

In a subsequent case, (*ex parte Gifford*, 6 *Ves.* 805.) *Marshall* and *Haigh* being creditors of *Bedford*—*Bedford*, *Niblock* and *Burgefs*, and *Baylis*, joined in a promissory note as a collateral security; *Baylis* entered into a composition with his creditors of 4s. in the pound, in which *Marshall* and *Haigh* concurred, and gave him a receipt in full; *Bedford* and *Niblock* and *Burgefs* became bankrupts; *Bedford* paid 4s. in the pound; *Niblock* and *Burgefs*, 5s.; and the petition was presented on the part of the assignees of *Niblock* and *Burgefs*, praying that the proof upon their estate might be expunged; and in support of the petition, it was contended, that this discharge of *Baylis* was a discharge of the

(a) Viewing the case as totally unconnected with all professional reasoning, is it possible to imagine, as a matter of fact, that a person agreeing to liberate the drawer of a bill of exchange upon payment of 8s. in the pound, actually intends at the same time, and as a necessary consequence of such agreement, to make him a present of the remaining 12s., which may be eventually received from the acceptor, the principal debtor?—And if it is impossible to suppose such an intention to have actually existed, why is it to be presumed, from the mere act of liberating the drawer, that any such intention was professed, and that the following up a legal right was a deceit and violation of good faith?

co-sureties *Niblock* and *Burgess*, in the same manner as the discharge of the principal is the discharge of the surety; for the surety who had received the discharge would be thereby freed from contributing towards what might be afterwards paid by the co-surety. The decision of the Lord Chancellor was, that the petition was at least premature, for that until *Niblock* and *Burgess* had paid 10s. in the pound, for which they were liable, as between themselves and *Baylis*, they could have no cause of complaint. His lordship entered in some degree into the general question of the surety being discharged by the discharge of the principal, as proceeding upon the ground that otherwise the principal, who would be liable over to the surety, would not have the benefit of his discharge, and referred to the opinion of Lord *Thurlow*, that the surety would not be discharged, if there was an express reservation at the time of the composition, for that then the subsequent demand was assented to, in the terms of the contract. But this ground does not fully meet the law upon the subject; for it is held, as we have seen, that the surety is absolutely liberated, not only when the principal is entirely discharged, but also when time is granted to him. Now the principal would not lose the benefit of the contract with himself, unless the surety were proceeded against within the time allowed to the principal; therefore, the discharge of the surety is referable to a more extensive principle than that of the mere effect of a circuitous liability, defeating the benefit acquired to the principal. It seems impossible that the last case can be reconciled with that of *Stock v. Mawson*, when reduced to their fundamental principles. If a discharge to one of two persons, who, as between themselves, are jointly and equally liable, is not an exoneration of the other, except so far as it actually operates to his prejudice; much less can a discharge to the surety (the drawer) operate as a discharge to the principal (the acceptor); and if the acceptor, in the case of *Stock* and *Mawson*, was liable to the plaintiff (the drawer) for the effects in his hands, in consequence of the transaction between the plaintiff and defendant, he could not also be liable to the defendant (the holder); and if the acceptor was not liable to the holder, the discharge of the surety induced the discharge of the principal; but how very far was it going beyond that, when it was held, that the receipt of part from the surety was a transfer to him of the whole that was due upon the obligation of the principal: and that what was only intended to liberate him from an obligation, should give him a claim to property, to which he was not otherwise intitled.

It also appears to me very difficult to reconcile, in principle, the opinion in the case *en parte Gifford* with that in *en parte Slater* before cited; and if they are irreconcilable, there can be no question as to which the real principles of justice would award the preference.

The

The principles which prevail in respect to the drawer and indorsers, upon a forbearance to the acceptor, are equally applicable to a forbearance given to a drawer or indorser, which operates as a full discharge to the subsequent indorsers, in respect to whom the other party is to be regarded as a principal debtor.

In the case *ex parte Smith*, 1 P. W. 237, it appeared that *A* lent money to *B* and *C*, on their bond, that *B* became a bankrupt, and *A* took *C* in execution, and *C* thereupon paid *A* 2*l*, and *A* consented to discharge *C* out of execution. Upon which it was objected that this being an escape with the consent of the plaintiff, the obligee, and the debt being in law entire, it was a discharge of the whole debt, and should operate as well for the benefit of *B* the bankrupt, the other obligor, as of *C*. But it was answered, that the bankruptcy of *B*, and the assignment of his estate, were prior to the execution taken out against *C*, and by that assignment *A*, the plaintiff, had an interest in the estate of *B* the bankrupt, which interest could not be discharged by *A*'s taking out an execution afterwards against *C*, the other obligor, any more than if two were bound in a bond to me, and I should recover judgment, and take out an execution against the goods of one, and afterwards on obtaining a judgment, sue out an execution against the body of the other, and then consent that the latter shall escape, this will not discharge the execution against the goods, which was before completed against the former obligor; and that this was still harder doctrine in equity. And the Lord Chancellor admitted him to prove a moiety of the debt. The reporter subjoins a query, why he was not admitted for the whole.

There are no cases, so far as I am aware, which furnish any thing analagous to the doctrine stated by *Pothier*, concerning a release of solidity, though sometimes such a release may be very important and desirable; as for instance, when one entire rent is charged upon several houses, the person to whom it is due may distrain upon any of them for the whole, although as between themselves each may be only liable for an inconsiderable portion, which liability materially diminishes the respective and consequently the aggregate value; and therefore the release of such an entire liability, and an agreement to accept the particular proportion, is an object of great value to the several proprietors.

With respect to a mere personal obligation, if a creditor releases one of several joint and several debtors of any part of his liability, it should seem a necessary consequence of what has been premised, in respect to a release for the whole, that this release would be equally available to any of the others.

But the *English* law would not adopt the implications of a partial discharge, under the circumstances stated by *Pothier*, and as a general

ral principle, the obligation once contracted can only be defeated by an actual performance, or an express release.

With regard to the effect of an action being instituted against one for his own individual share, and a subsequent liability in respect to the shares of the others, I conceive that a discussion would be in general precluded, by the principle of the *English* law, which will not admit of several actions being brought against the same person, upon one and the same obligation.

The subrogation or cession of actions, is also a system to which the decisions of our own courts have but a very limited analogy. The following are the principal cases founded upon a similar principle. In the case *en parte Scrip*, 1 *Atkins*, 133, it was said by Lord *Hardwicke*, that where there is a principal and surety, and the surety pays off the debt, he is entitled to have an assignment of the security, in order to enable him to obtain satisfaction for what he has paid over and above his own share; and in the principal case, upon superseding the commission against one of three partners, upon his paying the debts proved, his lordship directed that the several creditors who had proved their debts, should assign the several securities, given to them by any of the partners, to a trustee in trust, to secure to the petitioner, and any other of the partners, so much money as they should respectively pay, more than their respective just portions. In *Bower v. Swadlin*, 1 *Atkins*, 294. the obligee of a bond gave a release to one of the obligors, and a bill was brought by the representatives of the obligee, and likewise by a trustee under the assignment of the bond for payment, and the defendant insisted by way of plea, that a release to one co-obligor was a release to all, the Lord Chancellor said there was no doubt, but that a release to one, was a release to both in equity, as well as at law, but if there was an assignment of the bond in trust for the benefit of the others precedent to the release, though the assignment be with or without consideration, it would be a material question whether the obligee could release, or if it could operate to the benefit of the release; and his Lordship directed the cause to stand over, until it appeared whether the release was precedent or subsequent to the assignment. In *Gammon v. Stone*, 1 *Ves.* 339, the executors of a surety filed a bill, stating an offer of payment; and that the only terms which they insisted on were, that the creditor should assign over the bond to them, with a letter of attorney empowering them to use his name upon their giving him an indemnity which he refused, and praying that he might receive his money, and that they might have the bond assigned and liberty to make use of it; the Lord Chancellor was of opinion that the plaintiffs had no right to expect the assignment, and that it was not to be insisted upon,

upon, because it was quite useless. In *Waffingham v. Sparks*, 2 Ves. 569, a surety filed a bill against the principal and the obligee, that the obligee might either put the bond in suit against the principal, or assign over the bond to the plaintiff that the plaintiff might do it and it was said by the Master of the Rolls that the assignment would be of no use to the plaintiff; for if the co-obligor in the bond was paid off, the principal might take advantage of that, and plead payment in bar of an action instituted by the plaintiff, in the name of the obligee, as it must be. (a)

It was formerly doubted whether one of two joint contractors, who had paid the whole of the debt could maintain an action against the other, as for money paid to his use; or whether the surety could maintain such an action against his principal for the whole, or against another surety for his proportion; but the right of such actions is now perfectly settled, and they are familiar in practice.

A suit in equity might always have been sustained for this purpose.

In a late case in the Common Pleas, Lord *Eldon* intimated a doubt whether a distinction might not be made, between holding that an action at law is maintainable in the simple case where there are but two sureties, or where the insolvency of all the sureties but two is admitted, and the insolvency of the principal is admitted, and holding it to be maintainable in a complicated case, where such an insolvency was neither admitted nor proved, and where the defendant, after a verdict against him at law, may still remain liable to various suits in equity with each of his co-sureties, and where the event of the action cannot deliver him from being liable to a multiplicity of other suits, founded upon his character as a co-surety. *Cowell v. Edwards*, 2 Bos. 268.

The general doctrine of contribution was most ably considered by Lord Chief Baron *Eyre*, in the case of *Deering v. Lord Winchelsea*, and others, on the equity side of the Exchequer, 2 Bos. 270. Sir *Edward Deering*, Lord *Winchelsea*, and Sir *John Rous*, became bound in three several bonds, that *Thomas Deering* should duly account as receiver of the customs. A sum rather less than the penalty of the respective bonds was levied upon Sir *Edward Deering*, who filed a bill against the other two for contribution, which, his lordship observed, was resisted on the ground that there was no foundation for the demand, in the nature of the contract between the parties; the counsel for the defendants, considering the title to contribution, as arising from contract expressed or implied, that

(a) But see *Rees v. Berrington*, *supra*, *Wright v. Simpson*, 6 Ves. 734. *Beardmore v. Crutenden*, Co. B. L. 212.

it was admitted that if they had all joined in one bond, for the aggregate amount of the separate penalties in each, there must have been contribution, but that this was said to be on the foundation of contract; implied from their being parties in the same engagement, and here the parties might be strangers to each other, and that it was stated that no man could be called upon to contribute, who was not a surety on the face of the bond to which he was called to contribute. His Lordship said, that the point remained to be proved, that contribution was founded upon contract. That if a view was taken of the cases, it would appear that the bottom of contribution was a fixed principle of justice, and was not founded in contract; that contract indeed might qualify it, as in *Swain v. Hall*, 1 *Ch. Rep.* 149. where three were bound for *H.* in an obligation, and agreed, if *H.* failed, to bear their respective parts. Two proved insolvent, the third paid the money, and one of the others becoming solvent, he was compelled to pay a third only (a). His lordship having cited several cases and authorities, in respect of the obligation of several parties liable to an entire duty, to contribute their respective proportions, and amongst the rest Sir *William Harbet's* case, 3 *Co.* 11. *b.* where many cases are put of contribution at common law, and the reason is, they are all *in quali jure*, and as the law requires equality, they shall equally bear the burthen. This is considered as founded in equity; contract is not mentioned. He proceeded as follows:

“ In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle; Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases, sureties have a common interest, and a common burthen. They are bound as effectually, *quoad* contribution, as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement, they must all contribute equally.

“ In this case Sir *E. Deering*, Lord *Winchelsea*, and Sir *John Rous* were all bound, that *Thomas Deering* should account. At law all the bonds are forfeited. The balance due might have been so large as to take in all the bonds, but here the balance happens to be less than the penalty of one, which ought to pay? He on whom the crown calls, must pay to the crown; but as between themselves they are *in equali jure*, and shall contribute. This principle

(a) *Vide Peter v. Rich*, 1 *Ch. Rep.* 35, cited in a note to *Deering v. Lord Winchelsea*, where two out of three sureties were compelled to pay in moieties, the third being insolvent.

is carried a great way, in the case of three or more sureties in a joint obligation; one being insolvent, the third is obliged to contribute a full moiety. This circumstance, and the possibility of being made liable to the whole, has probably produced several bonds. But this does not touch the principle of contribution, where all are bound as sureties for the same person.

“ There is an instance in the civil law of average, where part of a cargo is thrown overboard to save the vessel. *Show Parl. Cas. 19 Moor, 297.* The maxim applied is *qui sentit commodum sentire debet et onus.* In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shews that contribution is founded on equality, and established by the law of all nations. ]

“ There is no difficulty in ascertaining the proportions in which the parties ought to contribute; the penalties of the bonds ascertain the proportions.”

In *Cowell v. Edwards, 2 Bos. 268,* already cited, one of six sureties having paid more than his proportion of the debt, brought an action against another for so much, as, when added to what he had already paid, would make up one third of the whole, three of the other sureties being insolvent. The Court observed that it might perhaps now be found too late, to hold that this action could not be maintained at law, though neither the insolvency of the principals, or of any of the co-sureties were proved; but that at all events the plaintiff could not be entitled to recover at law, more than one-sixth of the whole sum paid.

If a surety, after the bankruptcy of his principal, pays the debt, or if one of the two partners after the bankruptcy of the other pays the whole, he may bring an action to recover the amount of proportion, notwithstanding the bankrupt is discharged by his certificate. *Wright v. Hunter, 1 East, 20.*

But if a surety at the time of his becoming such, takes an express security, it is held that the promise implied by operation of law does not attach. *Toussaint v. Martinnant, 2 T. R. 100.*

The last point discussed by *Pathier, viz.* whether when several persons are condemned in solido, to pay another a sum of money on account of an action arising *ex delicto*, he who pays the whole can have an action against the others, received a determination, though in a very summary manner, in the case of *Merryweather v. Nixon, 8 T. R. 186,* in which a sum of money having been recovered against two defendants, in an action for an injury done to a mill, in which action was included a count in trover for the machinery, one of the defendants, against whom the whole had been levied, brought

brought an action against the other for a contribution of a moiety, as for so much money paid to his use. Mr. Baron *Thomson*, before whom the cause was tried, being of opinion that no contribution could by law be claimed as between joint wrong-doers, and consequently that this action upon an implied assumpsit, could not be maintained on the mere ground that the plaintiff had alone paid the money, which had been recovered against him and the other defendant in that action, and a non-suit having been entered upon this opinion, Lord *Kenyon* upon an application to set it aside said, there could be no doubt but that the non-suit was proper; that he had never before heard of such an action having been brought, where the former recovery was for a tort. That the distinction was clear between this case, and that of a joint judgment against several defendants, in an action of assumpsit, and that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right; and the Court refused a rule to shew cause.

The case of *Philips v. Biggs*, *Hardr.* 164, was mentioned by *Law* for the defendant, as the only case to be found in the books in which the point had been raised; but it did not appear what was ultimately done upon it.

This case, so peremptorily decided as not to be allowed even the honour of a deliberate consideration, may perhaps be held to have settled the law upon the subject, but it must be a matter of regret to see an adjudication so positively made, which is so manifestly contrary to what every man must feel to be the real principles of justice, especially when it was not called for by any imperious authority of law. Nothing can be more obvious than the preference due to the *French* law (adopting the principle of equity, which does not allow one of the co-debtors to enjoy at the expence of another, the liberation from a debt for which they are equally liable), over the scrupulous principles of the *Roman* jurists, which did not give the debtor who had paid the whole to have any recourse against the others. Though the original foundation of the demand is an injury, by which no man can acquire to himself a right, the obligation arising from the judgment into which the cause of action for the injury is converted, has, in every other respect, the character and properties of a debt, and the obligation of contribution is founded upon the general principles, so accurately stated by the Lord Chief Baron *Eyre*, in the case of *Deering v. Lord Winchelsea*, by which all who are equally liable to a common demand, ought equally to sustain the burthen of discharging it.

## N U M B E R XII.

(Referred to, Vol. I. p. 204.)

*On Penal Obligations.*

The Chapter of *Pothier* on penal obligations, appears to be wholly referable to cases in which there is a distinct and absolute agreement, independent of the penalty; and upon failure of which the penalty as being merely accessary, becomes necessarily void; the existence of some other agreement, whether valid or otherwise, being constantly assumed.

The case of a bond in a given sum of money, with a condition to vacate the same upon a certain event, (which in *England* is a common instrument,) may in some respects fall under a different consideration; for a failure in the subject of the condition does not necessarily induce an insufficiency in the obligation.

We have seen in the Notes to the Chapter on Conditions, that an impossibility in the condition does not defeat the obligation; but in point of law, the engagement is absolute as if no condition had been added; on the other hand, if there is any thing illegal in the object of the contract, the obligation and condition are equally void. Where the condition refers to, and is intended to enforce another agreement, I conceive that the consequences stated by *Pothier*, will in general apply in this country: where a bond was for the performance of the covenants in a deed, and these related to a term of years which was held to be void in law, it was urged that the condition was single; for if the condition refers to a thing which does not exist, it is the same as if there was no condition; to which the court inclined; but afterwards it was held, that as the covenant and obligation were both for the corroboration of a grant which was void, they were void also. 1. *Lev.* 45. In a case which occurred a short time before, the condition of a bond was to perform the covenants in an indenture, and the defendant having pleaded that there were no covenants in the indenture, the plaintiff had judgment; because if there were no covenants in the indenture the obligation was single. 1 *Lev.* 3. These cases of an obligation being held single, do not occur in modern practice; and a court of equity would probably relieve against the effects of them, except so far as they were intended to enforce a real contract, and were fully intended to constitute an actual debt.

A bond with a penalty may in equity be considered as the evidence of an agreement, and the execution of it enforced according-

ly; and therefore in cases where bonds have been given in contemplation of marriage, by the intended husband or wife, to the other, which bonds were considered as having become void at law by the marriage, they were regarded as agreements for performance of the acts specified in the condition, and enforced accordingly. See *Atton v. Pierre*, 2. Vern. 280. *Carmel v. Buckle*, 2. P. Wms. 243. *Watkins v. Watkins*, 2. Atk. 97. Where two persons borrowed money and gave a joint bond, it was enforced by Lord *Hardwicke* against the heir of the obligor, who died first, as if it had been joint and several: his lordship saying, in reference to preceding cases, that the reason the court had gone upon was that the bond was to be considered as an agreement in writing; and therefore though the obligation and penalty were gone by the legal demand being gone, yet the condition, taking it altogether, was considered as an agreement in that court to pay the money, and an agreement under hand and seal. *Bishop v. Church*, 2. Vesf. 271. And where the condition of a bond was in consideration of a sum of money, to convey and assure certain lands, the Master of the Rolls declared, that bonds of this nature were always considered in equity as articles of agreement, and decreed to be specifically performed. *Ann Mosely*, 39. So Lord *Parker* said, in *Parks v. Wilson*, 10. Mod. 518, that bonds are considered as evidences of agreements, and the obligors held to a specific performance, and not allowed to forfeit the penalty. In *Hodson v. Trevor*, 2 Peer Wms. 191. the defendant, on the marriage of his daughter, gave a bond in the penalty of 5000*l.* to the plaintiff, the intended husband, with condition reciting an agreement, that he should within three months after the death of his (the defendant's) father, settle one third part of the estate that should descend to him, upon the plaintiff for life, with remainder to the daughter for life, and remainder to the issue of the marriage, and declaring that the bond should be void on making such settlement. A large estate having afterwards descended, the plaintiff filed a bill requiring a settlement of a third part, to which it was objected that he should have no more than the penalty of 5000*l.*; but the Lord Chancellor said, that it could be no argument to say, that the defendant ought only to pay the penalty of 5000*l.* because the agreement was recited in the bond, and such agreement was not to be the weaker, but the stronger for the penalty; and by the same reason, that had the penalty been higher, and beyond the value of the third part of the real estate, in such case the defendant would not have been bound to pay it; so now the penalty being beneath the value of a third part of the estate, the defendant is not bound to accept it; besides it was to be a settlement

for

for the benefit of the issue of the marriage, and the payment of the 5000*l.* to the husband would not answer the purpose.

And in another case, where, after a parol agreement by the husband's father to settle lands, he gave a bond in the penalty of 1200*l.* conditioned to pay 600*l.* if he did not do so; Lord *Hardwicke* said, that the general question whether the party had an election or option to settle the lands agreed in the bonds to be settled, or to pay the penalty of 600*l.* would depend on the consideration what was primarily and originally the intent of the agreement; whether it was that the lands should be settled, and this 600*l.* was only to be considered as a penalty, or further security for it; or whether it was agreed and stipulated, that either the one or the other was to be the provision for the husband, and issue of the marriage? His Lordship said, he must consider the agreement to settle the lands as the primary and original agreement; and that the other was only by way of further security or penalty, (call it what you please,) and an enforcing the making of the settlement. Suppose the agreement which is contained in the condition of the bond (which is a common but inaccurate way of making marriage agreements) had been in articles, instead of the condition of a bond, and an express direction (a) in the same words as here, that the husband, and his father, covenanted to settle these lands in such a time, or in default thereof, that they should pay 600*l.* the construction the court would have made, would not be that this gave the husband or his father an option to settle the lands or pay 600*l.* but they would say without hesitation that this was an agreement to settle the lands, and that the 600*l.* was a penalty if they did not settle within a certain time, and nothing else; if this would be so, then there would be no ground to make a different construction, when this is contained in the condition of a bond. But on the part of the defendant, a circumstance is made use of, and very properly, from that form of working it up, that if this was a penalty, what occasion was there for making a further penalty of 1200*l.*? but on considering the whole, he thought that was barely an inaccuracy in the forming of the agreement, and that no such intent or construction would be drawn from it, as was drawn for the defendant. They had made an agreement before marriage to settle the lands, (as he must take it, for it was so recited,) and if no settlement, that penalty; they reduce this into a bond; what ground is there to shew they intended this for a satisfaction? If indeed it could be shewn that no good title could be made, and that the defect of performance arose from inability, that they might have in view, but

(a) Qu. declaration.

not if the husband or his father had it in their power to make a settlement, *Challoner v. Challoner*, 2 *Ves.* 528.

In *Collins v. Collins*, 2 *Bur.* 820. Lord *Mansfield* observed, that the constant course of courts of equity was to consider the conditions of the bond, as the agreement of the party; and in *Mackworth v. Thomas*, 5 *Ves.* 329, Lord *Loughborough* said, that there was no doubt of that proposition; but in the same case, where the arrears of an annuity exceeded the penalty of the bond given for its security, he held that the bond could not, in the administration of legal assets, be allowed to rank as a specialty beyond the amount of the penalty; which distinction was certainly just, and accordant with the correct principles of equity. The Court will not cramp a security, so as to defeat or curtail the operation of the substantial agreement of the parties; and in furtherance of the agreement will relieve them against the legal strictness, resulting from the formality of the agreement, but will not extend the mere legal advantage arising from such technical formality beyond its own limits, to the prejudice of other interests equally entitled to protection, as being equally founded upon the general intention of the contracting parties; which general intention is the only principle upon which a court of equity can carry the substantial effect of a legal instrument beyond its legal operation.

The author of the *Treatise of Equity*, speaking upon this subject, observes, that though formerly courts of equity thought that where a bond was given to perform any agreement, the obligor had his election either to do the thing, or pay the money; and that the obligee having chosen his security, ought to be left to it; yet now they consider the penalty only as a collateral guard to the agreement, which still remains the same, and unimpeached by the parties, providing a further remedy at law for the performance, and, therefore, proper to be executed in that court; for it would be hard, that enlarging a person's security at law should make him in a worse condition in equity than if he had taken none at all; nor can it ever be intended, that a bond added only to enforce the performance, should weaken the lien of the agreement. And his learned annotator, Mr. *Fonblanque*, subjoins, that as courts of equity will interpose to restrain the recovery of the penalty, the principles of equal justice require that they should enforce the specific performance of the act agreed to be done, or restrain from doing that which was agreed not to be done. And upon this principle, wherever the primary object of the agreements be the securing the specific subject of the covenant, the party covenanting is not entitled to elect whether he will perform his covenant, or pay the money. Upon the concluding observations of the author, he remarks, that it may be laid down as

a general rule, that the agreement of the parties, if express, ought not to be affected by the taking a collateral security, intended merely to secure the performance of such agreement; but if the agreement be merely implied, as that the vendor shall have a lien upon the estate, until his purchase money be paid, the taking of a bond, or other security, for the purchase money, might reasonably lead to the conclusion, that the vendor trusted to such security, and that the property of the estate was intended to be absolutely vested in the vendee. *B. 1. c. 3. § 2.* This line of distinction is confirmed (independently of the authorities cited by Mr. *Fonblanque*) by the case of *Touissant v. Martinant*, 2 *T. R.* 100. A surety took a bond from his principal to pay the money, for which he was engaged, and the principal having become bankrupt, and obtained his certificate, the surety was not allowed to maintain the common action for money paid to the use of the principal, upon a payment subsequent to the bankruptcy. Mr. Justice *Buller* said, that the law raised a promise against the principal, because there was no security given by the party; but if the party choose to take a security, there is no occasion for the law to raise a promise. Promises in law only exist where there is no express stipulation between the parties. In the present case, the plaintiffs have taken a security, therefore, they must resort to that security.

The effect of penal obligations is, according to the jurisprudence of this country, circumscribed within much narrower limits than their literal import. With respect to the interposition of courts of equity, Lord *Thurlow* stated, in the case of *Sloman v. Walter*, 1 *Bro.* 418. that the rule that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore, only to secure the damage really incurred, was too strongly established in equity to be shaken. In the particular case, it was agreed that a partnership should be conducted entirely by one of the partners; but that the other should have the enjoyment of a particular room, whenever he thought proper; and a bond being given to enforce the agreement, his lordship seems to have been of opinion, that the case was within the rule, as he continued the injunction to the hearing. The following are some of the cases which had previously been decided upon this subject: *Sale* gave a bond to *Ryland* in 20*l.* not to disparage his trade, and afterwards seeing a customer of *Ryland's* cheapening a parcel of flounders, he said to him, Why would you buy of *Ryland*? those fish stink. *Ryland* put the bond in suit, and had a verdict. And it was held, that equity would not relieve, because of the smallness of the sum; but the Lord Keeper said, it would be otherwise,

were the penalty greater, as 100*l.* or upwards. 1 *Cham.* 183. 1 *Eq. Ab.* 91.

On the sale of an estate, it was agreed that the purchaser should retain 400*l.* for two years, without interest; and if the wife of the seller in that time released her dower, he was to pay the 400*l.* or else retain it absolutely. The seller having died, his widow did not release her dower, but brought a writ of dower, and died before the recovery of it. A bill was filed for the 400*l.* because it was but in the nature of the penalty to secure against the dower, which was then at an end, and the purchaser was secured as well as if she had released within the two years, or after the two years had expired; in which case, as it was said, the court would certainly have relieved. On the other side, it was said, that this was not in the nature of the penalty, but the term of the agreement, and the measure of the satisfaction for the contingent incumbrance of dower; and that the court would not have relieved on her release, much less when she was so far from releasing that she brought her writ of dower, and if she had recovered it, and lived several years, the purchaser could have had only the 400*l.* and as he run the hazard of her living, he ought to have the advantage of her dying; and of this opinion was the Lord Chancellor, and decreed accordingly. *Small v. Lord Fitzwilliam. Prec. Chan.* 102.

In *Aylet v. Dodd, 2 Atkins*, 328. and several other cases, it was laid down by Lord *Hardwicke*, that where there is a clause of *nomine pœna* in a lease to a tenant, to prevent his breaking up and ploughing old pasture ground, the intention is to give the landlord some compensation for the damage he has sustained, and therefore, in that case, the whole *nomine pœna* shall be paid. And in *Rolfe v. Peterfon. 6 Brown, P. C.* 460 (2d vol. 436. last edit.) the tenant covenanted, that in case any part of the premises, that had not been in tillage within twenty years, should be converted into tillage, he would, for the remainder of the term, pay the further yearly rent of 5*l.* for every acre so converted; the tenant having converted into tillage a parcel of land before covered with furze, and an action being brought against him for this, and other breaches of covenant, and 300*l.* damages being recovered upon a judgment by default, Lord *Camden* directed an issue *quantum damnificatus*, ordering that the damages upon each breach of covenant should be found separately. Upon appeal to the House of Lords, in opposition to the argument, that the damages were increased to so high a sum by means of the covenant to pay the increased rent, which was to be considered as a penalty, and that the court of equity could relieve against it, it was said that this was not a penalty, but a liquidated satisfaction, fixed and agreed upon between the parties, and was reserved

reserved as an additional rent; whereas a penalty is a forfeiture for the better enforcing a prohibition, or a security for the doing some collateral act. On the other side, it was said that these rigorous covenants, though seemingly made for the preservation of estates, are in effect a new mode of raising rents, more oppressive than the proceeding by ejectment, and are not in the nature of a contract, but of a penalty of vindictive damages; and therefore, ought to receive no countenance in equity, as the penalty thereby reserved frequently exceeds the value of the inheritance. But the decree was reversed.

A lease for lives was made at the yearly rent of 125*l.* with a clause, that if the tenant and his heirs, with all their family, did not live on the premises during the continuance of the lease, the rent should be raised to 150*l.* An action at law having been commenced upon this clause, the Court of Exchequer in *Ireland* granted an injunction; upon appeal to the House of Lords it was argued in support of the decree, that the covenant being inserted only for the sake of improvement, and to secure the rent reserved, the same had been substantially performed, and the design thereof answered; for it was admitted, that the lands were kept well stocked with more than sufficient to answer the rent; but the decree was reversed. *Ponsonby v. Adams*, 6 *Br. P. C.* 407. (last edit. 2 vol. 431.)

In *Roy v. Duke of Beaufort*, 2 *Atkins*, 190. the plaintiff and his son, while the son was in custody on the information of the duke's gamekeeper, for carrying a gun, gave a bond, that the son should not commit any trespass in the duke's royalties, by shooting, hunting, fishing, &c. unless with the licence of the gamekeeper, or in company with a qualified person. The son having caught two flounders with an angling-rod, in company with two servants of the duke, one of whom (a brother-in-law of the gamekeeper) invited him to go angling with them; the bond was put in suit, and a verdict obtained on the evidence of these servants, for the penalty, which, with 40*l.* for costs, the plaintiff (his son being dead) was obliged to pay. Upon a bill filed by him for relief, the following questions were made: 1st, Whether the bond was obtained by oppression and imposition? 2d, Whether it should be only considered as a security that the son should not poach for the future? 3d, Whether an ill use had been made of the bond? Lord *Hardwicke*, upon the first question, expressed his opinion in favour of the bond, and in the course of it, observed, in answer to an argument that the penalty was excessive, that to be sure the penalty was a large one; but he did not know that courts of equity, where bonds have been entered into voluntarily, have ever gone so far as to take into their consideration the greatness or the smallness of the penalty: he should be extremely

extremely cautious how he gave an opinion that would set aside such bonds, which, if rightly used, might be of great service in the preservation of the game, and an equal benefit to the obligors themselves, by taking them out of an idle course of life, which poaching naturally leads them into. As to the head of security, he said, that it was most absurd, to think that bonds of this kind were intended merely as a security, and that nothing was to be recovered upon them. He was of opinion, that when these kinds of bonds were given by way of stated damages between the parties, it was unreasonable to imagine, that they could only be intended as a bare security that the obligor should not offend for the future. "Was this the case (he said) in what respect is a gentleman, who has taken such a bond, in a better condition than he was before, if, after he has obtained judgment at law, a court of equity will give him no other satisfaction than the bare value of the price of the game that is killed. Upon the third point, he observed, that from the year 1729, when the bond was given, no evidence was offered of the son poaching until 1732 (a); and after killing these flounders, it rests two years, and no action is brought (b); afterwards, the plaintiff in equity was a witness against the two servants for a riot, and they were convicted chiefly on his evidence. It is a very material circumstance, that the son had a licence (c), or at least an encouragement, to fish, by being in company with two of the duke's servants (d) (one of whom was brother-in-law to the gamekeeper) (e). It frequently happens, that there may be a just cause of action, yet the real motives may be very unjust, which a court of equity will always take into their consideration, though they cannot at law pay any regard to it (f). It appears, that the gamekeeper, who

(a) Would not such evidence have been irrelevant? *Arkins* does not state the proceedings at law, but from the nature of the thing, there must have been a plea, alleging that the son had not trespassed contrary to the condition of the bond, to which the replication must have answered, with stating a particular trespass; to have stated more trespasses than one, would have been bad, as being multifarious, except as to the effect of the statute of *William*, which had not at that time been applied to such bonds as these, and which is not at all adverted to; and as one only was alleged, one only could be proved. If the son the minute after giving the bond had shot a partridge before the duke's face, would not this have been a breach against the full intention of the bond? But what distinction can reasonably be made, as a matter of legal enquiry, between one time and another, when there is no distinction by the contract itself?

(b) If a right of action once attached, in how short a space of time was it requisite that the action should be brought, so as it was not barred by any statute of limitations?

(c) This is quite out of the question.

(d) Can a man's legal right be prejudiced by his servant having, without his authority, concurred in the violation of it?

(e) What difference does this make?

(f) This appears to be a most dangerous doctrine. Where a man has a legal right, the motives which induce him to exercise that right, or to forbear from the exercise of it, must

who had the authority of the duke, who has been a witness to the transaction of the bond (*a*), gave a licence, or at least an encouragement (*b*), to this fishing, which, as it was with an angling rod only, cannot be 'called poaching, nor was it ever so esteemed (*c*). In such a tract of time as two years, it is impossible to suppose that the gamekeeper could be ignorant of this fishing, especially as his own brother-in-law was in the company (*d*).

"According to the condition of this bond, the plaintiff could not be relieved at law, because his son could not fish without express leave from the gamekeeper, or in presence of a qualified person, so that if the Duke of *Beaufort* himself (*e*) had given leave, there must at law have been a verdict, because it is not within the express terms of the condition of the bond.

"Now when a man has made this moderate use of his liberty (*f*) of fishing, and manifestly appears to have had leave, it would be hard not to relieve against the penalty recovered upon this bond at law."

The third point in the preceding case, though not immediately referable to the course of the present discussion, is inserted to shew the real ground upon which the case was determined; a ground that appears to me to be in every respect untenable, and which I

must rest with himself. If he forbears the exercise of it, the duration of such forbearance is also a matter of discretion, until the law has allowed it to operate as a bar. If a sentiment of personal disapprobation is a sufficient warrant for a court of equity to defeat the exercise of a legal right, the discretion assumed under this pretence will be so illimitable, as to eradicate all the principles of juridical certainty. If up to and at the time of the plaintiff giving evidence against the servants (who by the bye probably did not, until that time, divulge the circumstance), the duke had a right of action which a court of equity would not controul him in the exercise of, that right could not be defeated by such a circumstance taking place.

(*a*) What then?

(*b*) Gave a licence, that is, did not give a licence, but gave an encouragement; the meaning of which does not appear, except as it may be inferred from what follows, that he probably would; therefore, that he actually did know of the circumstance within two years afterwards.

(*c*) The word poaching does not occur in the condition of the bond; but if he shall trespass by fishing, the obligation shall be in force. The act against stealing fish is held to extend to angling.

(*d*) Is there any presumption *juris et de jure*, that a man is cognisant of every act done in the presence of all his brothers-in-law; and to what further degree of relationship in the principle to be carried?

(*e*) Here another principle would apply to prevent a person taking advantage of a penalty incurred by his own act or consent; but that is a principle totally inapplicable to the present question. The condition might have been made general, without including an exception of the consent of the gamekeeper. When a particular exception is introduced, referable to one case, it is not the province of courts of justice to create a more extensive exception not contemplated by the contracting parties.

(*f*) What liberty? What leave? He either had leave from the gamekeeper, or he had not. If he had, it was a defence at law, but the whole case assumes that he had not, and that the bond was legally forfeited.

have commented upon in the notes with a freedom which may perhaps be regarded as arrogance, but which I must always assert as the privilege of a writer, who wishes to extend his enquiries beyond the mere collection of authorities, and to investigate the principles of his subject (a).

Upon the second point, I conceive the opinion of the eminent magistrate to be founded upon the most correct principles of juridical reason; and I am persuaded, that if these principles had been more extensively acted upon than they have been, the true object of penal obligations would have been more effectually promoted. If the penalties had been allowed to operate really *in terrorem*, by being actually levied, when legally incurred, agreements would be more faithfully performed, from a terror of the consequences of their infraction; but the scarecrow doctrine of penalties being stipulated, merely *in terrorem*, whilst they are known to have no efficient power, is little more than a trifling with language. No penalty is requisite to render a person liable to the damages which may be proved to have arisen from the non-performance of his agreements, but by a real liability to an actual penalty, such non-performance will commonly be prevented.

In the following case, a bond was given by the plaintiff to the defendant, who was a hair-merchant, as a security for his service and behaviour in *Flanders*, as an agent for the defendant in buying hair there; the plaintiff was to stay abroad till a certain season, and as a security for his performance of the agreement he deposited 100*l.* in the hands of the defendant. The plaintiff bought but 5*l.* worth of hair for the defendant, and returned to *England* before the time agreed between them; and brought a bill for 50*l.* agreed to be paid for his trouble, and also for the deposit. It was insisted for the defendant, that this was a breach of the plaintiff's duty, and a forfeiture of the bond, and that the defendant had a right to retain the 100*l.* in satisfaction of the penalty, and that the Court would

(a) The general doctrine of preventing an ill use being made of a bond is properly applicable to a subject of a different nature, and is principally instanced in the case of general bonds of resignation, which, when they were allowed to be valid in point of law, were prevented by courts of equity from being made the cover of simony; and, in any other case, a court would prevent a legal contract from being used as the engine of an illegal purpose. That Lord *Hardwicke* should, from a sentiment of disapprobation of the conduct of the Duke of *Beaufort*, have resorted to such reasoning as has been stated, would seem a caution against looking in legal proceedings at any other object than the true legal grounds of judicial determination. An objection which might have deserved some attention in the principal case, *viz.* that the contract was repugnant to a principle of law, inasmuch as it was made by way of composition for dropping a criminal prosecution, was not made a point in the case (except as connected with the adventitious circumstance of oppression). The decisions in subsequent cases would give considerable weight to such an objection, if the question should hereafter arise.

not relieve against it, for it was the stated damages between the parties, and the counsel cited the above case of the Duke of *Beaufort*, and likewise compared it to the case of *nomine pœne* in leases. The Lord Chancellor said, he could not decree this penalty, because it was a bond for services only, and different from the cases of a *nomine pœne* in leases, to prevent a tenant from ploughing, because that was stated damages between the parties. Nor was it like the case of bonds given as a security not to defraud the revenue, because there, where a person is guilty of a breach, it was considered as a crime, and the Court of Chancery would not relieve for that reason. Here he could not decree the penalty, but must decree an action at law, upon a *quantum damnificatus*, to try how far the defendant had been damaged by the plaintiff's non-performance of his service. *Benson v. Gibson*, 3. *Atk.* 395. (a)

In the case of *Hardy v. Martin*, 1. *Bry. c.* 418. *n.* one partner, on retiring from business, gave a bond of 600*l.* to the other, not to carry on the same business within certain limits; and after a verdict at law for the penalty, the Court of Chancery granted an injunction to stay execution, and directed an issue to take an account of the damage actually sustained.

In case of a penalty for non-performance of covenants, or agreements, the Courts of Equity, in like manner, exercised a jurisdiction of restraining the recovery, to the amount of damage assessed by a jury. At common law, the rules of pleading, which require issues to be taken upon a single point in general, confined the plaintiff to state a single breach of the agreement, for the performance of which the penalty was stipulated; but this restriction did not exist in cases where the breach of the agreement was stated in the declaration, in which the plaintiff may allege his complaint as extensively as he finds convenient.

(a) There seems to be an inaccuracy in the phrase that the court could not decree the penalty, because that expression would be rather applicable to a suit by the obligee to enforce the penalty, than to one by the obligor to be relieved from it; but this inaccuracy is more probably imputable to the reporter than to the Lord Chancellor; as to the propriety of the decision, though there is not a similarity of circumstances to the cases mentioned, there does not appear to be any necessary opposition of principle; and it is impossible to suppose that the intention of the employer, in requiring the deposit, was any other than that it should be retained in case of the agent's infraction of his duty. In these cases the injury which can be manifested by evidence to a jury, is almost necessarily much less than that which is actually experienced by the party.

When the courts adopted the principle above cited, that if a penalty is merely inserted to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal effect of the deed; if they had gone on to ask themselves, How that effect would be most fully obtained? they would have probably found the answer to be, an enforcement of the penalty when that enjoyment was wilfully withheld.

The distinct enunciation of the above principle in the case of *Sloman v. Walker*, induced me to mention that case before the others upon the same subject, which are anterior to it in point of time.

By Stat. 8 & 9. W. c. 11. it is enacted, that in all actions in any court of record, upon any bond, or any penal sum, for non-performance of any covenants or agreements, contained in any indenture, deed, or writing, the plaintiff may assign as many breaches as he thinks fit, and the jury shall assess damages upon such breaches as the plaintiff shall prove to have been broken; and if judgment shall be given for the plaintiff on *demurrer*, or confession, or by *nil dicit*, the plaintiff may suggest upon the roll as many breaches as he shall think fit, upon which a writ shall issue to the sheriff to summon a jury before the justices of assize, to enquire of the truth of those breaches, and to assess the damages; and upon payment of such damages with the costs, execution shall be stayed; but the judgment shall remain as a security, to answer for any damages to be afterwards sustained by any future breach.

The natural construction of this act does not seem to apply to bonds, with a condition to do or not to do any given act, without there being any other distinct agreement, that such act shall be done; but in *Collins v. Collins*, 2 Bur. 824. above cited, where the condition of a bond was that the defendant should pay an annuity to the plaintiff, and should also maintain him. Lord Mansfield said, "This is an agreement between the parties, and an agreement in writing; the condition of the bond is an agreement in writing, and people have frequently gone into courts of equity upon conditions of bonds as being agreements in writing, to have a specific performance." I cannot help thinking that there is more ingenuity than solidity in this reasoning; for though in equity the condition of a bond is regarded as evidence of an agreement, that the act referred to shall be done, such conditions are not regarded as agreements at law, and cannot be declared upon as such; and where there was another subject to which the words of the statute were naturally applicable, it would have been as well to avoid extending the operation of it to a case, that does not naturally present itself to the mind, as being in the view of the legislature, and to which the words can only be applied by a forced and foreign construction. It is however settled in conformity with the above opinion, that the statute extends to all bonds for the performance of any condition. *Walcot v. Goulding*, 8. T. R. 124.

It is now also settled that the act is compulsory (a), and that the plaintiff is not at liberty to proceed for the penalty as at common law, although there have been decisions, and there seems to have been a tacit practice the other way (b). *Drage v. Brand*, 2 Willf.

(a) For the method of proceeding on the statute, see *Williams' Notes, Gainsford, v. Griffith*, 1 Saund. 58. *Roberts v. Marries*, 2 Saund. 787.

(b) See *Bird v. Randall*, post.

377. *Goodwin v. Crowle, Cowp.* 357. *Hardy v. Bern, 5. T. R.* 636. In the last case, Lord *Kenyon*, and Mr. Justice *Buller*, certified their opinion in writing to the Lord Chancellor, upon a writ of error from a judgment of the Exchequer; they stated that it was apparent to them, that the law was made in favour of defendants, and was highly remedial, calculated to give plaintiffs relief up to the extent of the damage sustained, and to protect defendants against the payment of further sums than what was in conscience due, and also to take away the necessity of proceedings in equity, to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only had accrued (a). See also *Rotes v. Roswell, 5. T. R.* 540.

But there are cases where the penalty stipulated by the parties, can be the only true and proper measure of justice; and though there is a technical distinction between a penalty and stated damages, to which I am about to proceed, I think it would be in general proper to regard the penalty as stated damages, unless there is some particular reason in the nature of the contract to the contrary. Many times engagements are entered into upon considerations, wholly arising out of the personal feelings of the parties. The person making such engagement of course acts under an adequate inducement, and the person who has given that inducement ought not to be deprived of the full security of an object, the personal importance of which can only be justly appreciated by himself. On the other hand where a bond is evidently a mere bond of indemnity from pecuniary loss, the extent of the loss is the extent of the damages. In many cases, the actual damage which could be brought under the contemplation of a jury must be as nothing; and if the nominal sum awarded in such cases, was the only consequence that could attach upon a person violating his engagement, the sanction provided with a view to its real and efficient security would be wholly frustrated. I shall have an opportunity presently of referring more conveniently to a case in which this sentiment was judicially adopted.

In all the cases above mentioned, where it was held that equity could not relieve against the sum agreed upon by the parties, I

(a) The act is penned in a most careless manner; but I think that this is evidently the true construction of it upon the point in question, and that the act is compulsory upon the plaintiff as to assigning some breach, but was discretionary merely as to the number of breaches. In any other point of view there would be a manifest absurdity, in providing that the plaintiff might assign as many breaches as he pleased, upon judgment on demurrer &c. and damages shou'd be assessed, &c. for before that time he might take his judgment and execution for the whole penalty, without assigning any breach at all; and giving him an option to assign a breach to enable him to recover a part of the penalty, instead of taking the whole without having recourse to that proceeding, would not be productive of any extensive practical consequence.

conceive it may be taken for granted, that the sum stipulated to be paid is the only proper measure for the decision of the jury; and whether the form of the transaction is held to be a penalty or stipulated damages, (the line of discrimination between which is not very accurately marked,) the sum so agreed is the amount which ought to be recovered.

In the case of *Lowe v. Peers, 4 Burr. 2225*, the defendant promised the plaintiff, that he would not marry any person besides herself, and that if he did, would pay her (the plaintiff) 1000*l.* (a) at the end of three months. Lord *Mansfield*, after stating the proceedings in the cause, said, that the jury had given 1000*l.* damages; and by law, and in justice, the defendant ought to pay the 1000*l.* Money is the measure of value. Therefore what else could the jury find but this 1000*l.* (unless they had also given interest after the three months). This is not an action brought against him for not marrying her, or for his marrying any one else; the non-payment of the 1000*l.* is the ground of the action. The money was payable on a contingency, and the contingency has happened, therefore it ought to be paid. There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty, after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole; or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*. And upon this distinction they proceed in courts of equity. They will relieve against a penalty upon a compensation; but where the covenant is to pay a particular liquidated sum, a court of equity cannot make a new covenant for a man; nor is there any room for compensation or relief, as in leases containing a covenant against ploughing up a meadow: if the covenant be not to plough, and there be a penalty, a court of equity will relieve against the penalty, *or will even go further than that*, to preserve the substance of the agreement; but if it is worded, to pay 5*l.* an acre, for every one ploughed up, there is no alternative, no relief against it, no room for compensation; it is the substance of the agreement. Here the specified sum of 1000*l.* is found in damages (b); it is the particular liquidated

(a) The promise was held to be void, but the amount which ought to be recovered, supposing it to be good, was previously discussed, which perhaps was necessary in regard to the question of costs.

(b) His Lordship at the trial directed the jury to find for the plaintiff with 1000*l.* damages, if they thought the deed a good one. This last, by the bye, was rather an odd point to leave to a jury.

sum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages. It is clear that where the precise sum is not the essence of the agreement, the quantum of the damages may be assessed by the jury; but where the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damage, and the jury are confined to it.—And the other judges gave their opinions to the same effect.

Where persons contracting for the iron-work of a building, agreed to perform it in six weeks, and to pay 10*l.* a-week afterwards until it was done, and gave a bond in a penalty for the performance, it was held that the 10*l.* a-week was in the nature of liquidated damages; and it was said by Mr. Justice *Ashburst*, that the object of the parties in naming this sum, was to prevent any alteration concerning the quantum of damages, which might have been sustained by the non-performance of the contract. It would have been difficult for a jury to have ascertained what damages had really been suffered by the breach of the agreement; so that it was a case of stipulated damages, and was not to be considered as a penalty. Mr. Justice *Buller* said, that when there is a penalty in the bond, it was strange that the sum mentioned in the condition should be called a penalty; he did not know that there could be an equitable and a legal penalty; but that was as strongly a case of liquidated damages as could possibly exist, and was like the case of demurrage. In either case it is impossible to ascertain what the damages are, and the parties agree to pay a stipulated sum. *Fletcher v. Dye*, 2. T. R. 32.

In *Astley v. Weldon*, 2 Bof. 346. the defendant engaged to perform at the plaintiff's theatre for a certain time, and to attend performances and rehearsals, or subject herself to the fines established at the theatre. There were also several agreements on the part of the plaintiff. "And it was agreed between the parties, that either of them neglecting to perform the agreement should pay to the other 200*l.*" The plaintiff brought an action against the defendant, for refusing to perform, and for wholly withdrawing from the theatre; and the declaration concluded, with stating that by reason thereof she became liable to pay the sum of 200*l.* in the articles mentioned. It being proved that the agreement was broke by the defendant absenting herself, and evidence having been given that by the regulations of the theatre, the performers were subject to certain small fines for inebriety, late attendance, &c. a verdict was found for the plaintiff with 20*l.* damages, with liberty for the plaintiff to enter a verdict for 200*l.* damages, if the court should be of opinion that the sum mentioned in the agreement, was to be considered in the nature

of liquidated damages. After argument, it was held that the question of damages was properly left to the jury. Lord Eldon said, that when the cause came before him at *nisi prius*, he felt, as he had often done before in considering the various cases on this head, much embarrassed in ascertaining the principle upon which those cases were founded; but it appeared to him that the articles in this case, furnished a more satisfactory ground, for determining whether the sum of money therein mentioned ought to be considered in the nature of a penalty or of liquidated damages, than most others which he had met with; what was urged in the course of the argument had ever appeared to him to be the clearest principle, viz. that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed a penalty. The case of *Sloman v. Walter*, did not stand in need of this principle; for there, by the very form of the instrument, the sum appeared to be a penalty, in which case a court of equity could never consider it as liquidated damages, but must direct an issue of *quantum damnificatus*. A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive, considered as liquidated damages, it shall be taken to be a penalty, though agreed to be paid in the form of contract. This has been said to have been stated in *Rolfe v. Peterson*, where the tenant was restrained from stubbing up timber. But nothing can be more obvious than that a person may set an extraordinary value upon a particular piece of land or wood, on account of the amusement which it may afford him. In this country a man has a right to secure to himself a property in his amusements, and if he choose to stipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, he saw nothing irrational in such a contract; and it appeared to him extremely difficult to apply with propriety the word "excessive," to the terms in which parties choose to contract with each other. His Lordship made some observations upon the preceding cases on this subject, and said that with respect to *Hardy v. Martin*, he did not understand why one tradesman, who purchases the good-will of a shop from another, may not make it a matter of agreement, that if the vendor trade in the same article within a certain distance, he shall pay 600*l.* and why the party violating such agreement should not be bound to pay the sum agreed for; though if such agreement were entered into in the form

of a bond, with a penalty, it might perhaps make a difference (a). In his observations upon the particular case, his lordship referred to the pecuniary payments agreed to be made by the plaintiff, and also to the small fines, which, according to the regulations of the theatre, were to be paid by the defendant; inferring that in these cases the sum of 200*l.* was only to be regarded as a security for the stipulated payments; and that there was not any ground for distinguishing between these and the other parts of the agreement. Mr. Justice *Heath*, in the course of his opinion said; it was very difficult to lay down any general principle in cases of this kind, but he thought there was one which might safely be stated; that where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty; but where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated is treated as liquidated damages. Mr. Justice *Chambre* said, that though in point of form the action was for damages, yet if the parties are to be considered as having stipulated for certain damages, the jury ought to be directed to find damages, to the amount of the whole sum so agreed for, and the effect of the case must have been the same, as if the plaintiff had declared in debt for a penal sum. After taking notice of some of the decisions above cited, he said, there is one case in which the sum agreed for must always be considered as a penalty, and that is, where the payment of a smaller sum is secured by a larger: in this case, it is impossible to garble the covenants, and to hold that in one case the plaintiff shall only recover for the damages actually sustained; and in another, that he shall recover the penalty: the concluding clause applies equally to all the covenants. With respect to the case of *Hardy v. Martin*, in which he was concerned, Lord *Mansfield*, upon the trial at law, inclined to think it a case of stipulated damages: though it appeared by the printed report, that it was considered otherwise in a court of equity (b).

In *Legb v. Lewis*, a bond was given by the defendant to the plaintiff in 400*l.* to resign the situation of master of a school at

(a) If such was admitted to be the real intention of the parties, there can be no foundation for a court of equity, whose peculiar province is to preserve and maintain the substance of transactions, to subvert both form and substance, in a manner which renders the transaction itself wholly nugatory. The damage which can be actually proved in such case as this must in general be nothing, because it is very difficult to shew that the profit received by the one, would in particular cases, have otherwise fallen to the other; but the real injury sustained by continuing the trade in violation of the agreement, may at the same time invaluably exceed the stipulated penalty.

(b) This case would regularly come before Lord *Mansfield* a second time, upon the issue directed by the Court of Chancery, and perhaps it was upon that occasion that he expressed the opinion alluded to: for a direction to the jury that they had no other guide, than the penalty in the bond would certainly be more proper and judicious than any other.

*Knutsford* upon the plaintiff's request ; the validity of this bond was established upon demurrer, by the Court of King's Bench, 1 *East*, 391. The case afterwards came on at *Chester* assizes for an inquiry of damages : on the one hand, it was contended that as the plaintiff had not any personal interest, the damages should be merely nominal ; on the other hand, that they ought to be given for the entire penalty. Mr. *Mansfield*, and Mr. *Burton*, the justices of *Chester*, supported this latter opinion in a very elaborate discussion of the subject, and the damages were found accordingly ; the judges considering that it was the intention of the parties, that an actual liability to the penalty should operate as a sanction, for the performance of the primary obligation to resign (a).

From the above series of cases which I have cited, at much greater length than is consistent with my general plan, it is obviously no easy matter to determine, in what cases the sanction, intended by the parties to enforce the performance of their engagements, shall or shall not be permitted to take effect. But in framing an instrument for this purpose, I think the best way will be to express the condition or engagement, in terms declaring " that the party shall do, or not to do the act intended, or in default thereof shall pay the sum of ——— as and for stipulated damages, for the same ;" and also to insert as a penalty, a larger sum than that agreed to be payable as stipulated damages : and in case it is intended that the party making default shall be liable to pay a certain stipulated sum, but that the other shall not lose his right to general damages, to add, " and such further damages as the said ——— shall in that behalf sustain ;" or otherwise to add a *proviso*, " that the damages above stipulated shall not prejudice the right of the said ——— to sue for any other or greater damages, for and on account of the non-performance of the agreement."

Bonds given in a larger sum of money, for securing the payment of a smaller, at a very early period attracted the notice of courts of equity, and were reduced to what was deemed their true intention ; a security only for the principal and legal interest. Lord *Mansfield* has, upon different occasions, reprehended the courts of law for not adopting the same principle, and rendering it necessary to resort to a court of equity for the reduction of the penalty. In *Wyllie v. Wilkes*, *Doug.* 501. speaking of the act 4 & 5 *Ann.* which will

(a) I regret that I am not able to furnish a more full account of a judgment from the good sense and learning of which I received peculiar gratification, at the time of its being pronounced, than the following very short note by Mr. *Wigley*, (who was counsel in the cause) of the opinion of Mr. *Mansfield*. " Here the defendant is to resign ; this is the object of the bond to compel a resignation. What else but the penalty can possibly be the measure of damages ? If this is not the measure of damages, the bond is a farce. The plaintiff, to be sure, might make the defendant pay costs ; but my opinion is, that if he is intitled to recover any thing, it is the whole."

be cited presently, he says, that it was made to remove the absurdity, which Sir *Thomas More* unsuccessfully attempted to persuade the judges to remedy, in the reign of *Hen. VIII.*; for he summoned them to a conference concerning the granting relief at law, after the forfeiture of bonds upon payment of principal interest and costs; and when they said that they could not relieve against the penalty, he swore by the body of God, that he would grant an injunction. And in *Bonafous v. Rybot*, 3 *Burr.* 1370, he said, it was surprising that after the statute of usury, 37 *Hen. VIII.* which excepts obligations with condition, made upon a just and true intent, the courts of law did not consider the just intent of a bond to be principal interest and costs, secured by a penalty, and suffer the party at any time to save the forfeiture by performing the intent. It was more extraordinary, that after this was settled in a court of equity, to be the nature of a bond, and therefore every party to a bond understood it in this sense, the courts of law did not follow equity, but still continued to do injustice, as of course; and put the parties to the expence and delay of setting it right elsewhere, as of course.

The practice of courts of law upon this subject was corrected by *St. 4 & 5 Ann. c. 16. s. 13*, which provides, that if at any time pending an action upon such a bond with a penalty, the defendant shall bring into the court, where the action shall be brought, all the principal and interest due on the bond, and all costs, the money so brought in shall be deemed a full satisfaction, and discharge of the bond.

In the before mentioned case of *Bonafous* and *Rybot*, it was made a question, whether a bond for payment of money by instalments, was within the provisions of the act? upon which Lord *Mansfield* said, that the act reforms, in some instances, an erroneous course of proceeding which ought never to have prevailed, and which the courts themselves might, and ought to have remedied, but did not. Therefore, it should not only have the most liberal construction, but the courts ought to exercise their own authority, to extend the spirit and reason of this parliamentary interposition for the easier, speedier, and better advancement of justice, to cases not mentioned in the act. After making the observations before cited, he added, that the act meant that in cases of penalties by way of security, the clear final justice of the case should be attained in the courts of law, much to the benefit of both parties: that he could not see a doubt upon bonds conditioned for payment of money by instalments, (a) and he was glad to hear it had been so determined; that

(a) But the act inasmuch as it directs that "the money brought in shall be taken to be a full satisfaction and discharge of the bond," cannot be applied to this case without injustice,

that the defeazance being dated at a subsequent time, and written on a distinct paper, makes no difference. The discussion upon this subject was however merely incidental; the ground of decision in the cause will appear in the course of the present dissertation.

In *Wyllie v. Wilkes*, Lord *Mansfield* intimated an opinion, that bonds for the payment of an annuity were within the reason, though not within the letter of the statute; he also thought, that payment of the annuity after the day would save the forfeiture of the bond. The point decided was, that where the bond had once become absolute by the annuity not being paid at the day; the value of the annuity might be recovered as a debt, under a commission of bankrupt, although no payment was in arrear at the time of the bankruptcy taking place. Upon this subject Lord *Mansfield* said, it was a pity that the legislature should be silent, and should force the courts, in order to attain the ends of justice, to invent legal subtleties which do not come up to the common understanding of mankind. That has been done in cases of annuities. The Court of Chancery has laid hold of this subtlety; it has said, the penalty is the debt, if the forfeiture has been once incurred; and you may have a value set upon your annuity, and come in as a creditor, under the commission. It was objected that the forfeiture was waved: the court answers, no matter for that, it shall be still in force, because it is for the benefit both of the creditor and the bankrupt, that it should be so. This has been settled, and we all adhere to the determination as far as this case goes, as a legal subtlety, established for good purposes, but not to be drawn into principle or argument in other cases.

Although in point of fact, a creditor may suffer the most serious mischief from the want of punctual payment of his debt, as happens every day, and a subsequent payment of principal, and interest, may be a very inadequate compensation for the original disappointment, it may be stated as a general rule that a promise of paying a penalty, beyond the amount of legal interest, cannot be enforced. In one case, where goods were sold with an agreement to pay a halfpenny an ounce *per* month, (which rather exceeded the legal rate of interest) it was held that the agreement might be enforced, being according to the general usage and practice of the particular trade, *Floyer v. Edwards, Cowp.* 112. But in a late case, where certain bleachers agreed to allow a discount of 30 *per cent*, in case of prompt payment, the commissioners of bankrupt only allowed

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justice, and certainly would not be so applied. Before judgment, the proper course seems to be a rule to stay proceedings; and after judgment, a rule to stay execution, letting the judgment stand as a security for future payments.

a proof of the sum, to which the debt would have been thereby reduced, with an addition of five *per cent.* the Lord Chancellor said, that the trade of a gold refiner, upon which *Floyer & Edwards* arose, had been turned into a cover for usury; the custom of the trade could not make the debt more than the money really advanced, with 5*l. per cent.* The creditor cannot have more than 5*l. per cent.* and the commissioners have done right: *Ex parte Aynsworth*, 4 *Ves.* 678.—When the Lord Chancellor referred to money really advanced, he seems to have had a slight view to the real nature of usury, which is essentially founded upon a loan, either real or colourable, and is not referable to other contracts confessedly of a different nature. If such other contracts are referred to, as the colour and disguise of what is actually intended as a loan, it is certainly proper that the consequences of usury should attach; but modern cases afford numerous other instances, in which the original nature of usury, as regarded both by the authorities of the *English* law, and by all foreign jurists, seems to have been entirely disregarded, and the consequences of it extended far beyond its regular limits; a subject upon which at present it would be irrelevant to enlarge, but upon which I hope in a future essay to enter into a more particular examination (a).

Where a bond is entered into with a penalty, and it is necessary to proceed upon that security, it seems to be settled as a general rule, that nothing more can be recovered than the amount of such penalty, with nominal damages for the detention of the debt. A distinction has been taken in courts of equity, that where the obligee is plaintiff, a court of equity will not carry the debt beyond the penalty, because he has chosen his own security, and made himself judge what recompence he shall have, in case the debtor

(a) With respect to the case last cited, it is certainly foreign to the real principles of usury, to apply the laws upon that subject to an engagement, for taking less than the stipulated price of goods or labour upon the condition of immediate payment; and to reduce the price agreed to be paid in default of such condition, to that agreed to be received in case of its performance. But upon another ground, I think the decision might fairly be supported; for it is manifest that these excessive discounts are not really intended by the parties, as compensatory of promptness of payment, and that in fact they are allowed after the expiration of a considerable lapse of credit, no accounts ever being settled upon the footing of the nominal price, when the debtor continues solvent. The object of them is to secure a disproportionate advantage in case of insolvency, and by obtaining a dividend of 1*5s.* in the pound upon a nominal sum, the whole debt really intended to be paid after deducting the nominal discount, would be secured to the prejudice of the general creditors; so that in fact the nominal price is merely a form and colour to the transaction, contrary to the real intention of the parties. But every discount does not fall within the principles of these observations, merely upon the ground of its exceeding the legal rate of interest; for in many cases, the actual benefit of immediate payment greatly exceeds the amount of a year's interest on the debt. In fact, there seems no reason at all to consider the amount of a year's interest as the legal standard of allowance, unless the period of a year is stipulated for the duration of the credit.

pays him not, or performs not his agreement, and there is no equity that his security shall be bettered or enlarged for him. 1 *Eq. Ab.* 92. But where an action was brought upon a bond, in the penalty of 140*l.* conditioned for the payment of 72*l.* and the obligor, after several delays at law, preferred a bill suggesting fraud and want of consideration, and praying a discovery, and a cross bill was filed praying a discovery if the bond had not been executed; it was ordered that the obligor should not be relieved against the penalty of the bond, and that it should be referred to the master to compute the principal money, and interest due thereon, and to tax the costs of the obligee both at law and in equity, and that what should be found due for principal, interest, and costs, should be paid by the obligor. The master computed the principal and interest at 154*l.* (which as it may be collected, though it is not stated in the report, was ordered to be paid.) Upon an appeal to the House of Lords, it was made a question, whether the court of equity could justly award more than the penalty; and it was objected, that the order being to save against the penalty, no more ought to be decreed. But it was said that notwithstanding that, when the same was referred to a master to tax principal and interest, the order bound the party to pay both, though it was more than the penalty; and the meaning of the first part was only to relieve against the penalty, in case the principal and interest came to less than the penal sum, especially the same coming to be heard upon cross bills, and as this case was circumstanced after such delay, and upon such pleading in the Court of King's Bench. And the decree was affirmed. *Duvall v. Terrey, Sho. P. C.* 15.

In the course of proceedings at common law, when judgment is given for a penalty in an action of debt, a further sum is added as damages for the detention of the debt; this is usually the nominal sum of 1*s.* and when a larger sum than the penalty can be allowed to be recovered, it is by increasing those damages. In *Holdipp v. Otway*, 2 *Saund.* 102. the earliest case upon this subject, an obligation was entered into (by single bill as it seems) in 68*l.* and upon judgment by default in the Court of Common Pleas, the prothonotary, in consequence of the time which had elapsed, taxed 50*l.* for damages, and interest, for the detention of the debt. Upon a writ of error, the only objection was, that the Court had themselves taxed damages for the detention of the debt, without the intervention of a jury. But the objection was not allowed, for the Court said, that the whole course and practice of both courts was upon a judgment in debt, by default or confession to tax the damages on occasion of the detention of the debt, as well as the costs of suit; and if the Court can tax 20*s.* or any other small sum for damages,  
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on occasion of the detention of the debt, for the same reason they may tax 20*l.* or other greater sum for damages, if they see cause.

The preceding case does not at all turn upon the propriety of allowing damages, under particular circumstances, but solely upon the manner in which those damages were adjudged; and it is certainly true that if a judgment for one shilling damages, is not error on the record, neither is a judgment for two shillings, or ten shillings, or ten pounds, or any larger sum; and I do not see that any distinction can be made in respect to the present subject, between an obligation by single bill, for the money actually intended to be paid, and an obligation conditioned to be void upon the payment of a smaller sum, or upon some other contingency; for, in the latter case, the sum specified in the obligation is the legal debt; the detention of which debt is the foundation of the damages, and it certainly would be repugnant to the nature of the proceeding, to allow any larger damages than those which are adapted to the mere detention of the debt.

In *Brangevin v. Perrot*, 2 *Bl. Rep.* 1190. a motion was made to pay the whole penalty of a bastardy bond into court, with costs; which was opposed, on the ground that the action was for a single breach of the bond, on which the plaintiff was intitled to recover; after which the penalty should still remain in full force, to answer subsequent breaches as they might arise *in infinitum*; but it was said by the Court that this was so plain a case, that they did not know what could be said to make it clearer. The bond ascertains the damage by the consent of the parties; if, therefore, the defendant pays the plaintiff the whole stated damages, what can he require more?

In *White v. Sealey*, *Doug.* 49. the defendants had entered into a bond of 600*l.*, conditioned for the payment of a rent of 570*l.*, by another person upon a lease of 21 years. After judgment by default in an action on this bond, a second action was commenced, and a second judgment entered up; and the defendants obtained a rule to shew cause, why, upon payment of the penalty and costs, the plaintiff should not acknowledge satisfaction on the record; it being sworn that they had conceived the second action to be the same as the first, and the declaration to have been only delivered to cure a mistake in the proceedings. The questions were, whether the bond in this case was a standing security for all the payments of rent, during the term, or only to the amount of the penal sum? 2d. Whether, upon the equity of the case, and an affidavit on the part of the plaintiff, it did not appear that it was the intention of the parties, that the defendant should be bound for the rent during

the whole term, so as to entitle the plaintiff to retain the advantage he had got by mistake of the defendant (a)? Mr. Justice *Buller* at first was strongly of opinion, on the first point, (which had not been made at the bar) that by the statute of 8 & 9 *W.* 3. c. 11. an obligee of such a bond as this might from time to time assign breaches, and recover his damages, and have execution for them, though they amounted to more than the penalty in the bond, and that the judgment would still remain as a security for all subsequent breaches. Mr. Justice *Asbhurst* observed, that that would be very equitable as against the lessee; but extremely hard on sureties, who only mean to bind themselves to the extent of the penalty. Lord *Mansfield* said, as the bond is conceived, are the defendants liable for more than the whole penalty? I think not, upon the true construction of the statute of *William*, the meaning of which only was, that a plaintiff should not be obliged upon every breach to go into a court of equity, to have issues directed of *quantum damnificatus*. 2d, Is there any thing collateral that should make the sureties liable for more? I see nothing in the facts of the transaction that ought to have that effect. The slip of not pleading the first judgment to the second action only affects the costs, and not the merits. Mr. Justice *Buller* then declared himself to be of the same opinion, concerning the construction of the statute.

In Lord *Lonsdale v. Church*, 2 *T. R.* 388, the defendant had entered into three several bonds of 2000*l.* each, conditioned to account for all monies received by him, as receiver of the harbour dues of *Whitehaven*; he admitted having received 5400*l.*, but it was conceived that he had received interest for several parts of that sum; and three several actions having been brought, he obtained a rule to shew cause why the proceedings in two of the actions should not be stayed, upon payment of the two penalties into court, and why it should not be referred to the master to see what was due for principal on the other bond, and why on payment thereof proceedings should not be stayed. After argument, Mr. Justice *Buller* said, he was not satisfied with the determination in the case of *White and Sealy*; he was persuaded that many cases had been determined upon the point, though they did not occur to the Court then; and that case was not moved again, because it was the case of a surety. On searching, he found several cases where the doctrine had been before established. In *Elliot v. Davies*, *Burb.* 23, interest upon a bond was decreed to be paid,

(a) There were some circumstances which satisfied the Court, that the lessor was misled by the sureties, with respect to the smallness of the penalty.

though it exceeded the penalty. And in a case in the King's Bench, *Tr. 6 Geo. 3.* Lord *Mansfield* said, the penalty is merely a security; and where it is not sufficient, the plaintiff may recover damages, as well as the penalty. Nothing can prove the principle stronger than the constant practice of giving 1*s.* damages. He then referred to the cases above cited, of *Collins v. Collins*, *Holdipp v. Otway*, and *Duwall v. Price*. The Court however said, that as there appeared to be some hardship in the defendant's case, they would let him pay the penalty in the two actions into court, but they would not stay the proceedings; and then, if the plaintiffs chose to proceed further, they would do it at the risk of a jury's not giving more than the amount of those respective penalties. The defendant then consented to have the rule discharged, and moved to pay money into court, as a motion of course; which was permitted. The subsequent event of this case does not appear.

In *Wilde v. Clarkson*, 6 *T. R.* 303, the defendant, in an action on a bond, to indemnify a parish against a bastard child, obtained a rule to shew cause, why, upon payment of the penalty of the bond with costs, satisfaction should not be entered on the record, which was opposed on the authority of the preceding case of *Lord Lonfdale v. Church*; but Lord *Kenyon* said, that he could not accede to the doctrine in the case cited, as according to that an obligor who became bound in a penalty of 1000*l.*, conditioned to indemnify the obligee, might be called upon to pay 10,000*l.* or any other larger sum, however enormous. Suppose the plaintiff proceeds in the action, and no defence is made to it, the judgment would be for the penalty of the bond, and 1*s.* nominal damages for the detention of the debt. But here the defendant is willing to pay the whole penalty, and the costs of the action, and the plaintiff is not entitled to more. In actions on bonds, or on any penal sums for the performance of covenants, &c. the act of parliament expressly says, that there shall be judgment for the penalty, and that the judgment shall stand as a security for further breaches; but the obligor is not answerable in the whole beyond the amount of the penalty.

A bond having been entered into before the *American* war, in the penalty of 2400*l.* proclamation-money of *South Carolina*, and application having been made in an action on the bond commenced in the year 1792, to pay into court that amount in proclamation-money, and that thereupon all further proceedings should be stayed, it was said by Mr. Justice *Buller*, that they should do great injustice by acceding to such application. The proclamation-money was of a certain value when the bond was given, and also when it was forfeited; but by change of time and circumstances, was rendered

rendered of no value whatever, and therefore it seemed that justice would not be done between the parties, if the Court were to determine that the defendant should be at liberty to pay that which was then of no value, but which, had he paid his debt when it became due, would have been of great value. *Cuming v. Munro*, 5 T. R. 87. In two cases in chancery, which occurred subsequent to the case of *Lord Lonfdale v. Church*, it was determined, that interest on a principal sum could not be carried beyond the penalty of a bond; and also, that no interest could be allowed on the arrears of an annuity, which there was a bond of 10,000 *l.* to settle. *Tew v. the Earl of Winterton*. 3 Bro. Ch. 48. *Knighton v. M'Lean*. *id.* 496. In these cases, several authorities were cited, some of which seem to warrant the determination, but others were also cited which would be certainly adequate to maintain the opposite proposition.

Subsequent to all these cases, the following decision was made by the Supreme Court of the United States of *America*; the authorities of the *English* law being, as usual, fully adduced in the course of the argument. The defendant entered into a bond, in the penalty of 5000 *l.* with a condition to be void, in case he should, within six months, obtain a patent for certain lands agreed to be conveyed. Upon an issue of performance, the jury gave a verdict for 5000 *l.* debt, and 1922 *l.* damages, being the interest of the penalty, from the expiration of the three months. After a very able argument at the bar, the judges delivered their opinions as follows: *M'Kean*, Chief Justice; the only question before the court is, whether the jury had a power under the circumstances of this case, to give any damages beyond the penalty of the bond; the quantum (which might be a subject of dispute on a motion for a new trial) is not at all involved in the point submitted to our decision. Of the power of the jury we do not entertain a doubt. Though positive law and judicial precedents should be totally silent on the subject, the principles of morality, equity, and good conscience, would furnish an adequate rule to influence and direct our judgment. By that rule we must discover that the defendant, having contracted to make a conveyance, or to pay a specific sum, within a limited time, was guilty of an immoral act, in omitting to perform either of the alternatives; and of course he ought not to be allowed to be a gainer by the violation of his engagements. It is true, that we cannot compel him specifically to comply with the terms of the contract, as a Court of Chancery might do; but we can enforce the payment of a compensation for the breach; and as the breach was made in the contract at the end of six months, when either the lands should have been conveyed, or the penalty should have been paid, the interest (which is a reasonable and moderate measure of damages) ought

ought in justice to run from that period. The verdict for the amount is, therefore, in our opinion, moral and equitable; nor is there, I will venture to say, any authority to impeach it, upon the strictest principles of law. *Shippen*, Justice; if the jury had undertaken to give more than 5000*l.* for the injury sustained, by the infraction of the original contract, their verdict would have been affected by the cases that have been cited. But the cases go no further; and certainly do not deny the right of the jury to make an allowance of interest for the detention of the money, after the time limited for its payment. Indeed, the strongest possible inference to the contrary is to be drawn from the cases cited by the defendants; for Lord *Mansfield* having asked what else the jury could give than the penalty, expressly adds, "unless they had also given interest after three months," stipulated in the contract. 4 *Bur.* 2228. In short, the 5000*l.* paid with interest at this day is not in fact, or law, more than the 5000*l.* paid, without interest, at the day it became due. *Smith*, Justice; the plaintiff is clearly entitled to the interest on every principle of law, morality, and equity. It would have been sufficient to me, therefore, if the verdict had been unsupported by any precedent: but I am the more strengthened in my opinion, as not a single authoritative dictum is to be found against it. *Yeates*, Justice, concurred. By the Court; let judgment be entered for the plaintiff, for damages, interest and costs. *Peut v. Wallis*, 2 *Dallas*, 252.

In forming an opinion upon the preceding cases, I think it is perfectly clear, that the doctrine which would exclude a party from paying the entire penalty, so that he might be held afterwards liable, from time to time, to answer for the amount of damages accruing to an indefinite extent, cannot be supported upon any principles of legal reasoning. At common law, a person sued in an action of debt could only be subject to the payment of the debt which was the object of the demand (with such damages, as under particular circumstances, might be allowed for the detention of it); the condition providing that such debt should be a penalty for the security of a collateral object, was matter of defence; shewing, that under the circumstances of the case, the debt, which was the formal object of the obligation, did not attach; and this condition, which was in its nature intended to limit the extent of the obligation, could not reasonably have the effect of increasing it. When the condition had not been performed, so that the penalty attached as a legal debt, courts of equity, in some cases, interposed, to prevent such penalty being carried further than what was considered to be its substantial intent, the security of the actual damages sustained by the non-performance of a primary agreement, but the interposition for that purpose was necessarily at the instance of the obligor; and if the obligor, instead  
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of resorting to such interposition, submitted to the payment of the sum awarded by the judgment as upon an unconditional debt, no further remedy could have afterwards been obtained upon the footing of the penal obligation. When the legislature, by the statute of *William*, introduced the same principle in the proceedings at law, which had previously been the foundation of a practice in courts of equity, it certainly was not intended to extend the limits of the former legal obligation; the purpose was merely to confine the operation of it to what was regarded as its actual object; and when that object had exhausted the debt which constituted the formal subject of the obligation, there was nothing further to which the provisions of the legislature could be applied. Execution was to be only taken out for the damages awarded, but the judgment was to remain as a security for further breaches; a judgment wholly satisfied could not be a security for any thing; and a judgment partially satisfied must, upon the same principles, only be a security to the extent in which it was not satisfied.

The cases in which it is held, that after several payments of an annual or other periodical sum, secured by a penalty, execution may be had for the entire penalty, without regard to such previous payments, stand upon a very different footing from those which relate to the question of a penalty remaining as a security for further payments, accruing *after the offer of an entire payment* of the penalty stipulated; for, in the former case, the payments are not made as a partial satisfaction of the debt composing the penalty, but as a performance of the condition, upon the failure of which alone the penal obligation is to attach.

The allowing a party to have satisfaction to the extent not only of the debt which constitutes the penalty, but also of the interest on that penalty, which is the proper damages for *its* detention, appears to be no more than answering the claims of ordinary justice, when the non-performance of the condition is attended with circumstances that render the penalty, without such interest, an imperfect satisfaction of the primary object of the contract; and it certainly ought to be the aim of every tribunal to render as perfect justice as is consistent with the rules of law. By the rules of law, real damages may be allowed for the detention of a debt. For that, the case of *Holdipp* and *Otway* is a decisive authority. By the forms of law, *vs.* damages is always awarded for the detention of the penalty, or any other debt; and these forms will be best rendered subservient to their substantial purposes, by their being extended so far as may be necessary for securing the original obligation, provided they are not extended further than is consistent with their own particular character. And this is particularly the case with respect

to bonds for securing money, when the principal and interest amount to more than the formal penalty; whilst the Courts restrain the legal operation of the formal instrument, in order that it may not be carried beyond the substantial purpose on the one hand, it is very unequal justice not to allow the full extent of that operation, when it is necessary to enforce such purpose on the other. And it is the more extraordinary, that courts of equity, which in other cases so far sacrifice the form to the substance of the transaction, as to enforce the specific performance of an agreement, only evidenced by its being the condition of a penal obligation, without allowing the payment of the penalty to be substituted for the performance of the agreement, should so completely deviate from that practice in the very instance of all others where the real purpose of the agreement is most indisputably evident, and where the measure of justice is with most facility ascertained (a). But so are the precedents; and it is easier to follow precedents than to investigate principles, and there is often a timidity in deviating from even those precedents which are most at variance with principles, and that, when the effects of the deviation would be merely prospective; and none of those mischiefs would arise which are the consequences of disturbing precedents that have been rested upon as rules of property, and have so interwoven themselves with the frame and substance of the law, that they cannot be separated without occasioning an injury disproportionate to the advantage.

There is a strong case, illustrative of one of the principles laid down by *Pothier*, that the penalty shall be deemed a full satisfaction, and which perhaps carries that principle beyond its fair extent. A servant entered into a bond for the due performance of his service, and the master having recovered upon the bond, and received the money, it was held that he could not maintain an action against a third person, by whom the servant was seduced, though the money was not paid till after the other action was commenced. It was said that a penalty, in the very term, includes more than the real damages actually suffered, and that the master having received more than ample satisfaction for the injury done him, he could not afterwards proceed against any other person for a further satisfaction. *Bird v. Randall*, 3 *Burr.* 1345. The modern determinations, that the penalty is only to be considered as a security, may perhaps induce the consequence, that the rule established in that case cannot be applied.

(a) I am here only contending for that incomplete justice which is satisfied with the payment of simple interest; but the creditor can only be placed in the situation which he would have been in if the primary agreement had been performed by the payment of compound interest; and probably he may have in the mean time been accumulating a load of compound interest upon the same which he has been obliged to borrow, in lieu of that which he was entitled to receive.

Much of the reasoning in the case itself appears very disputable, and some of the positions which it contains are clearly untenable. It does not, in point of reason, seem to be, by any means, a necessary consequence, that one man shall not be charged with what he has agreed to pay upon the non-performance of his contract, and another charged with damages for the injury which he has committed, in causing that contract to be violated.

In the case of the Duke of *St. Alban's* against *Shore*, 1 *H. Bl.* 270. it appeared, that the plaintiff had entered into articles of agreement with the defendant for the sale of an estate, upon which all trees were to be valued and paid for by the purchaser, according to the valuation; and the parties mutually entered into penalties for the performance of their agreement. In an action to recover the penalty, on account of the defendant refusing to complete his purchase, it was pleaded; that the plaintiff had cut down some trees, and thereby disabled himself from performing his part of the contract; and a principal part of the discussion turned upon the nature of the agreement, and upon the question, whether this was not such a reciprocal agreement, that any non-performance on the one side would excuse a non-performance on the other? But the point decided was, that as this was not an action of covenant where one party had performed his part, but was brought for a penalty, on the other party refusing to execute a contract, and that, to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally, to complete his part.

It is to be observed, that this opinion was pronounced without adducing any reason, or citing any authority, that the point was first started by the Court, without having been agitated at the bar, so as to enable the plaintiff's counsel to agitate its justice or propriety. In order to form an opinion upon the rectitude of the decision, it must be assumed, that the plaintiff's breach of the agreement was not such as to liberate the defendant; but only such as to entitle the defendant to a compensation in damages; for the Court thought themselves relieved from giving a judicial opinion upon that part of the case. At common law, certainly it was no objection to a person suing for a debt due to him, that a similar debt was due from him. The statutes of set-off have introduced a particular system upon that subject; but this case was not at all put upon the footing of a set-off. Previous to the statute of *William*, the courts of equity had restrained actions for penalties on the non-performance of covenants to a mere security for damages actually sustained; and by that statute, the same principle is introduced into courts of law; so that the effect of the decision is, that notwithstanding a party having, to a certain extent, violated his part of the

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the agreement, and being subject to damages for such violation, is intitled to an action to the full extent of the damages sustained by the non-performance of the opposite party, and notwithstanding an action, which in point of form is for the recovery of the penalty, is in substance only a remedy for the actual damages, he shall be deprived of that particular remedy, for the slightest possible violation of his own part of the agreement. I forbear entering into a further discussion, how far that proposition is founded on correct and accurate principles, but have thought it proper to state the proposition according to what appears to be its necessary import and effect; by doing so, the speculative inquirer will be enabled to form an opinion for himself, as to the foundation upon which it is established; but I am far from thinking, that any reasoning upon its principle will, in practice, be allowed to diminish its authority.

There is a case contrasted to that of a penalty, in which a creditor agrees, upon a certain condition being performed, to remit an advantage to which he is otherwise entitled; in this case, the condition must be literally performed: thus, where a bond was entered into, with a condition to pay a sum in gross on a given day, and a subsequent agreement made in favour of the debtor, easing him of that stipulated payment at that fixed day, and consenting to take it by instalments, provided that he paid it punctually at the days agreed upon, otherwise the agreement and defeazance were to be void, Lord *Mansfield* said: as the debtor has not paid the money punctually, they are void, and the gross sum is due. There is a distinction in the court of Chancery, that if 5 *per cent.* be reserved for interest; with a condition to accept, if punctually paid, this condition must be strictly performed, and the debtor shall not have relief after the day of payment is elapsed (because the abatement was to be upon a condition which is not performed); but if 4 *per cent.* is reserved, with an agreement, that if the four be not punctually paid at the day, the debtor shall pay five, that shall be considered as a penalty added, and the court of equity will, in such case, relieve against it. Now, the present case is in effect within the former part of this distinction; for it is a condition unperformed, therefore, the debtor cannot have relief in a court of equity, any more than he can have it in a court of law; but the creditor has a right to have recourse to his bond. *Bonafous v. Rybot*, 3 *Burr.* 1370.

## NUMBER. XIII.

(Referred to, Vol. I. p. 408.)

*Of Compensation, or set-off.*

It is evidently a principle of natural reason and justice, that when two parties are mutually indebted, the balance only shall be paid; and that one of the parties shall not be compellable to pay the debt which he has incurred, and be left to sue for that to which he is entitled. This principle forms an essential part of the civil law: and the effect of such mutual debts, in destroying each other, is distinguished by the term Compensation; the extinction or reduction of the one debt ensues immediately, and by operation of law upon the other, being contracted; as is shewn in the Chapter to which this Appendix refers.

By the common law of *England*, if the plaintiff was indebted to the defendant in as much or more than the defendant was indebted to him, it was no defence. Until the reign of *Queen Anne*, if a person who owed me 1000*l.* became a bankrupt, and I was indebted to him in 50*l.* I must have paid the 50*l.* and have been left to my chance of any dividend upon my larger demand; or reversing the account, I must have paid the 1000*l.* entire, and have taken my chance of the dividend upon the 50*l.* If my debtor in the larger sum died, I must still have paid the debt due from myself, possibly for the satisfaction of his specialty creditors, and might entirely lose the whole of my cross demand. "The natural good sense of mankind was first shocked at this in the case of bankrupts, and it was provided for by 4 *Anne*, c. 17. § 11. and 5 *G.* 2. ch. 30. § 28. Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring, that Parliament interposed, by the acts of the 2 and 8 of *Geo.* 2. and in any actions where there are mutual debts, the defendant may *set off* the debt due to himself, against that for which he is sued. Before the statutes which have been mentioned, where the nature of the employment, transaction or dealings, necessarily constituted an account, consisting of receipts and payments, debts and credits, the balance only was considered as the debt, and could only be recovered." *Vid. Green v. Farmer*, 4 *Burr.* 2214.

The doctrine which was thus introduced into the law of *England*, partakes very much of the nature of *compensation* in civil law; but there is this material difference, that the debts are not in themselves and of right balanced and extinguished; that the right of *set-off* is merely a defence to an action for the debt; that a defendant is not obliged

obliged, in any instance, to avail himself of this right, but may at his option pay, or on other grounds contest, the one debt, and bring a separate action for the other. If the creditor, to whom the larger debt is due, brings an action in which the other does not set off his mutual demand, but brings a counter-action, the debt due to the first may be set off in the action by the last, and is not extinguished by his first obtaining a verdict for his whole debt; and he may take advantage of it in the action against him, remitting so much of what he has recovered, as will reduce it to the balance. *Baskerville v. Brown, et e contra, 2 Bur. 1229.*

The principle that the debt is not extinguished by the right of set-off, is strongly illustrated by the case of *Pitts v. Carpenter, 1. Wilf. 19*, in which it was held that the plaintiff, to whom a larger debt than 40s. was originally due, but whose demand was reduced by set-off to less than that sum, might bring his action in a superior court, and was not within the provisions of a local act, confining debts for less than 40s. to an inferior jurisdiction.

In the law of *England*, as in the civil law, the right of compensation or set-off, is confined to debts; one injury cannot be balanced against another, nor an injury against a debt. *Freeman v. Hyett, 1 Bl. Rep. 394.* Neither can unliquidated damages, for not performing an agreement, be set off, either against another demand of a similar nature, or a debt. *Howlett v. Strickland, Cowp. 56. Weigall v. Waters, 6 T. R. 488.* or, *vice versa*, a debt against these. *Bull. N. P. 181.* And this rule applies even when there is a bond with a penalty, which in point of form constitutes a debt, but the payment of which as such cannot be effectively enforced. *Redriff v. Hogan, Bull. N. P. 180.* It may be added, that upon a bond for the payment of money, the money secured, and not the penalty of the bond, is for the purposes of set-off considered as the debt. *8 G. 2. ch. 24.* And by setting off any money due under such a bond (as the arrears of an annuity), the bond is not extinguished. But certain stipulated damages which are precisely due according to the terms of a contract, or a penalty to which the defendant has become absolutely entitled, may be set off, these being certain liquidated debts. *Fletcher v. Dyke, 2 T. R. 32.* It was ruled, in *Eland v. Karr, 1 East, 375*, that it was no answer to a plea of set-off, that the defendant promised to pay the plaintiff in ready money.

The mutual debts must be due in the same right, and therefore a person cannot set off a demand in his own right against one, for which he is sued as executor, or the reverse, *Stat. 22 G. 2. c. 22. s. 13.* When a person continues tenant, or receiver to executors, after a testator's death, he cannot set off against debts contracted by him in that capacity, debts due from the testator in his life-

time. *Shipman v. Thomson*, Bull. N. P. 180. *Tegetmyer v. Lumley*, Willes, 261. *Montague on Set-Off*, 32. Also if a debt is due to, or from several persons jointly, there can be no set-off on account of the debt of either of them singly; and a debt to or from a man in his own right cannot be set off, against a debt in right of his wife. To this principle, and also to the public nature of the trust reposed in the assignees of a bankrupt, may be referred the decision that such an assignee cannot retain a dividend due to one of the creditors, by setting off a debt from the creditor to himself. *Brown v. Bullen*, Doug. 407.

But where two persons are indebted *jointly and severally*, that engagement as being several may be set off against the debt claimed by either of them individually. *Fletcher v. Dyke*, 2 T. R. 32. Also, a debt from or to a surviving partner, may be set off against that for which he sues or is sued, on his own account. *Slipper v. Stidstone*, 5 T. R. 493. *French v. Andrade*, 6 T. R. 582.

It is a proposition confirmed by all the preceding cases, that a debt cannot in general be set off, unless a counter action could be maintained between the same persons, and in the same characters. But there may be some exceptions to the literal application of this rule. For instance, *Bottomly* sued *Brook* on a bond. It was held to be a good cause of set-off, that the bond was given to *Bottomly*, as a trustee for *Chancellor*, and that *Chancellor* was indebted to the defendant. *Vid.* 1 T. R. 619.

A debt may be assigned: and, though no action can be maintained for it in the name of the assignee, yet as such assignments have for various purposes been recognized in courts of law, it may be reasonably inferred, that after a person has assigned the debt due to him, and notified the assignment to the debtor, he cannot set off that demand against one which may be due from himself; on the other hand, it would be reasonable to allow it to be set off, by the person to whom it was assigned; at least, against any debt contracted after notice of the assignment (a); and that a debt due from such person might be set off, against the action nominally brought by the original creditor; but I do not state these distinctions as having any higher authority than mere suggestion.

A broker under a commission *del credere*, who is answerable for debts and losses, may set off against a debt from himself, those debts which are due to his principal, and for the amount of which he is personally liable, the transactions having passed wholly with himself, *Grove v. Dubois*, 1 T. R. 112. It has even been decided that

(a) As to the general principles respecting debts, so assigned, *Vid.* Appendix to P. I. Ch. I. § 1. Art. 5. (No. IV.)

a broker with such commission, who has paid his entire debt to the assignees of a bankrupt, was entitled to receive it back. *Bize v. Dickason*, 1 T. R. 285. And it has been held that a factor who receives goods, and is authorized to sell them in his own name, and makes the buyer debtor to himself, has a right to bring an action to compel payment: and it would be no defence to say, that as between the buyer and the principal, the buyer ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that, but where the factor has nothing due to him. *Drinkwater v. Goodwin*, Cowp. 251. It seems a necessary deduction from these cases, that if a factor sells goods in his own name, and an action is brought by the principal, the buyer may set off any debt due to him from the factor; and so it has been decided, *George v. Claggett*, 7 T. R. 359.

Amongst the other effects of compensation in the civil law, as amounting in itself to a liquidation of the debt, a creditor is obliged to restore the pledge, upon contracting a debt to an equal amount, or upon contracting a debt to a smaller amount, and an offer of the balance. I conceive that the difference between compensation and set-off, as established by our modern statutes, would in this respect be material; that our right of set-off is merely a matter of defence, and is not in any case the foundation of a claim. It is established by several cases, that there can be no set-off in the case of a distress for rent. *Vid.* the cases cited, *Sapsford v. Fletcher*, 4 T. R. 511. Lord Kenyon there said, "It was much to be lamented that it should have been so decided, but for the sake of certainty in the law, they must submit to those decisions, till the legislature alter the law. The decision in the principal case was, that a subtenant, who, under threats of distress, had paid rent to the original lessor, might defend himself to that extent against the distress of his own landlord, the original lessee; for that it amounted not to a set-off, but a payment, which seems fully to support the distinction suggested. Upon the same principle I am strongly inclined to think, that interest is not stopped by contracting a debt, which does not carry interest; and that only the principal of such a debt can be set off against the full claim for principal and interest. Before the statutes of set-off, the question could not have arisen, and those statutes do not seem sufficiently comprehensive to produce the effect of extinguishing the debts to the extent of their concurrence.

If a debt, barred by the statute of limitations, be pleaded as a set-off, the plaintiff may reply the statute; if it be given in evidence on a notice of set-off, it may be objected to at the trial. *Bull. N. P.*

180; but perhaps, in most cases, the subsistence of the mutual accounts would be held to take the case out of the statute. *Vid. infra*, No. XV.

It is now settled, contrary to former opinions, that set-off can only be maintained for such debts as were due at the commencement of the action. *Evans v. Prosser*, 3 T. R. 186.

The courts of law exercise a summary jurisdiction, with regard to money due upon judgments, more extensive than the right of set-off under the statutes; the provisions for set-off, under the bankrupt laws, are also more extensive than the common right of set-off above mentioned; but a particular examination of those subjects, or a view of the doctrines of pleadings, and practice respecting set-off, does not fall within the scope of the present design.

The principles, and cases relative to the law of set-off, are collected in a publication by Mr. *Montague*, which has appeared since the preceding summary was composed.

#### N U M B E R XIV.

##### *Of Confusion or Extinguishment.*

(Referred to, Vol. I. p. 429.)

Most of the observations in the chapter of *Pothier*, to which this number refers, are principally applicable to the case of an heir, who, according to the rules of the civil law, was a complete representative of the deceased, both in respect of his rights and obligations, without reference to the adequacy of the property, whose situation was therefore materially different from that of the heir, or the executor of the *English* law.

Much of what is stated upon the subject of confusion, is only an amplification of the self-evident principle, that no man can be under an obligation to himself. With us where a debtor or creditor is made executor, it is plain that an action cannot be sustained, in respect of that character, by the ordinary process of the law; but so far as the rights, or obligations of third persons are involved, the courts of equity will provide that there shall not be any defect of substantial justice, by the union of two characters in the same person; but the respective characters, so far as is necessary for this purpose, will be considered as no less distinct, than if they had resided in different persons.

One of the most familiar instances of confusion taking place, according to the *English* law, is the marriage of the debtor and creditor, by which, as a general rule, the respective rights and obligations become absolutely extinct, and do not revive upon the death of either of the parties. The civil law admitting a separation of property between husband and wife, the same consequence did not ensue. In the *English* law there is an excepted case, where a husband gives a bond to his intended wife for a provision, to take place after his death. *Vid. Cage v. Acton*, 1 Lord Raym. 515. *Milbourn v. Ewart*, 5 T. R. 381. And in equity, any agreement between the parties, in reference to their intended marriage, will be enforced; notwithstanding the failure of the legal remedy.

With respect to executors, the effect of extinguishment is very fully discussed, in the case of *Wankford v. Wankford*, 1 Salk. 229, and it is deduced as a settled rule from preceding authorities, that if several persons are bound jointly and severally, and the obligee makes one of them his executor, it is a release of the debt; and the executor cannot sue the other obligor. So, if the obligee makes the obligor and another executors, although the obligor never administers, yet the action is gone for ever; and although the obligor dies, and makes an executor, the other co-executor of the first testator who survives shall not have an action against the executor of the obligor. But if the executor of the obligee takes the obligor to husband, that is no extinguishment of the debt; because the husband may pay money to his wife as executor, and if she lays the money so paid to her by itself, the administrator *de bonis non* of her testator (if she dies intestate) shall have that money as well as any other goods of the testator.

If administration of the goods of the obligee is committed to the obligor, that is but a suspension of the action, and not an extinguishment of the debt; the reason is, that the commission of administration is not the act of the obligee. All the interest of the administrator is from the ordinary; but all an executor's interest is from the testator.

This extinguishment upon the appointment of an executor, is not wrought by way of actual release; but is in the nature of a legacy, and like all other legacies must be postponed to debts from the testator: and therefore, though no action can ever be maintained for a debt, which is extinguished by the debtor being appointed an executor, he is chargeable with it in account, as part of the assets of the testator, so far as the interest of creditors is concerned; and I apprehend there can be no doubt, but a suit in

equity may be maintained against a person whose obligation is discharged by the appointment of his co-obligor, as an executor (a).

That such appointment shall even operate as a legacy is by no means clear; and at any rate it only amounts to a mere presumption, liable to be repelled by inference from other parts of the will; as where a testator leaves a legacy, and directs it to be paid out of a debt due to him from the executor, such debt shall be assets to pay, not merely that specific legacy but all other legacies. 3 *Bac. Abr.* 11. *Yelv.* 160. (b) In like manner, if he leave the executor a legacy, it is held to be a sufficient indication, that he did not mean to release the debt, and in such case the executor shall be trustee for the residuary legatee, or next of kin. *Coney v. Goodinge*, 3 *Bro. Ch.* 110. So where a testator bequeathed large legacies, and also the residue of his estate to his executors, one of whom was indebted to him by bond in 3000*l.*, it was decided that this debt should be added to the surplus, and that both executors were equally entitled to it. *Brown v. Selwin*, *Temp. Talb.* 240. *Toller* 274.

The case of *Coney v. Goodinge* may warrant a more extensive inference than is drawn from it by Mr. *Teller*: for the Lord Chancellor did not, according to the report (which is very short), found his decision principally upon the executor having a legacy; but declared generally, that he thought it a settled point in that court, that the appointment of the debtor executor, was no more than parting with the action. I do not find any express decision in favour of such extinguishment operating as a legacy, although it is taken for granted in very respectable text authorities (c).

There is a material difference between a debtor being appointed executor by his creditor, and a creditor being appointed executor by his debtor. In the first case, the debt is extinguished, so that no action can be ever brought. In the second, the executor may sue the heir upon any debts for which the heir is legally bound, unless sufficient assets come to him as executor; for although he is the person to receive, yet having no assets he is not the person who ought to pay; but if it appears that he has administered assets

(a) This is the opinion of *Powell, J.* though *Holt, Ch. J.* *contra*, says it does not amount to a legacy, but to a payment and release; he, however, admits it to be assets.

(b) This case does not, however, warrant the proposition.

(c) 2 *Bl. Com.* 512. *Harg. n. Co. Lit.* 264. In *Etrington v. Evans, Dickens*, 456. Lord *Thurlow* said, that where an obligee makes an obligor one of the executors, and takes no notice of the bond, but devises the residue of the estate to others, he was clear that it was not in equity an extinguishment of the debt, though at law it would be so, because a personal demand once suspended is not to be resumed; and he decreed the executor to account accordingly.

to the amount of the debt or demand, it has been decided that it would be a good defence to the heir.

We have seen that the extinguishment takes place, in regard to a debtor appointed executor though he never administers; but a creditor who was appointed executor, having refused to act, was allowed to sustain an action against the other executor; and Lord *Kenyon* said, that the proposition, that if A. owe B. a sum of money, and chuse to make him his executor, though he will not act, his legal remedy is extinguished, was too monstrous to admit of any argument. *Rawlinson v. Sharv*, 3 T. R. 577.

In the case of *Goodright v. Wells, Dougl.* 771, a person being seized of an estate as trustee, by descent on the part of his mother, became entitled to the beneficial interest by descent on the part of his father, and the question arose after his death, whether the paternal or the maternal heirs were entitled? The case was decided upon a point irrelevant to the present subject; but Lord *Mansfield*, and *Ashurst*, and *Buller, J.* (*Willes, contra*) intimated their opinion in favour of the maternal heirs; for that the moment both the legal estate and the trust meet in the same person, there is an end of the trust which is merged and gone, for a man cannot be a trustee for himself, and one set of heirs has no more equity than the other; there never was a case in which it was held, that when an estate came by descent, the heir was a trustee though the ancestor was not.

Where a person possessed of an estate becomes in a different right entitled to a charge upon the estate, the charge is in general merged in the estate, and does not revive in favour of the personal representatives against the heir; there are particular exceptions, as where the person in whom the interests unite is a minor, and can therefore dispose of the personalty and not of the estate; but in the case of a lunatic, the merger and confusion was ruled to have taken place. *Lord Compton v. Oxenden, 2 Ves. Jun.* 261. Lord *Loughborough* said, that it is a clear principle, both at law and in equity, that where there is a confusion of rights, where debtor and creditor become the same person, there can be no right put into exertion, but there is an immediate merger; but it is true in equity, though there may be that which, if all was reduced to a legal right, would of necessity operate as a merger, the court acting upon the trust will on the intent express or implied preserve them distinct, and that confusion of rights will not take place.

## NUMBER. XV.

(Referred to, Vol. I. p. 457.)

*Of the Statutes of Limitations, and of Presumptions founded upon Length of Time.*

In stating the *English* law respecting limitations, and presumptions founded upon length of time, I shall 1st advert to the provision respecting ordinary debts; 2d, (deviating from my usual plan which does not embrace the law of real estates) to the case of ejectments; and 3d, to those cases in which, without any legislative provision, the Courts of Justice have adopted rules, analogous to those constituted by statute; without dwelling upon actions for injuries, or provisions of a special and particular nature.

By statute 21 *Jac.* 1. Ch. 16. § 3. all actions of account, and upon the case, other than such accounts as concern the trade of merchandize, between merchant and merchant, their factors or servants, all actions of debt grounded on any lending, or contract without speciality, and all actions of debt for arrearages of rent, shall be commenced within six years after the cause of action.

By the same section, actions of trespass, *detinue* and *replevin*, must be commenced within six years; actions of assault, battery, wounding, and imprisonment, within four years; and actions of slander, within two years.

By § 4. if judgment is given for the plaintiff, and afterwards reversed by a writ of error, or arrested; or if the defendant is outlawed, and the outlawry reversed, a new action may, from time to time, be commenced within a year afterwards.

And by § 7. if any person entitled to any such cause of trespass, *detinue*, action for trover, replevin, actions of accounts, actions of debts, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, at the time of the cause of action accruing, shall be under the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, such persons shall be at liberty to bring the actions within the time before limited, after being of full age, discoverd, of sane memory, at large, and returned from beyond seas, as other persons not having the same impediments should have done.

And by 4 & 5 *Ann.* c. 16. where any persons, *against whom* there is cause of action, shall be beyond sea at the time of such cause of action accruing, the persons who shall have such cause of action, shall have liberty to bring an action within such times as are limited by the statute of *James*, after their return.

I. The principle stated by *Pothier*, that prescription cannot begin to run, but from the time when the creditor might institute his demand,

demand, is included in the very terms of the statute, so that if credit is given, or if a debt is contracted upon condition, it is manifest that no cause of action can arise until the credit is expired, or the condition performed, and consequently that before those periods the time of limitation cannot commence. When the defendant received money belonging to an intestate's estate, it was held that the limitation only commenced from the time of administration being granted; for until that time there was no person entitled to receive the money. *Cary v. Stevenson*, 2 Salk. 421. See *Wittersbiem v. The Countess of Carlisle*, 1 H. Bl. 601.

I am not aware of any case in which the subject of a contract, including several distinct times of payment, has fallen under consideration. To such a case the terms of the statute may be literally applied, so as to run for each portion from the respective times of payment; and I see no ground upon which the operation of it can be prevented, though, under these circumstances, the courts would in all probability be peculiarly disposed to favour every implication of an acknowledgment, extended to the time appointed for the latest payment.

Where there are mutual accounts between the parties, an acknowledgment will be implied at the time of the last transaction; this will be more particularly mentioned presently. But the particular exception in the statute of accounts, between merchant and merchant, seems to have a more extensive effect; for it has been held that to such cases the statute does not at all attach, and therefore where the cause of action is brought within that exception, no length of time can be alleged as a bar to the demand. *Catling v. Skoulding*, 6 T. R. 191 (a). This exception is clearly confined to the case of mutual accounts and reciprocal demands between two persons in trade, and does not extend to cases between a tradesman and his customers, for these are not merchants' accounts. *Bul. N. P.* 149.

The continuance of a mutual account of debts and credits is held sufficient evidence of an acknowledgment: for, where an action was brought for several years' rent, and the tenant had supplied his landlord with shop-goods during the latter period of the tenancy, it was held that the statute did not apply. Lord Kenyon said, "Here are mutual items of account, and I take it to be clearly settled as long as I have any memory, that every new item and credit in account, given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being

(a) Vide in several cases cited, *Williams's* notes to p. 2. *Sand.* 127.

an open account, is sufficient to take the case out of the statute. Where all the articles are on one side, it seems, according to a case cited by his Lordship, and decided by Mr. Justice *Dennison*, that the last item, which happens to be within six years, shall not draw after it those that are of longer standing. *Catling v. Skoulding, Ub. Sup.*

In the exceptive clause of persons under certain protections, most of the causes of action before enumerated are repeated; but the clause does not mention actions on the case generally, but only actions on the case for words. It has however been decided to have a general application, and to include the common action upon promises, for recovery of debts; actions of debt are included in the enumeration; and though there is a casual omission of expression in the excepting clause, it is impossible to suppose that this exception was intended to apply only partially in respect of the objects mentioned in the general purview. *Vide Rochtschilt v. Leibman, 2 Str. 836.*

Upon the effect of the exception as to persons beyond seas, it has been observed by the Court of Common Pleas, that if the plaintiff is a foreigner, and doth not come to *England* in fifty years, he has still six years after his coming to *England* to bring his action; and if he never comes to *England* himself, he has always a right of action whilst he lives abroad, and so have his executors or administrators after his death. An infant may sue before he comes of age, if he pleases; but if he does not, he has six years after he comes of age, to bring his action. While any of the disabilities mentioned in the statute of limitations continue, the party may, but is not obliged, to bring his action. *Statborst v. Grame, 3 Wilf. 145.* It has been also decided, that if some of the persons, having a joint cause of action, are in the kingdom, and others beyond seas, the statute attaches as if they had all been in the kingdom. *Perry v. Jackson, 4 T. R. 516.* The term *beyond seas* is strictly construed, and the exception is not allowed to extend to a person in *Scotland*. *King v. Walker, 1 Bl. Rep. 286.*

In case six years have not elapsed at the time of the creditor's death, the executor is allowed to commence an action after the expiration of six years, provided he does so within one year after the death of his testator. This is said to be by the equity of the clause which gives a year to commence a new action, in case the first judgment has been arrested or reversed. *Bul. N. P. 150. Wilcock v. Huggins, 2 Str. 907.* However reasonable it may be to allow such an exception, it is not very obvious how any inference to that effect can be drawn from the clause to which it is referred.

It is a rule fully established, that when the time required by any statute of limitations has begun to run, it shall continue, notwithstanding the party entitled afterwards falls under any of the protections, or, as they are usually called, disabilities; for instance, if a woman marries the day she comes of age, or a person is thrown into prison the day after his arrival in the kingdom, the time will run, without interruption, from the time of coming of age, or of the arrival. If it has commenced against the ancestor, it will continue against his infant heirs. A distinction was lately endeavoured to be taken between a voluntary disability, such as marriage, and one which was involuntary, such as imprisonment; but this was not allowed. *Doe v. Jones*, 4 T. R. 300. *Smith v. Hill*. 1 Wils. 134.

According to the modern determinations of *English* courts, the admission of a debt has a more extensive effect than that which is stated by *Pothier*; for it is now an established rule, the application of which is of daily experience, that the slightest acknowledgment of the obligation not having been discharged, is sufficient not only to interrupt the operation of the statute, but to revive from that time the right of action, which was extinct.

Cases have occurred, in which a person, by mentioning in conversation that he had contracted a debt, but should not pay it, as it was of above six years standing, or by declaring at the time of his being served with process, that he should on that account resist the payment, has deprived himself of that right, upon which it was his intention to insist.

What acts or declarations constitute an acknowledgment, is a question of fact; it was therefore ruled, that a judge ought to have submitted the effect of a letter, couched in terms of ambiguity and evasion, to the decision of a jury, instead of deciding upon the insufficiency of it, of his own authority. *Lloyd v. Maund*, 2 T. R. 760.

A distinction prevails between such an act as shall prevent the operation of the statute of limitations, and such as shall repel the defence of an obligation being contracted during minority. In the first case, a mere admission that the debt remains undischarged is sufficient; in the second, there must be an actual promise. And the distinction is not without foundation; for, in the first case, the obligation is founded upon the fact, the length of time operates as a defeazance, and the admission furnishes evidence, that the presumption, which was the cause of providing a bar, is contrary to the fact. In the other case, there is no legal obligation in the first instance; there is only a moral obligation, which may be a sufficient consideration to support an actual promise. The mere acknowledgment

ledgment of such moral obligation can have no legal effect; an actual intention to assume a personal responsibility is the only foundation of a legal demand, and that intention must be manifested by acts or declarations inconsistent with the contrary disposition.

The effect of the statute is confined to a right of action, it is not to collateral purposes regarded as an extinction of the debt; therefore, if a person by will directs his debts to be paid, those which were barred by the statute are held to be included.

Neither is a creditor, whose debt is barred by the statute, precluded from taking out a commission of bankrupt, at least, unless the objection is taken by the bankrupt himself. *Quantock v. England*, 5 *Bur.* and even in that case, I have known the argument, in support of the opposite proposition, disallowed (a). And it is clearly no objection to the proof of a debt, under a commission, that it was contracted above six years before the commission issued.

A partial payment by one of the drawers of a joint and several promissory note, was held to be a sufficient acknowledgment, to prevent the operation of the statute in favour of the others. *Whitcomb v. Whiting*, *Doug.* 652. And I conceive it may be stated generally, that an acknowledgment, in whatever manner by one of several joint debtors, shall be obligatory upon all, and that the distinction between such acknowledgment being made within, or after the period of limitation, would not be allowed.

It has been decided, that where one joint debtor became a bankrupt, the payment of a dividend by his assignees should operate as an acknowledgment to affect the other. *Jackson v. Fairbank*. 2 *H. Bl.* 340. This was certainly carrying the matter to the furthest possible extent; for the right to prove upon the estate was not affected by the statute of limitations, and could not have been resisted by the assignees.

By the several decisions which have taken place, the effect of the statute of limitations seems to be almost reduced to a mere matter of presumptive evidence. However conformable such a course of proceeding may be to the original principles, which render it expedient to fix a limitation of time, it might be justly questioned, whether any thing less than an acknowledgment, intended to import the subsistence of a valid obligation, should be allowed to satisfy the true construction of the statute (b).

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(a) Upon applying for the rule to shew cause why there should not be a new trial in the case of *Glaisher v. Howes*, reported on another point, 7 *T. R.* 498.

(b) It is several years since these observations have been committed to writing. By a very recent decision, it was established, that saying, *I do not consider myself as owing Mr. B. a farthing; it being more than six years since I contracted; I had the goods, and paid part,* and

It may not be improper here to hint, that considerable caution should be applied to the evidence of persons brought to prove a mere verbal acknowledgment. Those persons are often selected to apply to the party charged as debtor, on account of their cunning in catching at any ambiguous expression, and in representing the case most favourably for those by whom they are employed. To this it may be added, that such evidence is seldom exposed to the temporal risks which attend the commission of perjury (a). It has been argued, that where a party has been induced, by fraud, to pay money, the statute of limitations does not run, or at least only runs from the time when the fraud is discovered; but the allegations in the particular case were deemed not sufficient to raise the question. *Bree v. Holbeach*, *Doug.* 655. I can, however, hardly think that the argument is tenable. Courts of equity have, in the exercise of that discretionary power which they are allowed to possess, adopted an analogy to the statute of limitations, with an

and 261. remains due, was an acknowledgment which took the debt out of the statute. The Court said, that whatever their opinion upon the statute might have been, had the question been new, yet after the long train of decisions upon the subject, it was necessary to abide by the constructions which had been put upon it; in conformity with which they thought themselves bound to hold that what was said by the defendant was sufficient acknowledgment of the pre-existing debt, to create an assumpsit, so as to take the case out of the statute. *Bryan v. Horsman*, 4 *Ess.* 599. This decision was certainly in conformity with the series of precedents upon the subject; but as to the general precedent of adhering to the mere authority of former cases, in opposition to the positive terms of an act of parliament, or an established maxim of law, of placing a secondary above a primary authority; much doubt may fairly, and without disrespect, be entertained. Where the return to the ancient principle would be attended with material detriment, as by disturbing titles to real estates, held under the sanction of rules, which, however erroneous in themselves, have been established by a series of precedents, the reason for an adherence to the precedents evidently preponderates; but where there will be no inconvenience beyond the immediate case, where the general consequences will be wholly prospective, I cannot but adhere to the opinion (which I have perhaps expressed with obtusive repetition), that the courts of justice have as much authority now to restore the law, as they have had before to subvert it; and that a correct principle of law is an authority entitled to higher respect, than an erroneous set of precedents. Considering the law, however, upon the particular subject, as now beyond the reach of argument, and aware how much my own opinion upon the effect of precedent is different from that which usually prevails in practice, I think it not irrelevant to suggest to persons whose claims are barred by the statute, and who wish to obtain an acknowledgment of the subsistence of the debt, the utility of filing a bill of discovery, obliging the defendant to state whether the debt was contracted, and whether it has been paid. If the subsistence of the debt is admitted, and without perjury, it cannot be denied, it will not, if there is any consistency of decision, be of any avail to add a claim to the protection of the statute.

(a) Mr. Serjeant *Williams* observes to the same effect, that it might perhaps have been as well if the letter of the statute had been strictly adhered to; it is an extremely beneficial law, on which, as has been observed, a *Salk.* 421. *Green v. Revitt*. the security of all men depends, and is therefore to be favoured, and although it will now and then prevent a man from recovering an honest debt, yet it is his own fault that he postponed his action so long; besides which, the permitting of evidence of promises, and acknowledgments within the six years, seems to be a dangerous inlet to perjury.

exception

exception in cases of fraud; and it seems from thence to be inferred, that the courts of law must adopt, in the construction of the statute, an exception analogous to that of the courts of equity. But the exposition of a statute is imperative, and not discretionary; and to qualify the express provisions of an act, by exceptions deduced from its supposed spirit, however conducive to the justice of particular cases, is a most alarming precedent. Besides, the ground of introducing a period of limitations is the lapse of memory, and the loss of evidence. A transaction, which when explained is perfectly fair, may be attended with circumstances of a fraudulent aspect, and it would be unjust to let those circumstances induce a claim, where the evidence, capable of affording an explanation, is lost. The qualification deduced from the time of discovering the fraud, would be attended with continual uncertainty; for circumstances may appear to give a man the first discovery of a fact, with which he has been long acquainted, but the knowledge of which rests in his own mind.

There is another rule in courts of equity, which may deserve a different consideration, as applied to legal demands, viz. that length of time is no bar in the case of a *trust*. Where a man deposits money in the hands of another, to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner, until an application and refusal, or other denial of the right; for, until then, there is nothing adverse, and I conceive that upon principle, no action should be allowed in these cases, without a previous demand; consequently, that no limitation should be computed further back than such demand. And I think it probable, that under these circumstances, the limitation would not be allowed to attach, though the other part of the observation would be as probably disallowed; for a sweeping rule has been by some means introduced into practice, that an action is a demand, whereas every action in its nature supposes a preceding default: where money is improperly received, or goods are bought without any specific credit, or even where money is borrowed generally, there is held to be an immediate duty, and it is a perfectly legitimate conclusion, that no demand can be necessary, in addition to the duty itself. But wherever there is a loan, in the nature of a deposit, or any other confidential duty, is contracted, the mere creation of that duty unaccompanied with the absolute breach of it, by denial, or inconsistent conduct, ought not to be considered as a ground of action.

The commencement of an action within the six years, of course prevents the statute of limitations having effect. There are many cases upon the subject, the result of which is, that the actual day of commencing the action is the time to be considered, without regard

regard to those fictitious relations, which, for general purposes, are deemed the commencement of the suit, and that the suit so commenced must be that which is effectively proceeded in.

II. By the same statute of 21 *Jac.* 1. c. 16. no person shall make entry into any lands, but within twenty years after his right shall first descend, or accrue; but in case the persons entitled shall be at the time of such right first descended, or accrued, within the age of twenty-one years, *feme covert, non compos mentis*, or beyond the seas, such persons, or their heirs, may make an entry as before the act, so as they take the benefit of the act within ten years after the disability removed.—The right of entry is essential to the maintenance of an action of ejectment, which is now the almost invariable course of proceeding for the recovery of lands.

Writs of right may be sued out within sixty years, which is the longest period of limitation allowed by law, with the like exceptions as to infants, &c.

In case of a fine with proclamations, all persons are barred after five years, from the levying of the fine, except persons under disability, and persons whose right shall accrue after proclamation, who must proceed within five years after the disability is removed, or the right accrues. 4 *Hen.* 7. c. 24.

By 9 *Geo.* 3. c. 16. the king (who is not bound by general acts of parliament) is precluded from claiming any lands, &c. except within sixty years after the title accrued.

The effect of the statute of limitations in respect to ejectments, is different from that which is applied to it in case of debts, whereby, as we have seen, it is reduced to little more than a mere presumption. For a possession of twenty years gives an actual possessory title, which may be made the substantive ground of a claim, without being subject to any defeazance, by evidence of an anterior and adverse right. *Taylor v. Atkins*, 1 *Bur.* 119.

So, a possession of sixty years or of five years, after levying a fine, is not only a bar to any judicial proceeding, but a complete and substantive title, subject to the several exceptions which are introduced in favour of persons under age, or having other protections or disabilities.

In order to sustain an ejectment, there must therefore have been an actual possession, consistent with the title claimed within twenty years; and acts which merely prove a property, but not a possession, are insufficient.

But the statute of limitations can only operate in case of an adverse possession; therefore, if one person has held the estate on the joint account of himself and another, or by the permission of the person really entitled, and without claiming any inconsistent right,  
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the original title is not affected. Whether the possession of one person is adverse to, or consistent with the title of another, is, in every case, a question of fact, to be collected by a jury, from all the circumstances. See *Doe v. Proffer, Cowp.* 217. *Page v. Selby, Bul. N. P.* 102.

The observation, that if the statute has once begun to operate, it continues to run, notwithstanding any subsequent disability, has already been mentioned, and this rule has been more frequently applied to the case of titles than of contracts.

We have seen that, according to the civil law, a prescription, which began against the heir, continued against the substitute. In the law of *England*, I take it to be clear, that the contrary is the case, and that no laches of the tenant for life, or in tail, can operate against those who are entitled in remainder, unless the adverse possession was paramount to that of the person from whom the several claims are derived. Such indeed is the literal construction of the act, and the application of it, in practice, is perfectly familiar.

But the laches of the tenant in tail falls upon his issue, claiming under the same limitation.

III. The utility of fixing a period of time, after which, rights that have not been asserted, or acknowledged, shall be considered as extinct, has induced the courts of justice, in many instances, to follow the example of the legislature, and to adopt a limitation of time, which shall be conclusive, for the bar of a claim, or the protection of a possessory enjoyment. And the period adopted for this purpose is almost invariably twenty years.

The present view of the subject does not extend to those cases in which the lapse of time is merely considered as a matter of circumstantial evidence; and as such, is either alone, or in conjunction with other circumstances, relied upon as material in respect of an individual case. The effect of it, in this point of view, may fairly vary, according to the different impressions of those to whom the decision of questions of fact properly belongs, and is perfectly distinct from the application of a general rule of presumption.

The statute of limitations, as we have seen, only extends to actions of debt, founded upon any loan or contract, without speciality. This, of course, excludes bonds and all debts secured by deed; but it is now an established rule, that after a lapse of twenty years, without payment of interest; or other acknowledgment, payment shall be presumed. And though this is only a circumstance for the jury to found a presumption upon, as it is a presumption universally applied, it is in a great measure attended with the same effect as an absolute bar.

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A smaller period of time may, in conjunction with other circumstances, such as settling another account in the intermediate time, without taking notice of the particular demand, be sufficient to induce a presumption in the particular case; but any consideration of that kind falls within the distinction above referred to. *Vide Ofwald v. Leigh*, 1 T. R. 270.

It is a general rule, that a person shall not be allowed to make evidence for himself; but it has been held, that an indorsement of the payment of interest upon a bond, made ten years before the presumption attached, ought to be left to the jury to decide, whether it was made with the privity of the obligor; on the other hand, where the indorsement was made after the expiration of twenty years, the evidence was rejected as inadmissible, and the Chief Justice took the distinction (manifestly founded in reason and good sense), that in the preceding case the indorsement was admitted, because it appeared to have been made at a time when it could not have been thought necessary to encounter the presumption. *Searle v. Lord Barrington*, 2 Str. 826. 2 Lord Raym. 1370. *Tamer v. Crisp*, 2 Str. 827.

Our courts of equity have, in most instances, adopted the presumption of a demand having been satisfied, or a right extinguished, after the lapse of twenty years, provided there are no intermediate acts, by which that presumption is repelled. The most common application of this principle is, that after a person, to whom an estate has been conveyed by way of mortgage, has been twenty years in possession, without rendering any account, the equity of redemption shall be held to have been released or abandoned; but if there are any acts within the twenty years, admitting the relative characters of mortgagor and mortgagee, the presumption is destroyed, and the time can only be computed from the last act, which is indicative of such an admission.

It is a maxim in equity, that no length of time is a bar in cases of fraud: where the fraudulent act is clear and manifest, the application of this rule is perfectly proper and consistent with the discretionary powers of a court of equity; but where a fraud is to be inferred from a complication of facts, and the delay in adducing the charge is not satisfactorily accounted for, it may be right to reflect upon the principles, on account of which any limitation is introduced, and which principally regard the difficulty of accounting for the particulars of transactions obliterated from the memory, and of which the witnesses may be dead or dispersed. This topic occurred in the case of *Deloraine v. Brown*, 3 Bro. Ch. 633. which was decided upon a collateral point; but the Master of the Rolls, in a subsequent case, said he referred to the arguments of counsel,

to shew that, even in a case of gross fraud, the court does not do justice, by decreeing an account, after a considerable length of time, against executors, legatees, and innocent persons, claiming under the fraudulent party. *Vide 2 Ves. J. 92. Hercy v. Dinwoody.*

It is also held, that no length of time shall operate as a bar in cases of trust; but this rule can only be applied between the trustee and the party interested in the execution of the trust, and cannot be opposed to the right of a third person claiming in opposition to both; and even as between the immediate parties, where the trust relates to some act of an evanescent nature, such as the payment of a sum of money, and not to any permanent interest, the length of time may be fairly regarded as evidence of performance.

The following recent cases will shew, in a clear point of view, the regard paid by a court of equity to length of time in general, with the disregard of that circumstance, where the inconvenience which might otherwise arise was fully obviated.

A suit was instituted for a legacy, which was resisted on the ground of presumed payment, arising from the length of time (being above forty years) which had elapsed without any demand, and because all the persons who could throw light upon the question were dead, and the claim was disallowed, Lord Commissioner *Eyre* observed, that it is a presumption of fact, in legal proceedings, before juries, that claims, the most solemnly established upon the face of them, will be presumed to be satisfied after a certain length of time. Courts of equity would do very ill, by not adopting that rule. So essential is it to general justice, that though the presumption has often happened to be against the truth of the fact, yet it is better, for the ends of general justice, that the presumption should be made and favoured, and not be easily rebutted, than to let in slight evidence of demands of this nature, from which infinite mischief and injustice might arise. If he could indulge conjecture, he doubted about the payment of the legacy; he knew that in *Wales* there is a pious reverence for the representatives of the family, and that the other relations are unwilling to press them, and will take these demands upon them by a little at a time. But the interests of general justice require that demands should not be afterwards enforced in this way; and Lord Commissioner *Albhurst* said, that all statutes of limitations and prescriptions, analogous to them, are to be favoured. *Jones v. Tuberville, 2 Ves. Jun. 11.*

In the case of *Pickering v. Lord Stamford, 2 Ves. Jun. 272—581*, a suit was instituted by persons claiming as next of kin of *Thomas Walton*, who died above thirty years before, having directed by his will, that his personal estate should be applied to such charitable purposes as his executors should direct. The executors established a school;

a school; and the object of the suit was to recover so much of the personalty, vested in the mortgagees, as had not been applied, (all dispositions by will of money secured by mortgage to charitable uses being void, by the statute of mortmain). The Master of the Rolls, Sir *R. P. Arden*, upon the first hearing of the case, directed an inquiry to be made into the particular circumstances, without prejudice as to the result; and upon that occasion observed, that if a party, having knowledge of his rights, will sit still, and, without asserting them, permit persons to act as if they did not exist, to acquire interests, and consider themselves as owners of property, to which the other will not assert his right, there is no reason why every presumption should not arise; as in the case of a bond.—Upon the inquiry which was directed, it appeared that the accounts had been kept so regularly, that there was no difficulty in ascertaining the personal estate at the death of the testator. The Master of the Rolls, upon a full and able view of all the circumstances of the case, decided in favour of the claim of the next of kin. The following are the passages of his opinion more immediately applicable to the subject before us: “The bill certainly requires very extraordinary circumstances to sustain it at so late a period; and the first question is, whether, at this distance of time, it is too late to make the claim? The question in all the cases is, whether there are motives of public policy, or private inconvenience, to induce the court to say, that under all the circumstances the suit ought not to be entertained? It is a very sensible rule, that parties shall not, by neglecting to bring forward their demands, put others to a state of inconvenience, subjecting them to insuperable difficulties. If, from the plaintiff’s lying by, it is impossible for the defendants to render the accounts he calls for, or it will subject them to great inconvenience, he must suffer, or the court will interpose what is the best ground, public convenience. The question is, whether these principles apply to this case? But first, I shall mention another ground; the presumption that the demand itself has in some manner been satisfied or released; that is a ground perfectly different from a bar, and prevails as much in a court of equity, as it has by modern determinations been wisely held to do at law. Every presumption that can be fairly made, shall be made against a stale demand. It may arise from the acts of the parties; or the very forbearance to make the demand affords a presumption, either that the claimant is conscious it was satisfied, or intended to relinquish it.” It will not be necessary to state the examination of the particular circumstances from which his Honor very accurately concluded, that it was impossible, by any fair presumption, to infer that the parties, being cognizant of their rights, slept upon them, or ever intended to relinquish,

linquish, what he must say upon the whole complexion of the case, they never knew they had a right to.

“ If the accounts of the personal estate (he proceeded to say) could not now be obtained, and it was impossible to know to what the plaintiffs were entitled, that is a sufficient reason for saying, they should not have it, and rob the charity, because they could not tell what belonged to them, and what to the charity; but that unfortunately is not the case. Therefore, desiring to be understood by no means to give any countenance to those stale demands, but upon the circumstances that there is nothing inducing great public or private inconvenience, that the accounts are found, and that the trustees are not called upon to account for what has been disbursed, I am bound to decide in favour of the plaintiffs.”

In *Blewitt v. Thomas*, 2 *Ves. Jun.* 669. length of time was pleaded in equity, as matter of defence, and as inducing the presumption, that the demand was satisfied; and the plea was allowed. But in *Pearson v. Belchier*, 4 *Ves.* 627. the Master of the Rolls, while he held that a bill could not be entertained, on account of length of time, said, that it could not be pleaded in bar in the court of Chancery. See also as to the following cases, respecting the allowance or disallowance of length of time, in opposition to an equitable claim, *Earl of Deloraine v. Brown*, 3 *Bro. Ch.* 633. *Hercy v. Dinwoody*, 4 *Bro. Ch.* 257. 2 *Ves. Jun.* 87. *Ackerly v. Roe*, 5 *Ves.* 565. *Harmood v. Oglander*, 6 *Ves.* 199. In the case of *Sutton v Earl of Scarborough*, 1 *Ves. N. S.* 71. (just published since this sheet was sent to the press), the Court of Chancery allows a plea of the statute of limitations, to a bill in the nature of an action for money, had and received, both as to the discovery and relief; but the decision does not affect the case of a mere bill of discovery.

None of the statutes of limitations contain any provision in favour of incorporeal rights, (except in case of rents). According to the rules of law, the right to these can only be founded upon an actual grant, or an immemorial prescription which supposes a grant. But in order to establish a right, as founded upon a grant, it would be unreasonable to expect the production of the grant itself as a requisite indispensable to the support of the title, which is derived from it. A long continued enjoyment, not otherwise to be accounted for, may, after such a period of time as renders it probable that the deed may be lost, or destroyed, be fairly considered as evidence of its former existence; and from such evidence, the jury may be fairly induced to infer the truth of any proposition, which is not opposed by stronger evidence on the other side. But the decisions of our courts have carried the matter much further than is warranted, by the mere application of this principle; and under the

the name of a presumption, have, in effect, rendered the length of enjoyment a direct and substantive title.

It is held, that not only private grants, but records, and even acts of parliament, may be presumed from length of time, and so far as any such presumption is founded upon a real unaffected opinion of the truth so presumed, I subscribe to the justice and propriety of the proceeding. Beyond that, whilst I admit that the maintenance of a long established enjoyment is a very desirable object, I cannot forbear entertaining the opinion, that recent decisions have exceeded the proper limits of judicial authority, and have introduced a principle, which, though it is now perhaps only open to controversy, as a matter of speculation, was not warranted by the fair rules of legal argument.

In the case of the *Mayor of Kingston-upon-Hull* against *Horner*, *Cowp.* 102. a toll had been received by the corporation for upwards of 300 years, but the corporation itself having been created within the time of legal memory, it was impossible that the title could be founded upon prescription; but it was left to the jury to infer from the usage, whether there had not been a grant of the duties subsequent to the charter of incorporation; and the verdict founded upon the presumption of such a grant was supported by the court of King's Bench. But soon afterwards, Lord *Mansfield*, in referring to the authority of that case, advanced a position in favour of the principle, which I venture to contest. He said, that a grant may be presumed from great length of possession. It was so done in the case of the corporation of *Hull* against *Horner*; "not that in such cases the court really thinks a grant has been made, because it is not probable that a grant should have existed, without its being upon record, but they presume the fact for the purpose, and from a principle of quieting the possession." *Cowp.* 214. That is, in a case of adverse right, they profess, by way of form, to believe as true what, in point of fact, they believe to be false, in order that length of time may, by fiction and circuitry, produce an effect to which directly and primarily it is inadequate.

By statute, any quit-rent, which has not been paid for fifty years, is extinguished; and there having been no payment of a quit-rent of half-a-crown, for thirty-seven years, that circumstance was left to the jury, as a ground for presuming an extinguishment or release; but the court of King's Bench decided, that such a presumption was not warranted by the evidence. Lord *Mansfield*, on that occasion, adverted to the principle, that the statute of limitations is a positive bar from length of time, and operates so conclusively, that although the jury and the court are satisfied that the claim still subsists, yet they are bound by the statute to defeat it: that there are many cases not within the statute, where, from a principle of quieting the

the possession, the court has thought that a jury should presume any thing to support a length of possession. He then proceeded to the position from which I have expressed my dissent, and afterwards shewed, from reasoning adapted to the particular case, that there was no ground for inferring an extinguishment. Mr. Justice *Aston*, in support of the same opinion, observed, that a presumption from length of time to support a right was very different from a presumption to defeat a right. *Eldridge v. Knott, Cowp.* 214.

But the case which seems to have had the most influence in modern determinations, is that of *Levis v. Price*, tried before Mr. Justice *Wilmot*, at *Worcester* assizes, in the year 1761, in which he said, that where a house had been built forty years, and has had lights at the end of it, if the owner of the adjoining ground builds against them, so as to obstruct them, an action lies, and this is founded upon the same reason as where they have been immemorial; for this is long enough to induce a presumption, that there was originally some agreement between the parties: and he said, that as twenty years was sufficient to give a title in ejectment, on which he might recover the house itself, he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house. *Espinasse's Dig.* 636. Afterwards, upon a motion for a new trial, twenty years' quiet and uninterrupted possession of ancient lights (a) was deemed a sufficient ground, from which a jury might presume a grant. *Darwin v. Upton*, cited 3 *T. R.* 159. So far as length of time is merely regarded as a circumstance, upon which a jury may exercise their judgment upon the real fact, I have already admitted the propriety of its influence. But now it has become a matter of daily and established practice to adopt Mr. Justice *Wilmot's* idea to its full extent, that twenty years' possession gives a title to any easement. It is acted upon as a presumption, *juris & de jure*, a legal fiction, upon which any argument or discussion is as much excluded as upon an averment of the defendant's being in the custody of the Marshal of the Marshalsea, and not as a mere circumstance open to the discussion and consideration of a jury. And it has even been held, that the forbearance to exercise a right for twenty years shall produce an extinction of the right itself, and that all rights incident to land shall be referred to the criterion of twenty years' enjoyment.

Having been engaged in opposing the application of that principle, and having, in conjunction with some of the most distinguished ornaments of the profession, entertained the idea, that it was

(a) There seems to be either a redundancy or insecurity in this expression. If the meaning was, that an enjoyment of twenty years was sufficient to impress the character of antiquity, the epithet of *ancient* is implied in the statement of the fact. If the word is used in its old and impicinate signification, the term of twenty years is out of the question.

a deviation from the regular course of the law, to give the effect of a bar to a mere presumption; whilst I submit to the contrary adjudication of the court, I cannot, upon the most frequent consideration, adopt the reasoning upon which that adjudication proceeded; and hope I shall not incur the imputation of presumption, by stating the argument, by which it was opposed; fully aware of the influence of that prejudice which results from a professional engagement, and of the deference which is due to judicial authority.

I would previously suggest, that the analogy stated by Mr. Justice *Wilmot* is apparently subject to two objections; 1st, It is an analogy of common law, drawn from the provisions of a particular statute. The statute professedly introduces an alteration in the law, and it is the only authority by which such an alteration can be properly made. The courts of justice must take the law as they find it, and are not authorised to say, that because the Legislature has made an alteration, which we find to be beneficial in one case, therefore, we will make an alteration in another case, where the same beneficial effects will probably ensue. But 2d, the principle of the statute of limitations is, that it operates upon an adverse possession, upon one person enjoying property which another was authorised to claim, and the omission of claiming which is a mark of negligence, and therefore should be discouraged: whereas, the use of an easement is not in every instance an usurpation of property; it may not be subject to an action; and whilst the owner of the adjacent property is not injured in his own possession, he has no cause of complaint. But it would be injurious to debar him from the full enjoyment of the rights incident to his own property, such as the building upon his land, because another person had previously built on a contiguous part of the adjoining land, though, in doing so, he had not rendered himself liable to any action, but had only been subject to the imputation of folly, by placing his windows in a situation where they were liable to be obstructed (a). Whatever may be fairly ascribed to courtesy, or forbearance, ought not hastily to be construed as the exercise of an adverse right; much less should any act allowed to have the effects of an adverse possession, where there could be no right of contest, and consequently no imputation of laches.

(a) If a person places windows contiguous to my land, I must, according to modern practice, put myself to the expence of erecting a building to obstruct them, within the space of twenty years, which may be attended with detriment and inconvenience to me, or I must be decreed to have made a grant and surrender of the rights which previously belonged to me. The practical inconvenience of this is perhaps not very great, with respect to buildings recently erected, for the modern decisions are sufficiently notorious, and the requisite precaution is generally taken; but many rights have been lost or prejudiced, for want of knowing, by the spirit of prophecy, that such a system would have been established.

In the case of *Prefcott and Phillips*, which was tried at *Chester Spring* assizes, 1797, it appeared, that the persons, under whom the defendant claimed, had an ancient mill and weir, which were permitted to fall into decay; and after a period of twenty years, above nineteen years before the commencement of the action, another mill was erected (upon which it may be assumed, for the purpose of the argument, that there was no alteration in the scite or fall, as no reference was made to these circumstances), no act having been done in the mean time by the owners of the adjacent land, adverse to the right. The judges at the assizes, and afterwards in the court of King's Bench, were of opinion, that the cesser of twenty years, in the enjoyment, was an extinguishment of the right to the water-course; and, upon that general principle, decided in favour of the plaintiff, treating it as a case which would not even warrant an argument (a).

The observations which occurred to the present writer, in support of the position, that it ought not to be presumed that the ancient right was lost or abandoned, were, 1st, That no inconsistent or adverse enjoyment had been acquired; 2d, Because the traces of the ancient right remained at the time of the new erection; 3d, Because so long a period having elapsed since the present erection, without the right being judicially questioned, it ought to be presumed, that that was in pursuance of, and connected with, the ancient right. An analogy has been adopted to the statute of limitations, in the cases of corporate offices, easements and bonds. But the statute of limitations, in cases of ejectment, only operates upon acts of adverse possession, not permitting an undisturbed possession and actual enjoyment to be defeated. In cases of corporate offices, the King's Bench proceeded upon the exercise of a discretionary power, and always in protection of a positive and actual enjoyment. None of the cases embrace the principle, that a right is lost by neglect, there having been no adverse enjoyment; and the protection is merely personal and individual. Upon the death of the corporator, the right reverts according to the original constitution.

In respect to easements, all the cases are in support of positive acts, as the making windows: there an enjoyment was actually acquired, which the court would not suffer to be defeated. There was a case in *Surry*, before Lord *Mansfield*, who laid it down, that an incorporeal right, which, if existing, *must be in constant use*, ought to be decided by analogy to the statute of limitations. *Must be in*

(a) The defendant's counsel, in fact, obtained a hearing, but not without difficulty; and the judgment of the court, in a great degree, consisted in complaining of the length of time which had been occupied upon a point too plain for argument.

*constant use*, is emphatic. But *non constat*, that a right must be in constant use, the exercise of which is attended with expence and risk. The party has not submitted to any actual inconvenience, which he might have avoided by the assertion of his right; he has merely not deemed it necessary to exercise a right, which may or may not be beneficial, according to times and circumstances; he has not acquiesced in any act tending to contradict or invalidate it. If *A.* buys of *B.* the coals under a piece of land, and of *C.* a right of road to these coals through a barren moor, and declines getting the coals for twenty years (the place continuing a barren moor), is the grant void or lost? Here, at the time when the mill was suffered to fall into decay, the right was as great as if an original right to dam up the water had been granted at that time. If, after such grant, the plaintiff had made a weir, and enjoyed it for twenty years, the grant or right might be presumed to have been surrendered. That is a case of adverse enjoyment; but merely suffering the river to run in its natural course, is reducing it to the case of a barren moor; and the case of *Eldridge* and *Knott* establishes the position, that the mere non-enjoyment of an incorporeal right does not necessarily induce the presumption of its extinguishment. With respect to bonds, a personal demand should, from the nature of it, be recently pursued, and the non-claim of twenty years is a strong presumption of payment; but this is no wise similar in principle to a right connected with the optional mode of enjoying a real estate.

The court of Common Pleas have since decided, in an action brought by the owner of a market at *Southall*, for erecting another market at *Hayes*, within three miles, that the erection of pens, and the sale of cattle in them, for twenty years, was a clear bar to the right of action. *Holcroft v. Heel*, 1 *Bos.* 400.

The attempt to found a right upon an enjoyment of twenty years, was carried to the most extravagant length, in a case which was brought to trial at *Lancaster* Summer assizes, 1800. A defendant, in justification of a trespass, pleaded that the owners of a messuage had, from time immemorial, enjoyed the right of shooting upon the plaintiff's land; and it was intended to be proved, that the defendant and his father had been in the habit of sporting there upwards of twenty years. But the counsel for the defendant did not persist in an attempt which could only have subjected themselves to equal ridicule with their client.

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The present discussion has been composed for several years, and I have ingrafted the substance of it into the view of the decisions of  
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Lord *Mansfield*; a work in which I have had the mortification to experience a total sacrifice of a considerable portion of assiduity and expence. Since that time, the subject has been before the court of King's Bench, in the case of *Campbell v. Wilson*, 3 *East*. 294. The defendant had, for upwards of twenty years, used a way over the plaintiff's land, the right to which, if it really existed, must, from the circumstance of the case, necessarily have commenced within thirty years; but there was evidence to shew, that the possession was adverse: on the other side, there were circumstances to shew the probability of the claim having originated in mistake. Mr. Justice *Chambre* observed to the jury, that it was probable that the enjoyment did originate in the mistake supposed; but however that might be, if they were satisfied that it was adverse, and had continued twenty years, it was sufficient ground for presuming a grant. Upon a motion for a new trial, Lord *Ellenborough* observed, that it came to the common case of an adverse possession of a way for twenty years, without any thing to qualify that adverse enjoyment; and there was no reason why the jury should not, as in other cases, make the presumption, that the defendant acted by right. Mr. J. *Grose* thought that in substance the question was left to the jury, whether the enjoyment originated in a grant, or in any other manner? and therefore, he could not say, but that upon the evidence the jury might not make the presumption which they had done, though, had he been one of them, he did not know that he should have dared to do so. Mr. Justice *Lawrence* said, no doubt adverse enjoyment for twenty years, unexplained, is evidence sufficient for the jury to found a presumption that it was a legal enjoyment. Mr. Justice *Le Blanc* thought that such length of enjoyment was so strong evidence of a right, that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant. The same learned judge explained the case respecting *Hayes* market to have only amounted to an intimation, that it would be left to the jury to find for the defendant, upon the ground of presumption of a grant, after twenty years uninterrupted use. And Mr. J. *Grose* said, he assented to that case, as so explained, but no further.

In reviewing the preceding opinions, 'Mr. Justice *Grose* seems to concur in the opinion which I have endeavoured to maintain; that the presumption in these cases is real matter of inference; upon which the jury are, as in other cases of circumstantial evidence, to exercise a genuine opinion as to the existence or non-existence of the fact in question. But I cannot concur with him in thinking, that such was really the spirit of the directions to the jury in the particular case. The other judges certainly appear to support the fictitious

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tious presumption (a), that although, in point of fact, no legal title existed, the adverse possession of twenty years was to be deemed sufficient to constitute such title, and that the false supposition of a grant, destroyed by time or accident, was the mode and form in which that right is to be maintained.

(a) There are, in truth, two kinds of presumption, acted upon in the law, which scarcely agree in any thing but the name: 1st, Inferences of fact, really and *bona fide* made; as where a person, having the recent possession of stolen goods, is presumed to be the thief; 2. Presumptions of form; as where a satisfied term is presumed to be surrendered, though, in fact, no such thing is believed to have taken place. And to the latter class, the practical application of the presumption in question is certainly to be referred; because in most of the cases, it is impossible to suppose that any person in his senses can believe the fact to be true, which is said to be presumed. Juries are never called upon to balance between the improbability of an enjoyment having subsisted for twenty years, without a legal grant, and the opposite and infinitely greater improbability, if so gentle a term can be applied to what is absolutely incredible, that within twenty years a deed creating a right, or even a grant from the crown (an act which must be upon record), should have actually been made, and that every trace of its existence should be lost and obliterated.

In fact, courts have departed from their proper province, whenever they have prescribed to a jury the inference which they are to draw from given facts: and twenty years, or any other arbitrary period, can never be the ground of a legitimate inference; which must always depend upon the general combination of circumstances.

In the case of *Campbell v. Wilson*, the jury were told, that if the enjoyment had been by leave or favour, or otherwise than as a claim or assertion of a right, it would repel the presumption of a grant: but this principle would destroy the modern doctrine, so far as relates to the enjoyment of lights, as has already been particularly shewn.

I will not contend that, after the decisions which have taken place, it may not be more convenient to the public, that the doctrine which has been extensively acted upon in the enjoyment of real estates, should be adhered to than departed from, though of very modern origin. This differs from the cases in which I contend for the departure from erroneous precedent, on account of the consequences being merely prospective: but I shall ever retain the sentiment, that the introduction of such a doctrine was a perversion of legal principles, and an unwarrantable assumption of authority. See the cases upon this subject, collected in *Mr. Serjeant Williams's notes to Tard v. Ford, a Saund. 175.*



# A P P E N D I X, No. XVI.

(Referred to Vol. I. p. 474.)

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## *On the Law of Evidence.*

### S E C T I O N I.

#### *General Preliminary Observations.*

**N**O part of jurisprudence is of greater importance than the law of evidence: for the administration of justice must necessarily be preceded by the investigation of truth, and the application of the law must in every case be founded upon the establishment of the facts.

In adverting to this subject, we perceive one of the strongest contrasts between moral and legal obligation. In the discharge of moral obligation, every man is a witness to himself with regard to his own conduct and intentions; but, in enforcing legal obligation, one man is called upon to form an estimate of the motives and conduct of another, of which in general he can only have an imperfect knowledge, and must act from representations subject in their nature to every gradation of error and deception.

The two important objects to be provided for in establishing a system of evidence, are the manifestation of truth, and the exclusion of falsehood; but from the imperfection of human knowledge and perceptions, the full attainment of these is often impossible; the latitude which is requisite for the one is inconsistent with the caution which is too often necessary for securing the other; an excessive strictness, excluding the admission of truth, for the purpose of guarding against the dangers of falsehood, is equally attended with a false impression injurious to the interests of justice; the negative falsehood, in the one case, being no less repugnant to an adequate representation of the fact upon which justice is to decide, than the positive falsehood on the other; and the withholding an actual right being not less an act of injustice, than the commission of an actual wrong. Whatever rule is established in general, for the purpose of securing these respective advantages, and avoiding either of these opposite inconveniences, must, from the very nature of the subject, be frequently defective, or erroneous

in its particular application; and all the perfection which judicial wisdom can apply, must only consist in the adoption of such a system as may, with reference to the state and condition of society, be productive of the greatest sum of advantage in the whole.

In examining the general principles of this subject, we discern two different kinds of facts, very distinguishable from each other: the first, embracing those which at their occurrence are necessarily susceptible of some indisputable monument of authenticity, such as the pronouncing a judicial-sentence; the other, comprizing acts of which the traces can only be preserved in the memory of those who were the witnesses of them, such as offences and injuries; but between these are various intermediate degrees of subjects, susceptible in their nature of similar gradations of authenticity.

The interest of society is greatly promoted, by establishing authentic criteria of judicial certainty, so far as this object can be effectuated without materially interfering with the claims of general convenience. Where the acts which may become the subject of examination will admit of deliberate preparation, and the purposes of them evince the propriety of a formal memorial of their occurrence, more especially when they are from their nature subject to error and misrepresentation, it is reasonable to expect that those who are interested in their preservation should provide for it in a manner previously regulated and established, or that, in case of neglect, their particular interest should be deemed subordinate to the great purposes of general certainty. But it is also certain that this system of precaution may be carried too far, by the exacting of formalities, cumbersome and inconvenient to the general intercourse of civil transactions; the special application of these principles must be chiefly governed by municipal regulations: but as a general observation, it is evident that the great excellence of any particular system must consist in requiring as much certainty and regularity as is consistent with general convenience, and in admitting as much latitude to private convenience as is consistent with general certainty and regularity. It may be added, that for these purposes every regulation should be attended with the most indisputable perspicuity; and that the established forms should be cautiously preserved from any intricacy or strictness, that may tend to perplex and embarrass the subjects which they were designed to elucidate, and to endanger and destroy the substance which they were instituted to defend (a).

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(a) The annuity act is a strong instance of the application of formal requisites, the defect of which is subversive of the transaction in numerous instances, where there could not be possibly any other intention than a strict and fair compliance with its directions

## SECTION II.

*Of the Onus Probandi.*

The principle, "that he who alleges himself to be the creditor of another, is obliged to prove the fact or agreement upon which his claim is founded, when it is contested; and that, on the other hand when the obligation is proved, the debtor who alleges that he has discharged it, is obliged to prove the payment," is clearly one of those propositions in which every system of jurisprudence must concur in general, whatever particular rules may be adopted, as to the mode and form of the allegation by which the necessity of such proof is to be determined.

That precision of allegation, which is required by the *English* rules of special pleading, is particularly well calculated to ascertain the incumbency of the proof, which is to be made by the respective parties; and the principles which regulate the obligation of proof, where strictness of pleading is required, may frequently assist in the exposition of the law, where the allegations are of a more general nature.

The same rules which prescribe the original obligation of proof, will also be frequently material in deciding upon the application of it, where the opposite proofs are so much in conflict, either in respect to the credibility of testimony, or the inferences to be deduced from admitted facts, that the mind, upon a patient and attentive consideration, is unable satisfactorily to form a conclusion upon their relative force; since it is manifest that whoever is under the necessity of establishing a given allegation, must adduce, not merely an equality, but a preponderance of proof.

It is sometimes too generally contended, that in case of opposition of testimony, the plaintiff, on whom it is incumbent to prove the case, must maintain his right to recover by an absolute preponderance of testimony; but this is only true so far as it is requisite to establish a presumptive and *prima facie* case; and whenever a fixed and undisputed point is established by either party, it is from that point that the conflict must commence, whether in those cases where the allegations are particular, or in those where the whole matter in dispute is open upon general pleading. Thus, if a plaintiff establishes a possession of any article taken from him by

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tions. The abuses to which the contract was subject, induced the legislature to prescribe certain indications for their notoriety; but in the construction of the provisions adopted for this purpose, a system of chicanes has been established of so extensive a nature, as almost to destroy any certainty or confidence in the apparent regularity of the contract, and its incidental accompaniments.

the defendant, and the defendant asserts a right of property, upon which the evidence given by the respective parties does not lead to a decisive preponderance; the decision should be in favour of the plaintiff; his possession being an adequate title, until a superior property is proved by a preponderance of evidence on the other side. So, if an heir at law claims as a plaintiff in ejectment, and his consanguinity is established or admitted, he will be entitled to the advantage in case of equivalent proofs, in affirmance or contradiction of an adverse will. If the respondent, in a sessions appeal, fixes an original settlement with the appellant, the obligation of proof is transferred, and the establishing a preponderance of evidence of a subsequent settlement becomes the business of the appellant. And, generally, whoever asserts a claim, or negatives a claim, which without contradiction would be sufficiently established, must support his position either by circumstances inducing a legal presumption in his favour, or by proofs in opposition to what the law presumes against him, or respecting which the law is passive in not establishing any presumption on the one side or the other.

A confusion in practice, which I have occasionally been witness to, has induced me to state the preceding observations, in themselves sufficiently obvious, with some particularity and perhaps prolixity.

They coincide in substance with the general position of *Gilbert*, "that in all courts of justice the affirmative is to be proved, for it is sufficient to deny what is barely affirmed until the contrary be proved; and this is a rule both in the common and civil law. The civil law says, *Probatio imponitur ei qui allegat, negantis autem per rerum naturam nulla est probatio*. But where the law supposes the matter contained in the issue, there the opposite party must be put to the proof of it by a negative, as in the issue *ne unques accouple en loyal matrimonie*, the law will suppose the affirmative without proof, because the law will not easily suppose any person criminal, and therefore the defendant must begin with proving the negative (a)."

(a) Mr. *Leff*, in his edition of *Gilbert*, very frequently takes greater liberty with the text of his author than the functions of an editor will fairly warrant. At this place his interpolation of the text involves a complete inconsistency from the passage which he professes to expound. After the words above mentioned, he adds, "that the marriage was lawful." Now the text of *Gilbert* means that a marriage shall be presumed good; and that the defendant who impeaches it by his plea, shall be put to shew that it was not so, at the same time the plaintiff having averred a general illegality, the defendant, from the necessity of the case, is put to shew on what marriage, under what circumstances and qualifications he relies. It is therefore in truth the defendant must begin by offering evidence to prove the legality of the marriage.

In an information against Lord *Halifax*, for refusing to deliver up the rolls of the auditor of the exchequer, the court of exchequer put the plaintiff upon proving the negative, viz. that he did not deliver them up; for a person shall be presumed duly to execute his office, until the contrary appear. *Bull. N. P.* 298.

In a very recent case, an action was brought against the *East India Company*, for putting an inflammable substance on board a ship, without giving sufficient notice thereof to the captain; and it was resolved, that the proof that such notice had not been given lay upon the plaintiff. Lord *Ellenborough*, in delivering the opinion of the court, said, that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary, that is, in such case, of proving a negative, on the other side. *Williams v. E. I. C.* 3 *East*, 192.

To a plea of infancy, the plaintiff replied a confirmation after the defendant came of age, and merely proved a promise; and it was held to be incumbent upon the defendant, to prove his being under age, that being a matter within his own knowledge, which it might be impossible for the plaintiff to prove. *Buller J.* said, he did not agree to a general position, to the extent in which it was laid down, that the plaintiff is bound to prove every thing which he alleges. For in actions on the game-laws, although it is necessary to allege that the defendant was not qualified, yet the plaintiff need only prove the offence; and then, if the defendant is really qualified, it is incumbent on him to shew it. *Grose J.* said, it is presumed that when a man contracts, he is of proper age to contract, until the contrary be shewn. *Borthwick v. Carruthers*, 1 *T. R.* 648.

A debtor of a bankrupt, setting off notes of the bankrupt indorsed to himself, must prove that they were indorsed to him before the bankruptcy; and by *Asbburst J.*—It is a general rule of evidence, that in every case the *onus probandi* lies upon the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant. *Dickson and others, assignees, v. Evans*, 6 *T. R.* 57.

In an action for loss by barratry of the master, upon a policy of insurance upon goods, a *barratrous* act being proved, it was objected that the plaintiff ought to have shewn, that the master was not also the owner or freighter of the ship, in which case no barratry could be committed; but it was ruled, that it was not incumbent on the plaintiff to make such proof, for that would be calling upon him to prove a negative, and the proof of the fact, which operates in discharge of the other party, lies upon him. *Ross v. Hunter*, 4 *T. R.* 33.

The position incidentally mentioned in one of the preceding cases, that in an *action* upon the game laws, it is not necessary for the plaintiff to prove the defendant's want of qualification, is always followed in practice; but it is a disputed point whether that doctrine extends to summary convictions before justices of peace; and the judges of the King's-bench were equally divided upon that question, in the case of *The King v. Stone*, 1 *East*, 639. A case of *The King v. Jarvis*, in which a conviction was held bad, the want of the several qualifications required by law, not being alleged in the information, or shewn by evidence, was much relied upon by Lord *Kenyon* and Mr. Justice *Grose*, in support of the necessity of negating the qualifications by evidence; but it is evident, that any opinion of the necessity of giving such evidence was in that case superfluous, the necessity of negating the qualifications in the information being a ground abundantly sufficient for setting aside the conviction. It is remarkable, that whilst Lord *Kenyon* was very tenacious of the authority of one case, he observed, with reference to another, that he had often thought there was sound sense in what was once said by Lord Ch. J. *Eyre*, that the sooner a bad precedent was gotten rid of the better. The judges gave their respective opinions, as to the principle of requiring such evidence. Lord *Kenyon* argued in support of such requisition, and of the necessity of keeping a strict hand over the summary proceedings of magistrates. Mr. Justice *Grose* evidently submitted to the supposed weight of authority, in opposition to his own opinion, respecting the reason of the case. Mr. Justice *Lawrence* and Mr. Justice *Le Blanc* thought the evidence not requisite; the latter said, "I do not know that there are different rules of evidence, in case of proceedings before magistrates, from those which apply to actions in the courts above. And if the court were to determine, that it was necessary for the witness to negative the defendant's qualifications, I do not see why it must not be equally necessary to give the same evidence before a judge and jury, in an action for the penalty. Whatever is an authority for the one must, I think, equally bind the other."

Whatever may be hereafter determined respecting the law, I conceive that there can be little doubt respecting the reason of the opinion last cited. The forms of proceedings before different tribunals are in their nature matter of arbitrary regulation, but the general principles of natural reason and justice, which ought to determine the administration of the law respecting evidence, where no positive institutions intervene, ought to be equally the rule of conduct of the highest tribunal and the lowest.

According to the practice which formerly prevailed at some quarter-sessions, the appellants against an order of removal were  
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bound,

bound, in the first place, to shew the settlement of the pauper out of their own parish. *Vid. Rex. v. Woodford, Cald. 236.* This rule seems utterly repugnant to principle; because a removal to a parish is in the nature of an affirmation that the settlement is there, and should be founded upon some evidence of the fact. The rule that an order confirmed is good against all the world, but an order reversed is only conclusive between the particular parishes, strongly indicates where the original proof should be; and shews that an order should only be confirmed upon evidence of an actual settlement, and that it may be reversed for defect of proof; and I believe that the practice alluded to is now universally exploded.

### S E C T I O N III.

*Of the Rule requiring the best Evidence the Nature of the Case will admit.*

All systems of law recognize a leading distinction between written and verbal evidence; and written evidence is subdivided into several classes of relative superiority and inferiority, beginning with public authentic acts, and descending to private *memoranda*. Written evidence is superior to verbal, as it is by no means equally liable to misconception, or misrepresentation. And an original is, for reasons equally evident, superior to a copy.

A grand rule of evidence in the English law is, that the best evidence must be given, which the nature of the case will admit; a slight ambiguity in the expression of this rule may, and frequently does, lead to considerable misconception, in those who are but superficially acquainted with the law, and who sometimes conceive not only that it is incumbent upon a party to give the best attainable evidence of existing circumstances, but that the circumstances themselves must be such as give the most distinct possible view of the disputed fact; and in other cases, where the circumstances of the case are not susceptible of legitimate evidence, that evidence, in its nature inadmissible, may be allowed as a substitute; both of which errors I have known to be the sources of judicial determinations, but it was in courts the judges of which have not necessarily a professional connection with the law, although very extensively engaged in the administration of it. But Lord Ch. Baron *Gilbert*, whose law of evidence is the most useful guide in investigating the general subject before us, obviates the first misconception by observing, that the true meaning of the rule of law, that requires the greatest evidence that the nature of the thing is capable of, is this, That no such evidence shall be brought, which *ex rei natura* supposes still a greater evidence behind, in the party's own possession; for such evidence is altogether insufficient, and

proves nothing, for it carries a presumption with it contrary to the intent for which it was produced; as if a man offers a copy of a deed, or will, where he ought to produce the original, this carries a presumption with it, that there is something more in the deed, or will, that makes against the party, or else he would have produced it, and therefore the copy is not evidence, and cannot weigh any thing in a court of justice. The same principle is expounded more fully in a very elaborate judgment of one of the courts of *North Carolina*, (upon a question which, in an English court, would not admit of much debate, the necessity of a deed being attested by a subscribing witness,) from which I shall transcribe the following extract, as affording not an unfavourable specimen of the juridical reasoning which prevails in those courts. "There is but one decided rule in relation to evidence, and that is, that the law requires the best evidence. But this rule is always relaxed upon two grounds, either from absolute necessity, or a necessity presumed from the common occurrences amongst mankind. The rule is not so stubborn but that it will bend to the necessities of mankind, and to circumstances not under their control. The rule is adopted only to obviate the fraud of mankind: one shall not deceive the jury by offering a less convincing testimony to establish his point, when it appears there is a proof more elucidative of the point in controversy in his own power, which, perhaps, he does not offer, because it would be decisive against him. It was never meant to exclude the party from justice, merely because he had not, through ignorance, provided himself originally with the best evidence it was possible for him to provide; for then two witnesses would be better than one, a hundred than two, and so on progressively. A writing would be better than a parol contract, a deed better than either, and a record better than all. Neither was it intended to deprive any one of justice, when, without any default in himself, he had lost the better evidence, which he had provided originally. It first deprives him of the power of imposing upon us, and then lays itself open to be relaxed as circumstances shall, in justice, require. These circumstances are of two kinds, those founded on absolute necessity, and those founded on a necessity occasioned by the occurrences which are common amongst mankind."

The greater part of the particular system which is established respecting the law of evidence, may be regarded as an amplification and exposition of this general rule.

It is to be observed that this, as well as most other rules of evidence, are chiefly referable to the admissibility of the proof required, and of course are preliminary to any considerations respecting its weight and efficacy. But the same principle which dictates the rule, concerning the admission of evidence, may be often ad-

vantageously applied in the discussion of its effect. The infinite variety of transactions which occur in the intercourse of society, must in general prevent the adoption of a system for determining what evidence shall be requisite for the decision of any contested fact, not requiring the formality of a written attestation; but when weaker and less satisfactory testimony is tendered in support of a fact, the nature of which will admit of illucidation, from proofs of a more direct and explicit character, the same caution which rejects evidence of an inferior degree, when higher evidence might be produced, will awaken suspicion; and it will reasonably be supposed, that a more perfect exposition of the subject would have laid open deficiencies and objections, which a more obscure and uncertain representation was intended to conceal. But there is still an important distinction to be attended to: the rules for the admission of evidence are absolute and imperative, and will not admit of any relaxation from considerations of inconvenience and expence; whereas, in forming a judgment upon the adequacy of testimony, in particular cases, circumstances which remove the cause of suspicion may also be admitted to obviate the effect.

Although the rule of law is for the most part confined to the known ranks and degrees of evidence, there are instances of its application to the more or less adequate representation of facts. Thus in the case of *Williams* against the *East India Company*, 3 *East*, 192. referred to upon another ground in the preceding section, it was alleged, that an inflammable substance had been put on board a ship, without giving a proper intimation. It appeared to be the duty of the conductor of military stores, to carry the goods on board, and of the chief mate to receive them; the mate was dead, and no evidence was given of what passed between him and the conductor of stores; but it was proved by the captain and second mate, that no communication had been made to them, of the nature of the substance in question. It was objected, and decided, that the officer who had put the article on board ought to have been examined. Lord *Ellenborough*, in delivering the opinion of the court, said, 'The question is, whether the plaintiff has given sufficient *prima facie* evidence of the want of notice, to have gone to a jury?' and we are of opinion that he has not. The best evidence should have been given of which the nature of the thing was capable. The best evidence was to have been had by calling, in the first instance, upon the persons immediately and officially employed in the delivering, and in receiving, the goods on board, who appear, in this case, to have been the first mate on the one side, and the military conductor on the other. And though one of these persons, the mate, was dead, it did not warrant the resorting

to an inferior and secondary species of testimony, viz. the presumption and inference arising from a non-communication to other persons on board, as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to (a).

The preference of written to parol evidence is a first principle of the law; but sometimes where a writing itself does not constitute the very act under inquiry, but is only evidence of the existence of a distinct collateral fact, parol evidence may be allowed in respect to such fact, in the absence of, or even in opposition to, the evidence furnished by the writing. This subject will be examined at length in a following section, and is only referred to at present as introductory to the following case, which is stated here with a view to assist in the exposition of the general principle.

The plaintiff had advanced several sums of money to the defendant, which he entered in his book; and the defendant signed the several pages which were not stamped. At a subsequent time, a clerk of the plaintiff examined the book with the defendant, who admitted the entries to be correct. It was agreed that the book could not be given in evidence, as it consisted of receipts unstamped; but it was contended on the part of the defendant, that the book was the best evidence of the items so admitted, and was necessary to be produced; but the court decided otherwise. Lord *Kenyon* said, that the subsequent verbal acknowledgment, that the defendant had received the money, was evidence to go to the jury of his having been furnished with it. *Grofe, J.*—The evidence was not of a receipt but of a verbal admission, proved not by the signature to the account, but by the testimony of the witness, to whom the admission was made. *Lawrence, J.*—If there had been no signature, it could not be pretended but that if the witness had used the book, to ask the defendant if he had had the sums contained in it, his admission would have been evidence. And the signature cannot make it less evidence for the purpose for which it was produced. *Le Blanc, J.*—The objection is, that there can be no verbal admission of a party having been furnished with articles in

(a) In the above case it must be obvious that there would be an aversion to calling the officer in question, whose own interest would be so much in opposition to that of the party required to produce him, that his evidence might have been objected to as incompetent, if produced on the part of the defendant. With proper deference, I cannot but entertain the idea, that the non-production of this witness was not so much a ground of objection to the admissibility of the other evidence, as of objection upon the effect of it; and even that subject to very strong observation, on the opposite side, of the reasonableness of apprehending a bias in the witness, inconsistent with fairness and impartiality, whilst any imputation arising from the party producing him would be repelled, by a clamour against impeaching the veracity of a witness produced by themselves.

an account, to which he has affixed his signature ; but that cannot be supported. *Jacob v. Lindsay*, 1 *East*, 460.

There are some cases, in which presumptive and *prima facie* evidence of a necessary fact is allowed, although the nature of the subject would admit of evidence of a higher and more authentic kind. Thus, in an action for defamation of a person in his character of an attorney, it was held not to be necessary to prove the plaintiff's admission; and *Buller, J.* said, That in the case of all peace officers, justices of the peace, constables, &c. it was sufficient to prove that they acted in those characters, without producing their appointments, in actions brought by attorneys for their fees, the proof now insisted upon has never been required. Neither in actions for tithes is it necessary for the incumbent to prove presentation, institution, and induction; proof that he received the tithes, and acted as the incumbent; is sufficient, *Berryman v. Will*, 4. *T. R.* 366. And in a very late case it was held in an action, upon a policy of insurance on a ship, that the mere fact of possession as owners was sufficient and *prima facie* evidence of ownership, without the aid of any documentary proof or title deeds on the subject, until such further evidence should be rendered necessary in support of the *prima facie* case of ownership which they made, in consequence of the adduction of some contrary proof on the other side. *Robertson v. French*, 4 *East*, 130.

## SECTION IV.

### *Of Public Evidence.*

Written evidence is, by *Gilbert*, divided into public and private, and the former into records and matters of inferior nature.

Records are defined by him to be the memorials of the legislature, and of the king's courts of justice (a), and are authentic beyond all manner of contradiction. But as these are placed in public depositaries from which they cannot be delivered out, the copies of them are allowed as sufficient evidence; but a copy of a copy is not evidence, for to that case the reason of necessity does not apply (b).

Acts of parliament, which are the first sort of records, are either general or private. The first are defined to be such as relate to the kingdom in general; and the second, to the concerns of private

(a) This definition cannot be admitted to be very exact, for it is not every memorial of all the king's courts of justice, that is distinguished by the name of a record; and there are other records besides those enumerated, such as patents, and acts affecting the royal revenue.

(b) See some observations respecting the copy of a copy of a deed in the next section.

persons; but many acts, private in their nature and operation, are expressly declared to be public, and in that case have for all technical purposes the same effect.

It is said by *Gilbert*, "That of general acts of parliament, the printed statute book is evidence, not that the printed statutes are the perfect and authentic copies of the records themselves, for there is no absolute assurance of their exactness; but every person is supposed to apprehend and know the law which he is bound to observe, and therefore the printed statutes are allowed to be evidence, because they are hints to that which is supposed to be lodged in every man's mind already;" but this mode of stating the subject does not appear to be perfectly accurate; for the general law of the land is not in legal contemplation the subject of evidence (a), but of universal knowledge; and evidence relates to questions of fact, and not to points of general law. Private acts (which, as *Mr. Peake* judiciously observes, are not considered as laws but facts) must be proved like other records, which is done by proving examined copies. The printed copy of a private act of parliament is not in general good evidence, without being examined with the roll; but *Mr. Justice Buller* states some cases, which, on account of the notoriety of the subjects that they concern, appear to be considered as exceptions to the general rule; such as the act for *Bedford Level*, for building *Tiverton*, &c. I think, however, that an exception of so vague a nature would now scarcely be allowed in practice.

The written laws of other countries, when they become material in the *English* courts, must be proved by examined copies; and this rule at common law applied to the statutes of *Ireland*; but by Stat. 41 *Geo.* 3. c. 90. § 9. it is enacted, that the copy of the statutes of *England*, before the union with *Scotland*, and of *Great Britain*, since published by the king's printer, shall be conclusive evidence of those statutes in *Ireland*, and the copy of statutes passed in *Ireland* prior to the union, and published by the king's printer shall be conclusive evidence in *Great Britain*.

It is not my intention to enter into a discussion of the particular grounds which distinguish a public from a private act, or of questions respecting the cases, where an act may or may not be given in evidence, without being specially pleaded; I shall merely advert to an error of *Gilbert*, which is continued by *Mr. Justice Buller*, and is nearly allied to one already mentioned. These eminent writers observe, that there are cases in which both public and private acts must be pleaded, and that is when they make void solemnities; for in this case the construction of the law is not

(a) See *post*, No. XVII.

that the solemn contracts shall be deemed perfect nullities, but that they are voidable by the parties prejudiced by such contracts. But this statement seems inaccurate; for although it may be necessary to plead specially a matter of defence arising from a public statute, that differs very materially from the pleading the existence of the statute itself, which is requisite with respect to private statutes, when they are the direct foundation of a claim or defence, and not merely evidence in support of an issue upon facts otherwise sufficiently alleged; whereas, every public statute is judicially known, and it is only necessary to plead those facts, which the statute may render material. What is pleaded is not the statute, but the application of it; such special pleading is equally necessary, when a specialty is to be avoided by matter of defence at common law, as fraud or force; but it was never said to be necessary, that the common law allowing such objections was to be alleged in pleading.

The records of courts of justice are conclusive evidence of the acts done by such courts, so that no evidence can be offered, to shew that the decision of the court was otherwise, than such as it appears by the record to be.

Thus, where a person not party to a former cause, (the verdict in which was offered as evidence against him,) endeavoured to shew that the finding of the jury in that cause was entered upon a particular issue by the mistake of the officer, it was held, that as this evidence went to impeach the authenticity of the record, as to the fact of such finding, it was not admissible. *Reed v. Jackson*, 1 *East*, 355.

How far a person, not party to a former proceeding, is affected by what passed thereon, is a subject of distinct consideration, which will be adverted to in another place.

But although it cannot be a matter of examination, whether a judicial act or proceeding was different from what it appears by the record to be, the record is not conclusive evidence, with regard to the facts expressed in it, except so far as the truth of such facts is necessarily imported, in an admission of the accuracy of record itself. For instance, a record of the conviction of an offender, is deemed conclusive as to the commission of the offence; but as the time specified in the indictment is not of the essence of the charge, it may be falsified by evidence. 2 *Hawk. P. C. c.* 15. (of avoiding judgment), *s.* 2.

So a judgment in ejectment is conclusive evidence in an action for mesne profits of the plaintiff's title, at the time stated in the demise; but as to the length of time that the defendant has occupied, it proves nothing. *Aslen v. Parkin*, 2 *Bur.* 665. Upon the

the same principle, the general relation which any act of a court of record has to the first day of the term may be corrected by evidence, where the justice of the case requires a distinction. Thus, if a cause of action has accrued subsequent to the beginning of the term, evidence may be given of the actual commencement of the action, being subsequent to the cause of it. *Morris v. Pugh*, 3 *Bur.* 1241. *Per Lord Mansfield*. "The bill by fiction of law relates to the first day of term; but fictions of law hold only in respect of the ends and purposes for which they were invented; and when they are urged to an intent and purpose, not within the reason and policy of the fiction, the other party may shew the truth." But fictions are not allowed to be contradicted, so as to defeat the purpose for which they were introduced.

An officer whose business it is to keep the records, may be examined as to the state and condition of them, but not as to the matter of the record. *Leighton v. Leighton*, 1 *Str.* 210. And if words have been struck out so as to render a record erroneous, witnesses may be examined, to shew such words were improperly struck out; but not to falsify the record, by shewing that an alteration, whereby the record was made correct, was improperly made. *Dickson v. Fisher*, 1 *Bl.* 664. 4 *Burr.* 2267.

There are various modes of authenticating the copies of records, as under the broad seal, or the seal of a court; and of copies not under seal, there are office copies, and sworn copies; the former of these are deemed authentic, when made by an officer trusted to that purpose; but a copy made out by an officer who is not so intrusted, is merely as the act of a private man, and is no evidence; but the more particular exposition of these distinctions, which I could merely transcribe from *Gilbert*, and *Buller*, would exceed the purpose of the present examination.

Next to records are the proceedings of the Courts of Chancery, and other courts not of record, of which copies are also allowed to be given in evidence, because as these matters lie for the public satisfaction, every man has a right to their evidence, and they cannot be in several places at the same time. The journals of the House of Commons are also acts of a public nature which are not records. Mr. *Douglas*, in his report of the trial of Lord *George Gordon*, after mentioning that sworn copies of certain entries in the journals of the House of Commons were produced and read in evidence without being objected to, subjoins a note in which he says, that he therefore presumes that sworn copies of the journals of parliament are clearly evidence, though he has known it disputed, that it is a general notion that copies of nothing but records are admissible, if the original exists. He mentions a case in  
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which an application was made for the *East India Company*, to produce their books, on the ground that copies from them could not be read. But the Court of King's Bench denied that to be the rule, and mentioned several cases where matters not of record were admissible; as copies of court rolls, of parish registers, &c. And Lord *Mansfield* expressly said, that the copies of the journals of the House of Commons were evidence; and that he remembered a case in which the Speaker of the House of Commons made a point that the copies should be offered in evidence. The court added, that the reason founded upon inconvenience for holding it not necessary to produce records, applied with still greater force as to such public books, as the transfer books of the *East India Company*; for the utmost confusion would ensue, if they could be transported to any the most distant parts of the kingdom, whenever their contents should be thought material on the trial of a cause. Mr. *Douglas*, therefore, infers the correct principle to be as laid down by Lord *Holt*, that whenever an original is of a public nature, and would be evidence if produced, an immediate sworn copy would be evidence. *Doug.* 590.

With respect to different matters of evidence falling under this class, the first subject which occurs is bills in chancery; which, according to *Gilbert*, are evidence when any proceedings have ensued thereon, but not otherwise; and, according to Mr. Justice *Buller*, are evidence in respect to the fact, upon which a party grounds his prayer of relief; but it is properly settled by modern determinations, that they are nowise evidence to the truth of their contents, being no more than the mere surmises of counsel. A bill is fictitious, it does not aver facts but suggests them, and calls for answers to ascertain them; it may be withdrawn or amended, and decides nothing. *Vi. Fitz.* 296. *Allan v. Hartley, Cooke's, B. Law* 1. *Doe v. Sybourn, 7. T. R.* 2. Except in some cases, which, in various other respects, admit of a greater latitude in evidence than accords with the general rule of law; as upon questions of pedigrees, (*7 T. R.* 2.) they are in general no further evidence, than to shew that such a bill did exist, and that the facts were in dispute in order to let in evidence of the other proceedings.

An answer in Chancery which is upon oath, and upon which it is presumed that a man speaks upon deliberation, is evidence against the person making it; but the answer of a guardian is no evidence against his ward, nor that of a trustee against the person beneficially interested in the trust. *Gilb.* 50. *1 Keble.* 281. It has also been held that the answer of the alienee of an estate is no evidence against his alienee. *1 Salk.* 286. But there is a contrary determination which is much stronger the other way; for the answer  
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of a person setting forth the tenor of a deed being offered in evidence, upon the trial of an ejectment, it was objected by the defendants, that as they had been in possession twenty years, the credit of that possession was sufficient evidence for them *prima facie*, so as they should not be compelled to shew their title, and therefore the answer should not be read against them, until the plaintiff proved that they derived their title under the person making it. But the plaintiff proving constant reputation in the country, that the lands belonged to that person, the court permitted her answer to be read against them, unless they shewed another title from a stranger. *Earl of Suffen v. Temple*, 1 *Lord Raym.* 310. There appears to be a substantial difference between such an answer (or any other declaration) made before and after the alienation, for a person whose title is already affected by the admission, should not be allowed by alienation, to transfer a greater right to another than belonged to himself; and on the other hand, a party who has acquired an actual title, ought not to be prejudiced by the subsequent acts of the person from whom it was acquired, and who has become a stranger to the property. I also conceive that the reputation of the country was an insufficient ground for admitting the declaration of the person, supposed to be the former proprietor; it being incumbent upon A., who founds his claim against B., upon the declaration of C., to make out the fact, by which such declaration could be allowed to have any effect. I should think it probable in the particular case, that there was some evidence of actual possession, which *prima facie* would be sufficient. An answer in Chancery is evidence against the party making it, of the truth of the facts which it contains, and an examined copy of such answer is allowed as evidence in all cases, except upon an indictment for perjury.

With respect to the party whose answer is adduced, having a right to insist upon the whole being taken together, provided it is relied upon at all, a distinction must be taken (which, although not declared in the authorities upon the subject, is to be collected from them, and is founded upon accurate principles) between its being part of the proceedings in the very suit depending, or being merely matter of evidence in a different cause.

In a suit in Chancery, the defendant by his answer, which was put in issue by the plaintiff's replication, admitted as executor that the testator had left 1100*l.* in his hands, and said, that afterwards he gave a bond for 1000*l.*, and the testator gave him the other 100*l.*; as there was no evidence, but the defendant's own admission for the receipt, it was contended that he ought to find credit when he swears in his own discharge. But it was answered, and re-

solved by the court, that when an answer was put in issue, what was confessed and admitted need not be proved; but it behoved the defendant to make out by proof, what was insisted upon by way of avoidance; but this was held under this distinction, where the defendant admitted a fact, and insisted upon a distinct fact by way of avoidance, there he ought to prove the matter of his defence, because it may be probable that he admitted it out of the apprehension that it might be proved, and therefore such admittance ought not to profit him, so far as to pass for truth whatever he says in avoidance; but if it had been one fact, as if the defendant had said, that the testator had given him 100*l.*, it ought to have been allowed unless disproved, because nothing of the fact charged is admitted, and the plaintiff may disprove the whole fact as sworn, if he can do it. *Gilb. 51.*

Now it must be remembered that the above decision is principally referable to the course of proceeding in courts of equity. A bill is filed, an answer is put in, the plaintiff either sets down the cause for hearing upon bill and answer, which is an admission of the *truth* of the whole, and merely brings the *sufficiency* of it into contest; or he replies to the answer, putting the whole in issue generally, whereupon the defendant must substantiate by proof, all the facts upon which he means to insist, whilst the plaintiff may rely upon every fact admitted, which he conceives to be material, without being bound to the admission of any others. Upon this proceeding no questions of credit, no inferences of fact, can regularly occur; there are certain general rules respecting what shall be taken as true, in the admissions and testimony, and if a real disputable question occurs respecting a matter of fact, it is referred to the examination of another tribunal.

But where an answer is adduced as evidence in a court of law, no part of it is immediately in issue, neither does it form any direct proceeding in the cause. It is only one amongst other *media* for the investigation of truth. And if one side introduces it at all, the other may insist upon the whole being read, in order that a judgment may be formed upon its entire credit and effect (a). But though the

(a) Mr. Peake having cited the preceding case at length, observes that no other better shews the distinction between the rules of evidence, in the common law courts and those possessing an equitable jurisdiction. In a court of law it would have been said, "that if a man was so honest as to charge himself, when he might roundly have denied it, and no testimony could have appeared, he ought to obtain credit when he swears in his own discharge. He adds, that his habits of thinking and legal notions having been formed in courts of law, might perhaps have given him an unfair prejudice in favour of their rules; but that to him they appear, in this particular at least, most consonant to reason and justice.

the whole must be read, it does not necessarily follow that it must be wholly admitted as true, or wholly rejected as false; the credit and effect of any part of it is to be considered by the jury, (the constitutional judges upon questions of fact,) according to the general impression of their minds, derived from the general consistency of the answer in itself, or the light which may be thrown upon it by other evidence. This was collaterally stated by Lord Mansfield, in observing upon the argument which had been advanced respecting the credit of a witness, that as the case rested entirely on his evidence, you must take it altogether and believe the whole; but although, said his lordship, the whole of an affidavit or answer must be read, if any part is, yet you need not believe the whole equally. You may believe what makes against his point who swears, without believing what makes for it. *Bermon v. Woodbridge, Doug. 788.*

Mr. Justice Buller mentions a case which seems to furnish a proper exception to the rule, that the whole must be even read if any part is; viz. where the answer in Chancery, of a person who swore that he had an annuity, was read in order to prevent his being examined, as the answer was only produced to shew that he was not a competent witness in the cause, and not to prove the issue.

The preceding observations respecting the reading of the whole of an answer, without being obliged to give credit to every part, are equally applicable to every other kind of evidence. A man's own admissions and representations shall be allowed as evidence against him, but he shall not be subjected to having one part of the same act considered without the other; nor shall the mere reliance upon his act, for the admission of any one circumstance, be considered as concluding in his favour, every other circumstance which he has chosen to introduce.

The rule mentioned by *Gilbert*, where the whole constitutes one fact, is founded upon the most evident principles of justice. Although relying upon the admission of one fact, shall not conclusively establish the assertion of another; the representation of one and the same fact must not be garbled and distorted.

The depositions of witnesses, or the verdict upon a former trial, with evidence of what the witnesses swore, is classed as written evidence. But as such testimony in respect of the facts is originally

If my ideas upon the general subject are correct, the distinction in this matter is not between courts of law and of equity, but between pleadings and evidence; and that if an answer in Chancery was introduced incidentally, and merely by way of evidence in a court of equity, it ought to be treated precisely in the same manner as in a court of law. On the other hand, it is very clear that if in a court of law, a plea confesses the matter in demand, but avoids it by other circumstances, the proof of the avoidance is incumbent on the defendant.

oral, and the distinctions respecting it regard the cases in which such minutes of oral testimony may be allowed or not, I shall postpone any reference to those subjects, until I come to the discussion of parol evidence.

The proceedings of all courts not of record, come under this secondary division of public evidence, consisting of matters inferior to record; and it may be stated generally that such proceedings are the proper evidence of matters within the jurisdiction of those courts. The effect of judicial proceedings, in whatever courts, will be particularly attended to hereafter. The effect of proceedings in foreign courts will also be a matter for future examination. It will however here be proper to observe, that the proceedings of courts of record in the Colonies, *Walker v. Witter*, Dougl. 1. and, I conceive also, courts in *Ireland*, have not in *England* the same authority with those of courts of record within the realm, but are, like the proceedings of our own inferior courts, subject to examination.

In a late case, it was decided that a judgment of a Court of *Grenada* was not sufficiently proved by evidence of the handwriting of the judge, without also proving that the seal affixed was the seal of the island. *Henry v. Arley*, 3 East, 221. A former case was relied upon, in which it was held necessary to prove, that the seal of a *Scotch* diploma was the proper seal of the university. *Moises v. Thornton*, 8 T. R. 303.

The parish register, or a copy of it, is good evidence, and proof *viva voce* of the contents of the register, without a copy has been admitted; but Mr. Justice *Buller* observes, that the propriety of such evidence may well be doubted, because it is not the best evidence the nature of the thing is capable of. In a question respecting the plaintiff's legitimacy, he produced the general register of the parish wherein he was entered, as the son of his father and mother, in the same manner as lawful children are entered. This register, the clerk said, was a book into which the entries were made once in three months, out of the day-book wherein the entries were made, immediately after the christening, or next morning. To encounter this, the defendants asked him if any notice was taken of bastards, and he said their method to add B. B. which stood for base born; and then they offered the day-book from which the other entry was posted, and in which B. B. was inserted, and insisted that it was the original entry, and this being opposed the opinion of the court was taken. Mr. Justice *Page* was for allowing it to be read, but the other two judges were against it, saying, that the other was the only register, and there could not be two registers in one parish, so the day-book was rejected. *May v.*

*May,*

*May, Str.* 1072. The propriety of this decision may perhaps be open to contest, for though the entry in the register was evidence, it was not conclusive evidence of the point in question, like a record or the probate of a will. In questions of pedigree, (as will be seen in the sequel,) entries of various kinds are allowed, which in other cases are not admissible, and the day-book was at least equivalent to any private entry. The event of the particular cause had probably some effect on the minds of the judges, who might have revolted at the decision, if the circumstances had been reversed; if the general register purported that the party had been illegitimate, and the day-book from which an incorrect transcript was made had evinced the contrary; but no legal distinction can be allowed between the two cases.

In an action for adultery, (upon which an actual marriage must be proved,) it was ruled by Mr. Justice *Blackstone*, that the evidence of the minister, or subscribing witnesses to the register, was necessary to prove the identity of the parties married, as being the best proof that could be given; but that opinion was over-ruled by the Court of King's Bench, who held that whatever was sufficient to satisfy a jury was good evidence; and Mr. Justice *Buller* observed, that the original register was not necessary to be produced, and it is only where that is required that subscribing witnesses must be called. *Birt v. Barlow, Doug.* 171.

Concerning other pieces of public evidence, I shall extract the following passages from *Gilbert*, subjoining the notes which I formerly prepared, with the design of submitting them to the public in an edition of that work.

“The pope's licence, without the king's, has been held good evidence of an impropriation, because anciently the pope was held to be the supreme head of the church, and therefore, the pope was held to have a disposition of all spiritual benefices, with the concurrence of the patron, without any leave of the prince of the country; and these ancient matters must be admitted, according to the error of the times in which they were transacted. A pope's bull is no evidence on a general prescription to be discharged of tithes, because that shews the commencement of such a custom, and a general prescription shews, that there was no time or memory of things to the contrary, so that the bull doth itself contradict such prescription. But the pope's bull is evidence on a spiritual prescription, when you only say the lands belonged to such a monastery as was discharged of tithe at the time of the dissolution, for then they continue discharged by act of parliament.

If the question be, whether a certain manor be ancient demesne, or not, the trial shall be by domesday-book, which shall be inspected by

by the court. Ancient demefnes are the focage tenures, that were in the hands of *Edward* the Confessor, and which *William* the Conqueror, in honour of him, endowed with certain privileges. Domefday-book was a terrier or furvey of the king's lands, which was made in the time of the Conqueror, and which afcertains the particular lands which had this privilege.

In ejeftment for the manor of *Artam*, the defendant pleaded ancient demefne; and when Domefday-book was brought into court, would have proved that it was anciently called *Nettam*, and that *Nettam* appears by the book to be ancient demefne; but he was not permitted to give fuch evidence, for if the name be varied it ought to be averred in the record. *Gregory v. Wilkes*, *H. 28. Ch. 2. B. N. P.*

I, however, conceive that this evidence was properly referable to the iffue on the record, and that it was not neceffary to put in iffue the former name of the manor. If an individual, whose name has been changed by the king's authority, is fued in his pre- fent name for money lent, it cannot be contended that a promiffory note figned in his former name would be inadmittable evidence.

An old terrier or furvey of a manor, whether ecclefiaftical or temporal, may be given in evidence: for there can be no other way of afcertaining old tenures or boundaries.

A terrier or glebe is not evidence for the parfon, unlefs figned by the church-wardens, as well as the parfon; nor then neither, if they be of his nomination, and though it be figned by them, yet it feems to deferve very little credit, unlefs it be likewise figned by the fubftantial inhabitants; but in all cafes it is ftrong evidence againft the parfon. *B. N. P.*

An old map of lands was allowed as evidence (a), where it came along with the writings, and agreed with the boundaries adjusted, in an ancient purchafe.

It was ruled by Lord Ch. J. *Holt*, *Warw. Sum. affizes, 1699*, that if *A.* be feifed of the manors of *B.* and *C.*, and during his feifin of both, he caufes a furvey to be taken of the manor of *B.*, and afterwards the manor of *B.* is conveyed to *E.*, and after a long time there are difputes between the lords of the manors of *B.* and *C.*, about their boundaries; this old furvey may be given in evidence, *contra*, if the two manors had not been in the hands of the fame perfon, at the time of the furvey taken. *Bridgeman v. Jennings*, 1 Lord *Raym.* 704. But it was held at *Exeter Sum. aff. 1719*, that furvey books of a manor which were ancient, unlefs figned by the

(a) This is not very correctly arranged as public evidence, but I have not confidered that as a matter of fufficient importance to require its tranfpoftion, efpecially as the fubject has a connection with thofe which accompany it.

tenants, or they appear to be made at a court of survey, are no evidence; they are else only private memorials. 12 *Vin. Abr.* 90. fol. 12. A survey taken by one under whom the plaintiff claimed, was also rejected as evidence for the plaintiff. *Anon. Str.* 95. *Vi. Bull. N. P. Tit. Ev.*

An ancient survey from the first fruits office, of the possessions of a nunnery to which a rectory was appropriated, taken upon the dissolution of monasteries, by which it appeared what species of tithes belonged to the rector and what to the vicar, and a similar survey taken 35 *Eliz.* were allowed as proper evidence, though it did not appear by what authority the last survey was taken. *Vicar of Kellington v. Trincoll*, 1 *Wilf.* 170. In *Denn* on the demise of *Godwin* against *Spray*, 1 *T. R.* 466, a parchment writing, transmitted from one steward of a manor to another without a date, by which “*de consilio domini regis ex assensu omnium summonitorum manerii dicti domini regis de B. de modo tenura sua ad specialem rogatum inscriptis expresse ordinatum est,*” &c. specifying the course of descent within the manor, was ruled to be good evidence, though it was not properly a court roll. In *Roe ex dem. Beebee v. Parker*, 5 *T. R.* 26, the presentment of the homage at a court baron of the mode of descent was held to be full evidence of the custom, and an objection that it was insufficient without instances being shewn, was over-ruled. Where there was an admittance of a person, as *youngest* nephew in 1657, on the one side, and on the other a presentment in 1692, that the custom of descent extended only to the youngest son, and if no son, to the youngest brother, and went no further; and there was parol evidence of that being the repute, the jury found according to the admittance, and the court refused to grant a new trial. *Doe dem. Mason v. Mason*, 3 *Wilf.* 63.

Corporation books are generally allowed to be given in evidence, when they have been publicly kept as such, and the entries made by the proper officer, not but that entries made by other persons may be good, if the town clerk is sick or refuses to attend, but then that must be made to appear. Whoever produces a book must establish it before he delivers it in. *Per Cur. Rex v. Mothersell*, 1 *Str.* 92. In that case, a book which appeared to have been only minutes of some corporate acts ten years ago, all written by the prosecutor's clerk, who was no officer of the corporation, was held to have been properly rejected. Evidence being given of orders in the corporation books, for disfranchising certain persons, it was ruled that orders in the same books, by which they appeared to have been restored by virtue of preceptory writs of *mandamus*, were admissible, though the writs themselves were not produced. *Symmers v. Regem, Cowp.* 489.

Rolls or ancient books, in the heralds' office, are evidence to prove a pedigree, but an extract of a pedigree taken out of records shall not be received; because such extract is not the best evidence in the nature of the thing, as a copy of such records might be had. 2 *Jones*, 224. *Bull. N. P.* 248. A visitation made by the heralds entered in their books and kept in their office, and the minute book of a former visitation, signed by the heads of the several families, and found in the library of Lord *Oxford*, were admitted. *Pitton v. Walter*, *Str.* 161. *Camden's Britannia* was held not to be evidence, to prove whether by the custom of *Droitwich* salt pits could be sunk in any part of the town, or in a certain place only; but a general history may be given in evidence, to prove a matter relating to the kingdom in general, as in the case of *Neale and Fry*; chronicles were admitted to shew that king *Philip* did not take the style mentioned in a deed as king of *Spain*, at the time it purported to bear date; *Charles V.* not having then surrendered (a). *Dugdale's Monasticon* was refused for evidence, whether *A.* was an inferior abbey or not, because the original records might be had in the augmentation office.

The register of the Navy Office, with proof of the method there used, to return all persons dead, with the letters D—d, is sufficient evidence of a death. *Ex dem. Whitcombe*, *E. 6 Ann. c. 13. B. N. P.* 249. An inventory taken by a sheriff was admitted as evidence between strangers, to prove the quantity and value of the goods; for the law intrusting the sheriff with the execution must intrust him throughout. 2 *Keb.* 277.

A copy of the bishop's institution book is not sufficient evidence to prove a presentation, for the presentation itself should be produced, or it should be shewn that it had been properly searched for and could not be found, and the institution book itself might have been produced. *Tillard v. Shebbeare*, 2 *Wilf.* 266.

A certificate from the secretary at war, of the nature of a serjeant's station, though opposed, was allowed to be read in evidence to the court, upon an application for the defendant's discharge as being a soldier. *Lloyd v. Woodall*, 1 *Bl. Rep.* 29.

The king's sign manual, declaring his intention to pardon a sentence of transportation, and insert the prisoner's name in the next general pardon, is evidence on an indictment for being at large after having been ordered for transportation. *Rex v. Miller*, 2 *Bl. Rep.* 797.

The Gazette is evidence of the king's proclamation, and of addresses made to him. *Rex v. Holt*, *T. R.* 436. The copy printed by the king's printer is evidence of the articles of war. *Reu v. Withers*, cited, *ibid.*

(a) *Pl. Mr. Peck's observations upon this subject, Law of Evidence.*

## SECTION V.

*Of Deeds.*

Private writings are divided into deeds, and writings of an inferior nature. The great distinction between them is, that deeds, *proprio vigore*, constitute and create an immediate obligation or release, whereas other writings are only a mode of evidence. An effect of this distinction was formerly adverted to, in examining the nature of the consideration requisite to support an obligatory promise; and it was shewn that an engagement by deed is in its own nature valid and obligatory, and does not require the existence of such a consideration, as is absolutely requisite to render a verbal engagement, or an engagement by writing inferior to a deed, efficacious. Upon the same principle, the discharge of an obligation by an ordinary writing is of no legal efficacy, merely considered in itself: a receipt for a sum of money is only evidence of the act of payment; it is open to contradiction by opposite evidence, that the payment did not take place, and has no immediate intrinsic operation in producing a discharge; whereas a release by deed destroys and annuls the obligation, and is perfectly independent of every extrinsic circumstance. An obligation contracted by deed is analagous to the *Roman* stipulation, as was shewn in a former number of the Appendix already alluded to; and the discharge of an obligation by release is, in the same manner, analagous to an acceptilation; the nature of which is explained in a note to No. 571. of the preceding treatise.

The effect of an engagement by deed is of considerable importance, in the event of the death of the debtor, on account of its being a charge upon real estate; which a verbal engagement, or an engagement by any inferior writing, is not, and also on account of its having a priority in the application of the personal estate.

In case a deed is entered into, engaging, for the performance of a preceding obligation by the same person, the inferior obligation is merged in the higher efficacy of the deed, which becomes the only effectual title. But a deed given by another person, as a collateral security, does not affect the validity of the previous engagement. *White v. Cuyler*, 6 T. R. 176.

In the same case it was held that an instrument purporting to be a deed, executed by a married woman without her husband, and therefore void, did not deprive the other party of the right which he had against the husband, as upon a parol contract; and in *Lowe v. Peers*; 4 Bur. 2225, in which a man gave a woman an engagement by deed, to pay her 1000*l.* if he married any other person, which engagement

'engagement was held to be illegal': Lord *Mansfield* said, that if there was really any mutual contract under fair and equitable circumstances, the plaintiff would still be at liberty to bring her action, for the void bond could never be in her way.

The general definition of a deed is an act in writing, sealed (a) and delivered. In the earlier periods of our judicial history, the art of writing was very far from being generally diffused, and hence arose the circumstance that the acts of individuals were rather ratified by appropriate seals, than by written signatures; accordingly a seal became the solemn mark of a legal obligation, and contracts or acts of liberation, as already observed, derived no additional legal efficacy from merely being reduced into writing. It does not seem that any particular manner or form of words are requisite to constitute the sealing and delivery of a deed. I conceive it to be sufficient, that the seal should be assented to as that of the party, and that he should in any manner testify his intention of delivering the instrument as his deed, having it in his presence. In one case, the last mentioned circumstance seems to have been considered as unnecessary. In this case a wife joined with her husband, in executing a mortgage of her estate which was void. After his death she did several acts confirmatory of the transaction, which, Lord *Mansfield* said, was a clear acknowledgment that the deed was hers, and that she was content that the parties should enjoy according to the terms of the deed. *Goodright dem Carter v. Strahans, Cowp.* 201.

I have in a former publication intimated my idea, that in that case a disposition to effectuate the moral justice of the case between the parties is more conspicuous, than a conformity to the principles upon which it ought to have been decided as a mere question of law; and that at least it ought to have been left to the decision of the jury, whether any of the existing circumstances were intended as an execution, or whether they were not the consequence of an apprehension, that a valid deed already existed.

(a) In *Adam v. Kerr*, 1 *Bos.* 360, an instrument executed in *Jamaica*, and declared upon as a deed appeared to have no seal, though a mark of a particular kind had been made with a pen, in the place where deeds are usually sealed; and it became a question whether evidence was admissible, of a custom in *Jamaica* to execute bonds in this manner. The opinion of the court appears to have been in favour of such evidence, but the point was not judicially decided. In the case in *Carolina*, cited in a former section, it is said, the people began at length to forget the original use of the institution of seals, and to seal with any impression they could get; and the law rather than invalidate the whole transaction, left it to the jury to decide whether that was the seal of the party or not. In this country the people have departed still further from the use of seals, by not making any impression at all, scratching something like a seal upon the margin of the paper, and making that pass for a seal.

In the case of *Ball v. Dunsterville & al.* 4 T. R. 313, it appeared that one of two partners, in the presence of the other, executed a deed for them both; there was but one seal, and it did not appear that he had put the seal twice upon the wax; and the court were of opinion that it was a good deed, that no particular mode of delivery was necessary, for that it was sufficient if a party executing a deed treated it as his own; and they relied principally on this deed having been executed by the one for himself, and the other in the presence of that other.

It has been a matter of dispute, whether the appellation of a deed was referable only to contracts, or extended to other sealed instruments; for instance, awards when they happened to be under seal; and consequently whether it was requisite for such instruments to have the stamp imposed upon deeds. Mr. Justice Lawrence, in a late case, mentioned, that the question had, with respect to awards, been agitated several times; but he thought the final determination was, that if the arbitrator delivers an award under seal as a deed, it must then have a deed stamp, but although it were by a writing under seal, yet if it were not delivered as a deed, it was sufficient if it had an award stamp. *Brown v. Vaufer*, 4 East, 384.

At common law the signature of the party certainly was not essential to a deed; but it is the opinion of many great authorities that it has been rendered so, by the statute of frauds. As the practice of signing deeds is universal, the discussion of that question cannot be of much importance; but it seems to be extraordinary that it should be supposed, that the statute has introduced any alterations, with regard to the general question, as all the provisions of it are merely applicable to particular subjects, and there are many deeds with which those subjects have not any kind of connection. With regard to the disposition of landed property, a writing signed by the party is expressly required.

The act of an agent, with respect to the object of his authority, is in general regarded as the act of the principal; but no person can be liable to the obligation arising from a deed, unless it is either executed by himself, (in which expression I include the acts above referred to, as amounting to an execution,) or unless the authority is given by another deed, so that the act is ultimately founded upon his own sealing and delivery. Accordingly, it has been ruled that one partner in trade, whose general authority is more extensive than that of an agent, cannot bind another by his execution of a deed. *Harrison v. Jackson*, 7 T. R. 207.

Where a person is empowered, by a letter of attorney from another, to execute a deed, or do any other act for him, it must be  
done

done as the act of the party himself, and not as the act of the attorney; but the particular mode and form of doing the act is not material. Therefore, when the attorney *Wilks* signed for *J. Brown, M. Wilks*, it was held to be a good execution of the deed, as the deed of *Brown*. See *Wilks v. Back*, 2 *East*, 142, and the authorities there referred to.

Where a deed is absolutely void in its execution, subsequent delivery may make it good as a deed then first executed. Such, for instance, is the deed of a married woman, which is void in respect of her legal disability to contract, but may be rendered valid by her sealing and delivery after she becomes a widow. But if the deed is only such as may be avoided, by persons for whose protection the law has introduced particular exceptions, the whole effect is derived from the first execution, and cannot be varied by any subsequent delivery. Subsequent acts may amount to a confirmation, but cannot operate as an execution of the deed. See *Perkins*, §. 154. *Zouch v. Parsons*, 3 *Bur.* 1794. *Goodright v. Strahan*, *Cowp.* 201.

The books on the law of evidence contain much learning, upon the subject of its being necessary upon pleading a deed, to produce it to the court, (or, in the language of the law, to make a profert of it,) and upon the distinctions in that respect, resulting from the different nature of the deeds alleged, upon the situation of the parties making the allegation, and upon their being the foundation of a claim or defence, or merely incidental. I have all along declined entering into discussions, which are confined to the rules of special pleading, not by any means as under-rating the importance or excellence of that branch of our municipal jurisprudence, but as being foreign to my general purpose. I, therefore, shall only observe, that by modern determinations, the profert of deeds may be dispensed with, upon an allegation of their being lost by time, or accident, or cancelled, in consequence of which determination, a person is not by such an accidental loss deprived of his ordinary remedies by the common law, and compelled to resort to the assistance of a court of equity. *Read v. Brookman*, 3 *T. R.* 151. *Bolton v. Bish. of Carlisle*, 2 *H. B.* 259.

With respect to giving deeds in evidence; the first rule is, that the deed itself must be produced, unless a satisfactory excuse can be given. What shall amount to such excuse, may vary according to the numerous cases, between the proof of its being accidentally consumed by fire, and the simple allegation that it cannot be found.

In the case where it was held that the profert might be dispensed with, upon an allegation of the deed being lost by time, or accident, Lord *Kenyon*, truly said, there was no doubt but upon the

trial of a cause, depending upon the existence of such a deed, every proper suspicion would be entertained. A mere excuse hatched for the purpose would not be considered as a sufficient apology for not producing the deed, nor indeed any excuse, but such as the justice and urgency of the case would warrant.

There is evidently in point of reason a distinction upon this head, between deeds which regularly should be in the custody of the person claiming the benefit of their contents, and those which belonging to or being in the custody of one person, are material to the interest of another. In the latter case, an application to the person to whom the possession of the deeds properly belongs, and an inability on his part to find them, ought to be considered as sufficient to warrant the admission of secondary evidence; and such is the practice upon the subject; for it would be unjust that one man should suffer by the negligence of another, over whom he has no control.

The strongest case for dispensing with the production of an existing writing is, when it is or ought to be in the hands of the adverse party who upon notice refuses to produce it.

There is a case respecting the non-production of a deed; which did not pass without a difference of opinion, and which appears to be very fairly open to dispute.

An ejectment was instituted upon the several titles of *Haldane* and *Urry*. Evidence being given of a title in *Haldane*, it appeared by the cross-examination of one of the plaintiff's witnesses, that *Haldane* had conveyed to *Urry* by a deed, which the plaintiff had in court, for the production of which no notice had been given, and which the counsel refused to produce.

This was held to defeat the title under *Haldane*, but not to set up the title under *Urry*, for that the refusal to produce was sufficient to let the defendant into parol evidence of *Haldane's* estate being divested; but not to excuse the plaintiff from shewing *Urry's* estate by the best evidence. The refusal to produce was regarded as a presumption of something fatal in the contents.

Mr. Justice *Yates* briefly intimated an opposite opinion, observing that the plaintiff's counsel were not obliged to produce this deed, that no man can be obliged to produce evidence against himself; and the only consequence of notice to produce it would have been the admitting inferior evidence. *Roe v. Harvey*, 4 *Bur.* 2484. The decision would have been very proper, if it had related to two distinct pieces of evidence; if it had been proved by parol, that *Haldane* had conveyed it to a third person, that would not have authorized the plaintiff to prove, that that person had conveyed to *Urry*, except by the proper rules of evidence; but the fact that

*Haldane* had conveyed to *Urry*, was one entire proposition, which ought to have been either adopted or rejected; and not from any disapprobation of a party's conduct, or from any presumption of an unknown something, garbled and separated.

Lord *Mansfield*, in the same case, observed, that in civil causes the court will force parties to produce evidence, which may weigh against themselves, or leave the refusal to do it after proper notice, as a strong presumption to the jury. But in a criminal or penal cause, the defendant is never forced to produce any evidence, though he should hold it in his hands in court.

That a party shall be actually forced to produce the evidence, so as to be punished for refusal, is a proposition totally unwarranted by authority, and I suppose that is not what was meant by the expressions above quoted, and what is said respecting leaving the refusal as a presumption to the jury, should it be received with considerable qualification; for it cannot be admitted that such a presumption should stand instead of all other evidence, and supply the total deficiency of proof. It is only in weighing the effect and substance of evidence, in its nature adequate to the support of a fact in question, that the jury can take into consideration the opportunity allowed to the opposite side of contradicting the evidence if false, or of destroying the inference from it, if erroneous, and thereby conclude that evidence, otherwise suspicious, is true; or that an inference, otherwise slight and feeble, is correct (a).

The distinction between civil, and criminal, or penal cases is expressly disallowed, in the case of *The Attorney General v. Le Merchant*, 2 T. R. 201. n. where, upon an information in the exchequer, for forfeitures under a revenue act, the subject was elaborately and with much perspicuity examined by the Lord Ch. Baron *Smith*.

In a very late case it was decided, that if a deed is pleaded with a protest, nothing can dispense with the production of the deed itself, as the deed is supposed to be in court at the time, and the party takes upon himself to aver the existence. In the particular case the evidence shewed that the deed had been destroyed by the opposite party; and as that circumstance would have been the most favourable ground of exception, it is the strongest proof of the universality of the rule. *Smith v. Woodward*, 4 East, 585.

In case there appear to be sufficient circumstances to excuse the production of the deed, the rule of evidence, as stated by Lord *Hard-*

(a) In a former publication I took occasion to observe, with reference to this case, that the having an instrument in court may not always be sufficient to countervail the inconvenience arising from a want of notice to produce it; because, upon a notice, the party may come prepared with evidence, to repel the inferences that might arise against him, upon the mere production of the instrument called for.

*wicks*, in *Villiers v. Villiers*, 2 *Atk.* 71. is, that the best evidence the circumstances of the case will allow must be given. If an original deed is lost, the counterpart may be read; and if there is no counterpart forthcoming, then a copy may be admitted, and even if there should be no copy, there may be parol evidence of the deed, and the manner of its being lost, unless it happens to be destroyed by fire, or lost by robbery, or any unforeseen or unavoidable accident, which are sufficient excuses in themselves.

There are authorities, that the recital of one deed in another is no evidence of the deed recited, unless against the parties to the other, but against them it has been held to be admissible. But according to the general doctrines just stated, it should seem that such a recital might be admissible, under circumstances which should satisfy a jury of its being correct; and it would at least be equal to parol evidence.

In the case of *Tyssen v. Clarke*, 3 *Wils.* 541. upon the trial of a writ of right, the draughts of two leases were allowed to be read in evidence, although there was no other evidence of such leases having actually existed. There being other circumstances to induce the inference, that a party had only a leasehold interest, the court held that the draughts ought to be read, as reasonable presumptive evidence of there having been such lease once existing.

In *Burridge v. The Earl of Essex*, 2 *Lord Raym.* 1292. an inquisition *post mortem*, setting out the tenor of a deed, was held good evidence of the deed (a).

It is said, that if a deed requires enrolment, then a copy of the enrolment is sufficient; but if it needs no enrolment, it is otherwise. The nature of this essay does not require a statement of the cases, in which enrolment is or is not necessary; a similar distinction has been taken with respect to an enrolment being sufficient, to dis-

(a) In a case before the court of Exchequer in *Ireland*, 30th *May*, 1794, it was properly decided upon the circumstances, that a copy of a letter book should not be admitted in evidence; but the court seemed to lay it down as a general rule applicable to all cases, that no copy of a copy of any writing could ever be received; and a case is cited before *Lord Lifford*, in which that rule seems to have been applied to the case of a deed, without regard to any particular considerations in the immediate case. *Ryves v. Bradall*, *Ridgeways Reports*, 184. This, as a general proposition, has perhaps been too hastily taken for granted. The general expression of *Gilbert*, that a copy of a copy is no evidence, is accompanied by reasons which do not go to the absolute exclusion in all possible cases; for instance, if it is clearly proved that a first copy of a given writing was examined with the original, and a second copy with the first; and the non-production of the original, and first copy were satisfactorily accounted for; the copy of the copy would be the best evidence, which the nature of the case would admit, and would be at least equivalent to a draught, a recital, or parol evidence.

pense with proof of the execution of a deed; this distinction with the objections to it will be stated presently.

It is also said, that the deed must be regularly proved by one witness at least, which is evidently intended to mean a subscribing witness; it is not, however, to be understood that such subscription is essentially necessary, but only that if the deed is actually attested, one of the witnesses attesting it must be examined; and as it is perfectly unusual for deeds to be executed without attestation, the rule is stated in general terms.

I conceive that the proposition of its not being necessary by the law of *England*, that a deed should be attested by subscribing witnesses, may be stated without reserve. The discussion of this question produced an elaborate judgment, in the superior court of *North Carolina*, which has already been referred to, as exemplifying the rule that the best evidence must be given, which the nature of the case will admit.

The general rule, that a deed must be proved by the subscribing witnesses, is subject to several exceptions; the first of which is that deeds, and all other writings which are above thirty years old, prove themselves.

This exception is qualified in cases mentioned by *Gilbert*, of trials at the assizes where possession had not gone with the deed, where there were rasures or interlineations, or where the deed imports a fraud, as by purporting to convey a reversion to one man, which by a deed of a subsequent date is conveyed to another. I rather think that the true effect of those cases is no more than that such circumstances ought to induce a jury, to entertain a strong suspicion of the authenticity of the deed; not that they should exclude it from being read, being of sufficient antiquity in point of date; there is no distinction which it is more important continually to keep in view, than that between objections to the receipt of evidence, and objections to its efficacy or credit when received.

Another exception is, that party need not prove the execution of a deed, which comes out of the hands of the opposite party upon notice to produce it. In a question of settlement, the sessions having required proof by subscribing witnesses of certain indentures of apprenticeship, the court of King's Bench decided, that that was not necessary; and Mr. Justice *Buller*, in giving his opinion upon the subject, said, that the only question as a general one in the case was, whether the indentures of apprenticeship should have been received in evidence? He did not go the whole length of saying, that the production of them by the appellants was conclusive against them, but undoubtedly they ought to have been received. In civil actions where a plaintiff wishes to give in evidence a deed in  
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the defendant's custody, he gives the defendant notice to produce it, and the deed, when produced, must *prima facie* be taken to be duly executed; because the plaintiff, not knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution of the deed. Therefore an instrument, coming out of the hands of the opposite party, must be taken to be proved. If indeed there be any fraud in the case, the other party will not be precluded from impeaching it. *Vi. Rex v. Inhab. of Middlesex*, 2 T. R. 41. Mr. Peake, after quoting this case, says, that the rectitude of the decision, as extending to third persons, into whose hands an indenture may fall, has been doubted by very high authority. There certainly is considerable difficulty on which ever side the point is decided, for the party requiring the production may be ignorant who are the subscribing witnesses. On the other hand, the accidental possession of the instrument may be wholly unaccompanied by any knowledge of its authenticity; but I conceive that the purposes of justice will be more frequently answered by the admission of this evidence, than by its rejection.

According to the opinion of Lord Chief Justice *Holt*, in an anonymous case, 12 *Mod.* 607. if it is proved that the witnesses to a deed are dead, beyond the seas, or that a party has made strict inquiry after them, and cannot hear of them, he shall be allowed to prove their hands. There are several cases connected with this proposition, which I think it material to notice.

In *Henley v. Phillips*, 2 *Atk.* 48. it is said, that if witnesses are dead who have attested a deed, it is not sufficient that you prove the hand-writing, but you must likewise shew that they are dead. Where a person has lived abroad for some years, there must be strict proof of his death; otherwise, where the witness has lived constantly in *England*, from the time of subscribing his name to the day of his death, there a slight evidence of his death is sufficient, especially where the person who proves his hand-writing knew him intimately, and swears that he believes him dead; in such a case, the court will not expect such nicety as that a certificate of his death should be produced. The distinction just stated appears to have no foundation in reason, and is so far from being consonant to actual practice, that proof is admitted of the hand-writing of an attesting witness who is alive, but out of the kingdom.

Where a subscribing witness became the representative of the creditor, proof of the hand-writing was admitted. *Godfrey v. Norris*, *Str.* 34. Also where the witness became the representative of the debtor. *Anon.* cited, 1 *Wms.* 289. So where the witness had become blind. *Vi. Wood v. Drury*, 1 Lord *Raym.* 734. or was rendered incompetent

incompetent by being convicted of forgery. *Jones v. Mason, Str.* 833.

In *Barues v. Trompowsky*, 7 T. R. 265, proof was given of the signature of the party to a writing, which appeared from the circumstances to have been executed at *Riga*. There was evidence of there having been a person at *Riga*, of the name of the attesting witness, but no proof of his hand-writing; and this was ruled to be insufficient. Lord *Kenyon* (stopping the counsel) said, "We ought not to suffer this point to be called in question; it is too clear for discussion. I do not say, that proof of the hand-writing of the contracting party is not under any circumstances sufficient, where there is a subscribing witness, as if no intelligence can be obtained respecting the subscribing witness, after reasonable inquiry has been made; but here the witness is a known person residing at *Riga*. Generally speaking, every instrument, whether under seal or not, the execution of which is witnessed, must be proved in the same manner, regularly by the witness himself if living, if dead, by proving his hand-writing, if abroad by sending out a commission to examine him, or at least by proving his hand-writing, which last indeed is a relaxation of the old rules and admitted only of late years. I remember a case alluded to, in the argument of counsel which was tried at *Guildhall*, where the subscribing witness having been domiciled in a foreign country, Lord *Mansfield* admitted evidence to be given of his hand-writing. The opinion was adopted with approbation at the time, on account of the necessity and convenience of the case, and I myself have adopted it in cases which have been tried before me. The same medium of proof has also been admitted, in cases where the subscribing witness has been sought for and could not be found, so as to furnish a presumption that he was dead. But the rule has never been relaxed further than these instances, and there is neither necessity nor convenience in doing so."

In *Adam v. Kerr*, 1 Bof. & P. 360, a bond was executed in *Jamaica*; one of the attesting witnesses was dead, and his hand-writing was proved; the court were of opinion that this was sufficient proof of the execution, without proving the hand-writing of the other, who was resident abroad, or of the obligor. In *Cunliffe v. Seston*, 2 East, 183, a bond appeared to be attested by one *Bate*, and by *Houghton*, who had since become interested, and was one of the plaintiffs. Diligent inquiry was made for *Bate*, at the place where the obligor and obligee lived, without having been able to obtain any intelligence of such a person, who he was, where he had lived, or any other circumstances relating to him; this was ruled to be a sufficient ground for allowing a proof of the hand-writing  
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of the witnesses, who had become interested, to be a sufficient proof of the execution. Nothing was said in this case respecting the hand-writing of the obligor. Upon the point decided, Mr. J. *Gryse* said, "I do not see what the plaintiffs could have done more than they have; and if they have used due diligence without effect, that will let them into secondary evidence: I form this opinion with reference to what is daily passing in the world. The frequency of written instruments, in modern times, has made persons less careful than they used to be, in the selection of witnesses to their attestation. It has occurred to me to know that persons unknown to the parties, such as waiters at a tavern, have been called in to attest instruments of the most important kinds, even wills, where the parties had no previous knowledge of them, nor even were apprised that they bore the names by which they attested the execution (a)."

In *Prince v. Blackburn*, 2 *East*, 250, evidence was admitted of the hand-writing of a witness, who, at the time of the trial, was out of the jurisdiction of the court, so as not to be amenable to the process, though it was objected that there was no proof of his being domiciled abroad, and that the instrument being executed in *England* made a distinction.

Where a witness to a bond was interested at the time of his attestation, and proof was admitted of his hand-writing, the court, on a motion for a new trial, were of opinion, that he could neither be examined himself, nor could proof of his hand-writing be sufficient, and that it was not like the case of a subscribing witness, being afterwards appointed executor of the obligee, in which case proof of his hand-writing might be given; but on being further informed that the hand-writing of the obligor had been also proved, Lord *Kenyon* said, that on consideration of all the circumstances, the matter had best rest where it was. *Sevire v. Bell*, 5 *T. R.* 371.

A subscribing witness having gone to the East Indies, and it not appearing, after due inquiry, that he had ever returned, and the defendant having admitted the execution of the instrument, it was held sufficient to entitle the plaintiff to a verdict. *Coghlan v. Williams*, *Doug.* 93. But where, in order to establish a bankruptcy

(a) It would certainly be attended with great advantage, if a system were adopted for having deeds authenticated, by the presence of a person invested with public character, either attesting his own knowledge of the identity of the parties, or having it certified on oath, by an act attached to the instrument. It has occurred to me, in practice upon a criminal prosecution, to see an instance of a forged deed attested by an attorney of the highest respectability; another person being introduced to him by the prisoner as the party to the deed. The various questions which have occurred respecting the inquiry for subscribing witnesses, strongly evince the propriety of selecting, as attesting witnesses, persons of settled residence, and considerable station in life.

against a third person, the bankrupt's acknowledgment of a bond was proved, the subscribing witness being in England, the court held it insufficient. *Abbott v. Plumbe*, Doug. 216. In another action by assignees it was proved, in order to shew an act of bankruptcy, that the defendant had, upon his examination before the commissioners, produced and admitted a bill of sale from the bankrupt; which was held to be sufficient proof of the deed as against him. *Bowles v. Longworthy*, 5 T. R. 366. It has since been held, without adverting to the preceding case, that the defendant's admission, in his answer to a bill of discovery, was not admissible evidence of the execution of the deed, without laying some foundation for it, by shewing that inquiry had been made for the subscribing witness, and that he could not, with due diligence, be met with. It was suggested, on the part of the plaintiff, that no knowledge of the witness could be obtained by him; but the chief Justice said, that no one person of that name (of whom several were suggested in court within reach of inquiry) had been applied to, for the purpose of knowing whether he was the subscribing witness. The counsel for the plaintiff observed, that the court had always considered the evidence of the subscribing witness material, in order that the defendant might have a disclosure of the circumstances; but here the defendant had an opportunity, together with his acknowledgment of stating all the accompanying circumstances, and therefore could not be hurt. But Mr. Justice *Le Blanc* said, that did not follow; a fact may be known to a subscribing witness, not within the knowledge of the obligor, and he is enabled to avail himself of all the knowledge of the subscribing witness, relative to the transaction. *Call v. Durning*, 4 East, 53. It seems very difficult, if not impossible, to distinguish this case from the preceding one of *Bowles v. Longworthy*. Mr. *Peake*, in his first edition, distinguishes *Bowles v. Longworthy* from the other cases which preceded it, by the difference between a mere verbal acknowledgment, and one made in the course of justice; but the case of *Call v. Durning* cannot be supported by that distinction.

In point of convenience the first case certainly has stronger claims to adoption, in establishing the rule upon the subject: there is something very remote in the probability of a subscribing witness knowing any thing fatal to a deed, which is at the same time unknown to the party executing it. The accidental circumstance, that several persons of the name of *Richard Wilson* (the subscribing witness) were known to individuals in court, if it proves any thing, seems to prove a great deal too much. The plaintiff was not, by any law, necessitated to take notice that that is the name of the Lord Chancellor's secretary. If *John Smith* appeared as the name

of attesting witness, it would hardly be expected that a party should inquire after every *John Smith* who might be known to the persons present at the trial; an application to one *John Smith* would be a very slight proof of a negative proposition; and it would be very difficult to draw the line between one and a thousand.

Where a witness who had been subpoenaed did not appear, and a written acknowledgment by the party was proved, the deed was allowed to be read. 12 *Mod.* 500. *Bull. N. P.*

In *Bretton v. Cope, Peake, N. P.* 30, Lord *Kenyon* held it to be clear, that the rule requiring the proof by an attesting witness, extends to a deed which has been cancelled. In *Kealing v. Ball, Peake, Ev. App.* proof was given of the loss of a bond, purporting to be executed by the defendant, but the names of the attesting witnesses were not remembered by the person who proved having seen the bond. Evidence was given of an acknowledgment of the debt by the defendant, and this evidence was ruled by Lord *Kenyon* to be sufficient. His Lordship said, that had it appeared who the subscribing witnesses were, the plaintiff must certainly have called them; but that it was the business of courts of justice to apply the general principles of the law to new cases as they arise; and this was a new case, for it did not appear that the plaintiff could, by any possibility, know who the subscribing witnesses were. In the case of *Birt and Barlow, Doug.* 171, cited in the preceding section, Mr. Justice *Buller*, speaking of the necessity of examining the witnesses to a register of marriage, said, that the original register was not necessary to be produced; and it was only where that was required, that subscribing witnesses must be called. If this observation was intended (as it seems) to be general, and not to be merely confined to the preceding subject of parish registers, it is contrary to the opinion incidentally expressed by Lord *Kenyon*, in the case last preceding. The opinion of Lord *Kenyon* seems, upon the whole, more analogous to the general system of the law upon the subject.

Mr. *Peake* observes, of a *dictum* of *Gilbert*, that proof of the hand-writing to a deed is not sufficient, without proving the act of delivery; that it is destroyed by the subsequent decisions. It is, however, to be observed, of all the cases respecting the hand-writing of witnesses, that the fact attested by their subscription is the sealing and delivery: but I think that even without that circumstance, as if the hand-writing of a party was proved, there being no attesting witnesses, it would be evidence for the jury of a proper execution. In cases upon wills it is held, that an attestation of the will having been signed by the testator, in the presence of the witnesses, is evidence to be left to the jury, of the witnesses having complied

complied with the requisite in the statute of frauds, of signing in the presence of the testator. *Hinds v. James, Comyns 531. Croft v. Pawlett, 2 Str. 1109 (a).*

By statute 26 *Geo. 3. c. 57. s. 38.* reciting that difficulties, expence and delay, arose in proving deeds in *England*, which were executed in *India*, and *vice versa*, it is enacted, that in such case proof of the hand-writing should be admitted.

It has been ruled, that it is not necessary that the subscribing witness should actually *see* the party execute; for if he be in an adjoining room, and the party, after executing the deed, brings it to him, tells him that he has done so, and desires him to subscribe his name as a witness, that is sufficient. *Park v. Mears, 2 B. & P. 217.*

But though the subscribing witness is examined, and denies the deed, other evidence may be admitted, *Doug. 216.* It has even been said, that witnesses ought not to be admitted to give evidence against their own attestation. *4 Bur. 224.* But this position can hardly be true to its full extent. *Ex vi necessitatis*, they must be examined; and it is impossible to compel them to swear otherwise than as they assert the truth to be; certainly such evidence ought to be received with very great suspicion. There was a case of considerable value, in which the witnesses to a will denied their attestation, but the will was proved by other evidence, and the witnesses were afterwards convicted of perjury, and sentenced to transportation. *Lowe v. Joliffe, 1 Bl. Rep. 365.*

A distinction has been already referred to, that if a deed is enrolled, which needs enrolment, a copy shall be received as evidence; but if it needs no enrolment there, though it be enrolled, the copy is no evidence. *Gilb. 97. 99.* The same distinction, if

(a) I have, in a former note, adverted to the danger of subscribing witnesses being imposed upon, by the personating of parties with whom they were unacquainted, and to the benefit which might result from a solemn authentication. This expedient would have the further benefit of dispensing with the necessity of examining attesting witnesses, which would often very much diminish the expence of litigation. It would also be conducive to the interests of justice, to establish a provision, that no plea should be admitted denying the execution of a deed, without its being accompanied by an affidavit of verification, or at least an affidavit of circumstances, shewing that there was a real question upon the fact of execution intended to be tried. Where the question of the execution of an instrument is not raised by the pleading, it might be very useful for the courts to be authorized, by a rule, to require a party to admit or deny, upon oath, before a commissioner, the writings purporting to be subscribed with his signature, and for the admission to be deemed sufficient evidence\*. These alterations in the law could only be introduced by legislative authority, but part of the benefit above suggested is within the reach of the courts themselves, who might very beneficially adopt the practice of not allowing any other plea to be joined to that of *non est factum*, without special reasons verified by affidavit.

\* The above idea presented itself to me in adverting the proofs of recognition, mentioned by *Pothier* in the text.

correct, must apply to the necessity of proof by witnesses; but Mr. Justice *Buller* observes, that the law that a bargain and sale inrolled may be given in evidence, without proving the execution; but that where a deed needs no inrolment there, though it be enrolled, the execution of it must be proved, may well be doubted; notwithstanding that deeds of bargain and sale inrolled, have frequently, in trials at *nisi prius*, been given in evidence without being proved. In support of which practice, the case of *Smartle and Williams*, in 1 *Salk.* 280, is much relied upon; but that case is wrong reported, for it appears by 3 *Lev.* 387, that the acknowledgment was by the bargainer, and so it is stated in *Salk. MSS.*; besides, it appears from both books that it was only a term that passed, and consequently it was no inrolment within the statute. If divers persons seal a deed, and one of them acknowledge it, it may be inrolled, and may ever after be given in evidence as a deed inrolled; but it would be of very mischievous consequence to say, that a deed inrolled, upon the acknowledgment of a bare trustee, might be given in evidence against the real owner of the land, without proving it executed by him. However, that has been the general opinion, and it seems fortified in some degree by the statute 10 *Anne, c.* 18, which provides, that where any bargain and sale inrolled is pleaded with a profert, the party to answer such profert may produce a copy of the inrolment. On the other hand, it seems absurd to say, that a *release*, which has been inrolled upon the acknowledgment of the releasor, should not be admitted in evidence against him, without being proved to be executed, because such release does not need inrolment; and indeed such deeds have often been admitted, and that was the case of *Smartle and Williams*; the deed did not need inrolment, yet being inrolled, on the acknowledgment of the bargainer, it was read in evidence against him, without being proved.

The indorsement of the proper officer is evidence of the inrolment of a bargain and sale, or of the assignment of a duchy lease, pursuant to a proviso. *Vi. Kinnersley v. Orpe, Doug.* 56.

In case of a deed being accidentally cancelled, there are several distinctions to be found, arising from the nature and operation of the deed, and of the necessity for its being offered to the court in pleading; likewise, respecting its being directly the point in issue, or only coming in incidentally. I apprehend it may now be justly stated, that all these distinctions are exploded, and that it is an universal rule, that such an accidental circumstance will in no case prejudice a right which has been duly acquired. Whatever objections would exclude the admission of a deed thus cancelled, would apply with equal force to the admission of collateral or presump-  
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tive evidence, of a deed absolutely lost: but recent practice has established the admission of that evidence beyond the reach of controversy. And the courts have, in modern times, so completely deviated from the ancient strictness, by which there was a failure of justice, according to the ordinary course of law, in the case of a deed being lost or destroyed, as to allow very extensive rights to be held under the fictitious authority of deeds and instruments which never had, nor in truth could ever have, been believed to have had an existence, except in the imagination. Such is the nature of the presumptions, which were examined with some particularity in the preceding number.

The following distinctions, stated by *Gilbert*, are founded upon a fair analogy, and seem fully applicable to the case of a deed cancelled by design.

“ If there be a joint contract, or obligation, and one of the obligors’ seals be torn off, it destroys the obligation, because they are both bound as one person; and if one be discharged, the other cannot stand obliged, because they both make up but one obligor. But if two persons be bound severally, there, if the seal of one of the obligors be broken off, yet the obligation continues in the other, because there are several contractors and several contracts, and therefore by destroying the obligation of one of them, the obligation of the other is not taken away. But if two men are bound jointly and severally, and the seal of one of them is torn off, this is a discharge to the other; for the manner of the obligation is discharged by the act of the obligee, and therefore that is, according to the rule of law that construes every man’s act most strongly against himself, a discharge of the obligation itself; besides, since both are jointly bound as one person, the person discharging one of them is a discharge of the whole; and a satisfaction is supposed, by the very cancelling it, to be given for the whole debt; and when one man is discharged who concurs to make an obligor, and the whole debt is satisfied, no obligation can rest upon the other.”

With respect to alteration of deeds, the rule has been, that if an alteration has been made by a stranger, in a point which is not material, it does not avoid the deed; but it is otherwise, if it is altered by a stranger in a point material, for the witnesses cannot prove it to be the act of the party that sealed and delivered it, when there is any material difference from the sense of the contract; but if the contract doth contain the sense of the parties, the witnesses may well swear it to be their act, for an immaterial alteration doth not change the deed, and consequently the witnesses may attest that very deed without danger of perjury. But if the deed be altered by the party himself, though in a point not material, yet it

will avoid the deed; for when the party himself makes any alteration in his own deed, it discharges the contract, for the contract hath the whole force from the words of the obligor; now, when the obligee undertakes to supply it with new words, and to alter those the party hath fixed upon, this is according to the rules of law which takes every man's own act most strongly against himself; a new making, and a new framing of the contract, and for a man to contract with himself, is entirely void and ineffectual. 11 Co. 27.

The rule concerning the alteration by a stranger, in a material part, has been extended to bills of exchange, in the modern case of *Master* against *Miller*, in which the determination of the King's Bench was confirmed by the Exchequer Chamber. 4 T. R. 320. 2 H. B. 141. It was found by special verdict, that the date of the bill had been altered by some person unknown, and the bill was ruled to be thereby utterly vacated. One judge maintained the opposite opinion, but that one was Mr. Justice *Buller*. And with all the deference which is due to the authority of a solemn adjudication, it is impossible to read his most excellent argument upon the occasion without regretting, that what was indisputably the real justice of the case, should be sacrificed to the application of a technical rule, extended beyond all former precedent, and that rule itself rendered disputable in principle, by decisions upon cases having a fair analogy in their nature and circumstances.

That the rights and obligations of two persons shall not be affected by the unauthorized conduct of a third, whether proceeding from folly or from guilt, is a rule which is founded upon the eternal principles of justice.

In respect of deeds, the ancient rules of pleading had rendered it necessary, that the deed itself should be formally tendered to the court. If the deed was accidentally lost, or cancelled, the party claiming under it was without a remedy, by the ordinary course of law. These rules were not, in their nature, applicable to instruments not under seal; and the reasons stated for rendering a deed inefficacious, which has been altered by a stranger, seem entirely to proceed from the supposition of the deed being brought by profert before the court.

In the progress of judicial improvement, when it appeared that the seals had been torn from a deed by the play of a child, good sense was allowed to prevail, and the effect of the instrument was sustained. In the case of *Read* against *Brookman*, 3 T. R. 151, the same judges of the King's Bench, who decided that in *Master* and *Miller* the bill was vacated, ruled most properly, that profert of a deed might be dispensed with, by shewing that it was lost by  
time,

time, or accident. In the case of *Bolton v. The Bishop of Carlisle*, 2 Hen. Bl. 259, the three surviving judges of the Common Pleas, who had before concurred in the affirmance of *Master and Miller*, gave their opinion, which I admit was not essential to their decision, but which still was given in a manner entitling it to judicial authority, that an allegation might be allowed, that a deed was cancelled by the seal being torn off and destroyed, or lost, and profert made of the remainder. Lord Ch. Justice *Eyre* said, "That if the deed be destroyed, God forbid that a man should lose his estate by losing his title deeds." Mr. Justice *Gould*.—"As to the cancelling a deed, a man's title to his estate is not destroyed by the destruction of his deeds. The case where the seal was torn off by rats, must be in the recollection of every one." Mr. Justice *Heath*.—"Surely no one will say that if deeds should happen to be stolen, therefore the owner should lose his estate." Mr. Justice *Rooke*.—(who came upon the bench subsequent to the decision of *Miller and Master*,) "I agree, that a right once vested is not divested by merely cancelling the deed." According to the principles of correct reasoning, it would certainly appear, that the circumstance of cancelling, which destroys the very appearance of a deed, or the actual loss of the deed itself, should produce as extensive consequences as an alteration in the writing. There is no reason why the officiousness of a stranger should induce a greater prejudice than the playing of a child, or the destruction by rats: and every argument is entitled to the most favourable reception, which maintains the essential interests of right and justice, in opposition to distinctions which are merely technical in their nature, and which are not fully supported by the most imperious authority.

That even an immaterial alteration by the party claiming under a deed, or writing, should defeat the instrument as against himself, does not seem objectionable; and the rules of evidence can never be understood to mean, that the one party can, by altering an instrument, defeat the interests of the other: where both parties concur in altering a deed, the protection of the revenue intervenes to prevent its validity, unless there is a new stamp. Where there are razures or interlineations appearing on the deed, it becomes a question of fact for the jury, whether they were made before or subsequent to the execution; and the decision of that question must of course depend upon the particular circumstances of each individual case.

## SECTION VI.

*Of Evidence of Hand-writing.*

The proof of hand-writing is a subject which concerns every kind of document, that may be adduced in evidence. *Gilbert*, in speaking of an indictment for perjury upon an answer in Chancery, observes, that the perjury may be illustrated by the comparison of hands, which possibly may be evidence in concurrence with other proof, that out of the answer itself evince the identity of the person. But that the comparison of hands only, should be a proof in a criminal prosecution, was never law but only in the time of king *James*; and the distinction has ever been taken, that the *comparison of hands* is evidence in civil, and not in criminal cases. The reason why the comparison of hands is allowed to be evidence in civil matters, is, because men are distinguished by their hand-writing as well as by their faces, for it is very seldom that the shape of their letters agree, any more than the shape of their bodies; therefore the comparison of hands serves for a distinction in civil commerce, for the likeness does induce a presumption that they are the same, and the presumption is evidence till the contrary appears. For every presumption that remains uncontested hath the force of an evidence; for light proof on the one side will outweigh the defect of the proof on the other, but in criminal prosecutions the presumption is in favour of the defendant; for thus far is to be hoped of all mankind, that they are not guilty in any such instances, and the penalty enhances the presumption. Now the comparison of hands is no more than a presumption, founded only on the likeness which may easily fail, because they are very subject to be counterfeited; therefore, when the comparison of hands is the only evidence in a criminal prosecution, there is no more than one presumption against another, which weighs nothing.

I am not disposed to contest the principle, that, in the application of evidence and in weighing its effect, a jury, resting upon the general presumption of innocence, may, without violating their duty, be more backward in drawing from the premises before them a conclusion which shall amount to the establishment of guilt, than they would be in drawing a conclusion from premises not more strong in the discussion of a civil right. But the general rules of law, concerning the admission and sufficiency of evidence, and the particular conclusion which a jury may draw from the evidence before them, in a particular case, are two things, which, as I have already more than once observed, whilst they differ most essentially in their nature and principle, are very subject to be confounded,  
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and which, therefore, in every discussion, should be most carefully kept distinct.

There seems to be something extremely illogical in the remarks which have been cited, as serving for the foundation of a general rule; "for if men are distinguished by their hand-writings as well as their faces, as it is very seldom that the shape of their letters agree any more than the shape of their bodies;" the same reason which convinces the mind, that a particular writing has come from the hand of a particular person, will equally produce that evidence whether the ulterior result is of one kind or another. The adequacy of evidence in its nature, to afford conviction of a particular fact, can never depend upon the effect and consequences of the fact intended to be proved. I conceive that the distinction is fully contradicted by modern authorities. In the case of the *Attorney General and le Merchant*, which has been already mentioned, it was laid down as a general proposition, (without any thing to confine it to the subject matter immediately under consideration,) that the rule of evidence in civil and in criminal cases is the same; the particular question which led *Gilbert* to the discussion of the general topic, has produced a determination directly opposite to the doctrine which he suggests; for in *The King against Morris*, 2 *Bur.* 1189, upon an indictment for perjury, in an answer in Chancery, proof of the hand-writing of the defendant, and the attestation of the jurat by the proper officer, were ruled to be sufficient evidence of the answer being actually sworn, so far at least as to put it on him, to shew or to raise a probable presumption that he was perjured.

In the case of high treason, comparison of hands is not sufficient for the original foundation of an attainder, because there must be some overt act, and writing is not an overt act; but it may be used as in circumstantial and confirmatory evidence, if the fact be otherwise proved. *Rex v. Hensley*, 1 *Bur.* 664. And in any other criminal prosecution, it will be evidence the same as in a civil suit, as on an indictment for writing a treasonable libel, proof of the hand-writing will be sufficient, without proof of the actual writing. The case of the seven bishops went upon the witness not being enough acquainted with their hand-writing, and not upon the nature of the evidence. *Bul. N. P.* 236 (a).

As to the nature of the proof upon this subject. In *Gould v. Jones*, 1 *Bl.* 384, Lord *Mansfield* admitted a witness to prove a person's hand-writing forged, who had frequently corresponded with him, but had never seen him write. In the case of *Goodtitle*,

(a) See the Collection of Cases on this subject in *At. Nolley's Law of Evidence in Princip.*

on the demise of *Revett v. Brabam*, 4 T. R. 497, on a question of forgery, upon a trial at bar, the plaintiff called two clerks of the Post Office, who swore that they were used to inspect franks, and detect forgeries. They were then asked, Whether, from their general knowledge of writing, the instructions were a natural or an imitated hand? this question was objected to, but allowed by the court, and the clerks swore that the hand was imitated; but in a subsequent case of *Cary v. Pitt, Peake, Ev. Ap.* Lord Kenyon refused to admit such evidence, saying, that though it was received in *Revett* and *Brabam*, he had in his charge to the jury laid no stress upon it. With all deference, however, the solemn decision of a court, upon the admissibility of a piece of evidence, is not affected by the opinion of a single judge, respecting its materiality in the particular instance.

It is now very clearly established by several authorities, that the proof of hand-writing must be made by persons having a previous knowledge of it, either from actually seeing the party write, or from correspondence; and that the comparison of an admitted with a disputed writing cannot be allowed, either by the inspection of the court and jury, or by the assistance of persons conversant with the examination of hand-writing, for the purpose of ascertaining its reality or detecting its forgery.

The reversal of the attainder of *Algernon Sidney*, which is often referred to as regulating the law upon this subject, does not seem to give much support to the distinction in question; for the act of reversal states several grounds and motives for infringing the conviction; and as to the hand-writing, there was that evidence of knowledge, which is now allowed to be admissible.

In one case where a parson had been long since dead, Lord *Hardwicke* admitted his book to prove *a modus*, the similitude of the hand-writing being proved by a witness, who had examined the parish books in which was the same parson's name. *Bull. N. P.* 236. But in another case, Mr. Justice *Yates*, at *nisi prius*, refused to let an entry, stated to be in the hand-writing of a deceased person, be proved by comparison with his returns to the spiritual court. *Brookbard v. Woodby, Peake, N. P.* 20. n.

Mr. *Peake*, in his *Law of Evidence*, seems to put the first case upon the circumstance of the witness having a general knowledge of the hand-writing appearing in the books, as distinct from the act of comparing and examining the two writings; in which point of view these cases may be possibly reconciled with each other.

In one case, Lord *Kenyon* accompanied his decision, that comparison of hands was no evidence, with the observation that if it were so, the situation of a jury who could neither read or write would be  
a strange

a strange one, for it would be impossible for such a jury to compare the hand-writing. *M'Pherson v. Boytes, Peake, N. P. 20.* Perhaps the occurrence itself of a jury, who could neither read or write, might be rather strange, but it does not seem the most accurate reasoning, to reject an assistance which in general cases would be beneficial, because in some possible case it might happen to fail; and a general presumption that a jury could read and write, would be at least as moderate as many presumptions, which have in fact been introduced into the administration of justice.

The general subject lately came under the consideration of Lord *Eldon*, in the Court of Chancery; and produced a very full and elaborate discussion, which may be referred to as containing an accurate view of the existing law upon the subject. *Eagleton v. Kingston, 8 Ves. 438,* and the practice of the law seems to be clearly settled, that the casual knowledge or belief of a person, who has once seen a witness write, and speaks from the effect of that incident upon his memory, in respect to the character of the writing, is admissible, and a sufficient foundation for reading the disputed paper; but that a direct comparison with the greatest possible number of authentic papers, indicating the similarity to the most obvious inspection, and confirmed by the most critical scrutiny, is wholly inadmissible.

But where, in point of reason, is the objection to a proof by comparison of hands, as founded upon an inspection at the trial? It will surely be admitted that the real object is the investigation of truth, and by the indiscriminate rejection of a means of establishing the truth, which in many instances must be more convincing than the evidence actually received, there is a frequent risk of the failure of justice. Every danger which may result from the case of forgery, must operate at least with equal force, when the deception is aided, by the comparison being made, not with the immediate object of the senses, where the erroneous impressions of one person may be corrected by the more accurate inspection of another, but with the traces in the memory, the errors and imperfections of which are beyond the reach of scrutiny. What is the common evidence of knowledge but an act of comparison; a comparison of the object presented to the sight, with the object imprinted by memory in the mind, with the image and copy of the supposed reality? And when the comparison is made not with this imperfect and fallacious copy, but with an undisputed original, applied with the skill and experience of persons habitually devoted to similar inquiries, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty, to reject the assistance which it may be naturally expected to afford. An expert of the most accurate

curate talents, comparing the characters of the admitted writing of an individual, through a continued series of years, with the character of a disputed piece, cannot be heard to offer his opinion, whilst the knowledge and familiarity that the mind may be suppose to have acquired, from the previous perusal of those very writings, or even from the casual inspection of a single act, is received and acted upon without objection. I have known the admission of this evidence carried so far, as for an attorney, after the failure of other attempts, to stand up and swear to a knowledge of the writing of the opposite party, from having once looked over his shoulder when writing a letter at an alehouse (a). I have purposely stated extreme degrees, because by these the character of a proposition is most distinctly shewn, and in the admissibility of evidence, the law allows no latitude of discretion.

## SECTION VII.

### *Of Writings inferior to Deeds.*

It does not occur to me to be necessary to make any general observations respecting writings inferior to deeds, having in a preceding section pointed out the distinguishing character of deeds, as constituting or discharging obligations *proprio vigore*, whilst writings of an inferior nature are only the evidence of a contract, which, in its nature and quality, is not of higher rank than if it was merely verbal or of a matter of fact: the peculiar character of bills of exchange, and promissory notes, does not fall within the purpose of the present examination.

The rules laid down, with respect to the evidence of deeds, are equally applicable to other instruments with respect to the necessity of producing the original, or, in case of its non-productions supplying the omissions by the best inferior evidence, and the whole of the system established respecting the examination of subscribing witnesses, is equally applicable to other instruments; but it may be proper to take notice as to the first of these subjects, that duplicates of notices, served upon any person, are in general regarded as equally original, with the copies actually delivered. In other cases, a notice to produce the original must be given to the party intended to be charged with it, or affected by it, in case it is or ought to be in his possession. Where the terms of an agreement are reduced into writing at the time, as evidence of the

(a) *Lancaster Summer Assizes, 1799*; but it is proper to add, that the same judge who allowed the reception of this evidence, made some observations upon it which decided the fate of its credibility.

agreement, the writing must be produced, and must have the proper stamp, and no parol evidence of the agreement can be admitted; but when there is written evidence of a matter of fact, as a receipt for a sum of money, proof may be given of the fact of payment, or of a distinct verbal acknowledgment, as was shewn in *f. 2, supra*.

The preceding section, respecting the proof of writing, is also of general application; and in point of fact, the subject to which it refers is of much more frequent application in other cases, than in verifying the signatures of deeds.

Upon the evidence of books of account, there is, in many respects, a considerable affinity between the doctrine stated in the text of *Pothier*, and the practice of the *English* law. The doctrine of semiproofs, by which a person may obtain a decision in his favour, by the testimony of his books, confirmed by his own supplementary oath, has not with us any kind of application. A person can in no case require his own books to be received as evidence in his favour; but if the other party refuses to call for them, and the party himself is willing that they should be produced, it will sometimes lead to pretty strong inferences in the mind of a jury, with respect to the veracity and effect of other evidence.

One party has no right to compel the other to produce his books; but if notice is given for that purpose, and they are not produced accordingly, not only may verbal evidence be given of their contents, but the mere refusal to produce them will always be considered as a very strong presumption of their contents being unfavourable.

A person who requires the production of books belonging to another, must make his election whether they shall be received as evidence; he has not a right first to inspect them, and then use them or not according to his discretion. Being admitted, their whole contents must be allowed as evidence; but that, as was before observed concerning other written evidence, does not necessarily conclude the veracity of their entire contents. A party cannot make any distinction with respect to what part shall be received, but a jury may distinguish with respect to matters of credit, and admit one part whilst they disallow the other; but without some circumstances to induce a particular suspicion, it is unreasonable that such distinctions should take place.

The following is a note of several cases, which have occurred respecting the admission of different pieces of written evidence.

“Where the draymen came every night to the clerk of a brew-house, and gave him an account of the beer delivered, which he set

set down in a book kept for that purpose, to which the draymen set their hands, and the drayman was dead, the book with his hand set to it was held good evidence of a delivery. *Price v. Lord Torrington*, 1 *Salk.* 285. So, a shop book was allowed for evidence : it being proved that the servant that writ the book was dead, and that this was his hand, and he accustomed to make the entries. *Pitman v. Maddox*, 2 *Salk.* 690. But where the plaintiff, to prove a delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles as delivered to the defendant, and a witness was ready to prove his hand, Lord Ch. Justice *Raymond* would not allow it, saying, it differed from Lord *Torrington's* case, because there the witness saw the drayman sign the book every night. *Clerk v. Bradford*, *M.* 5 *Geo.* 2. Upon an issue out of Chancery, to try whether eight parcels of *Hudson's Bay* Stock, bought in the name of Mr. *Lake*, were in trust for Sir *Stephen Evans*, his assignees (the plaintiff's) shewed first, that there was no entry in the books of Mr. *Lake*, relative to this transaction. Secondly, six of the receipts were in the hands of Sir *S. E.* and there was a reference on the back of them, by his book-keeper, to the book *B. B.*, of Sir *S. E.* Thirdly, the book-keeper was proved to be dead, and upon this the question was, whether the book of Sir *S. E.* referred to, in which was an entry of the payment of the money, should be read? And the Court of King's Bench, at a trial at bar, admitted it not only as to the six, but likewise as to the other two, in the hands of Sir *B. L.*, son of Mr. *Lake*. And in *Smartle v. Williams*, cited by Lord *Hardwicke*, in *Montgomery v. Turner*, 1751, a scrivener's book of accounts, the scrivener being dead, was holden good evidence of payment. *Bull. N. P.* 282, 283. In *Searle v. Lord Barrington*, 2 *Str.* 807. 2 *Lord Raym.* 1370. 8 *Mod.* 278. 3 *Br. P. C.* 535, the court were of opinion, that an indorsement by the obligee, of a bond of payment of interest, was good evidence to encounter the presumption of payment, arising from length of time, and ought to have been left to the jury, for they might have reason to believe it was done with the privity of the obligor; and the constant practice is for the obligee to indorse the payment of interest; and that, for the sake of the obligor, who is safer by taking such an indorsement than by taking a loose receipt; and the judgment given upon such evidence, was, on a bill of exceptions, affirmed in parliament; but in *Turner v. Grisp*, *Hil.* 13 *Geo.* 2. the Chief Justice refused to let the indorsement of the receipt of part of the money, secured by a bond which was made after the presumption had attached, be given in evidence. 2 *Str.* 827. The debt book of an attorney, long since deceased, where he charges 3*l.* for suffering

ing a recovery, two articles of which were for drawing and ingrossing the surrender of a tenant for life, and which bill appeared by the book to have been paid, was held admissible evidence of there having been such a surrender. *Warren v. Grenville*, 2 Str. 1129. A bill of parcels, and receipt of a merchant abroad, was admitted to prove the plaintiff's interest in a cargo against the insurer. *Russel v. Boheme*, 2 Str. 1127. A paper in the hand-writing of a testator, containing a list of bank notes found in his possession at or before his death, was held, by Lord *Hardwicke*, inadmissible to prove his property in those notes; but he sent the case to be tried at law, observing that the rules of evidence in general are the same in both courts as to matters of fact. *Glyn v. Bank of England*, 2 Ves. 38. Entries of a deceased steward in a common day-book, containing variety of matters, relative to his different employers, of money paid by persons for trespass on a particular place, on account of one of those employers, were held admissible evidence, in an action relative to the right of such employer to the place in question, as they would have been evidence to charge himself with the receipt of the money. *Barry v. Bebbington*, 4 T. R. 414. An entry by the church-wardens of *A.* in their accounts, stating the receipt of a sum of money from the chapelry of *B.*, who that year disputed their ancient custom; but after being sued had paid it, and 1*l.* for costs, and the following writing at the head of the same page: "It is an ancient custom thus to apportion our poor lay, *B.* to pay one fifth, &c." was held good evidence of the custom, the one entry as it charged the officers with the receipt of money, and the other as referring to and explaining that; and Lord *Kenyon*, said, that even without that reference, he did not see any objection to admitting the second entry as evidence *proprio vigore*, because usages relating to parishes must be got out of the parish books; it is like the instance of court rolls, which are frequently admitted in evidence, though they affect the rights of third persons. However, it was not necessary to decide upon that ground, though he had a strong opinion of it. *Stead v. Heaton*, 4 T. R. 669. On a question respecting the identity of a place, the coals under which, and also a rent issuing out of it, belonged to one of the parties under different titles, the entry in the book of a person under whom the party claimed the rent, but not the coals (which were the subject in dispute), of receiving the rent for a particular place, was held inadmissible evidence; for, by Lord *Kenyon*, what one man does in his closet ought not to affect the rights of third persons; there is only one instance in which this is allowed, namely, the books of an incumbent respecting tithes, which may be evidence for his successor,

cessor, but that has always been considered an excepted case. *Outram v. Morewood*, 5 T. R. 122.

In reviewing the preceding cases, there are some which appear to be founded upon rather disputable principles. The case of the draymen signing the entry, and the still stranger case of the shop book, are instances of persons being affected by evidence made behind their back, with intent to preserve a charge against them, and which they had no opportunity to cross-examine. If the drayman and the clerk had told another person, that such circumstances had passed, and that person had immediately made a minute of it in writing, it will not be supposed that a deposition, consisting ultimately of such hearsay evidence, would be allowed. If one man writes down that he saw a given act done, would the parties to that act be allowed to be affected by such a minute, any more than by a hearsay declaration? Would his signature make the evidence any better? And is there any substantial difference, in this respect, between a stranger who observes a transaction, and a person who is an instrument in it, and who is only from necessity allowed to be a competent witness, having himself a degree of interest in the subject. When a broker is agent for both parties, his minutes, which are part of the *res geste*, would fall under a very different consideration.

The case of Lord *Barrington* was founded upon very sound reasoning; at the time of making the entry (which, it is an admitted fact, was before the presumption had attached) *Serle* could have no undue motive; the purpose was merely to indicate a discharge. The bond itself would be perfect evidence of his claim; but in the case which immediately followed, it was not thought that a person whose right, if adversely contested, was at an end, could revive it by any act of his own. Having no legal claim to 10*l.* he could not found a right to 50*l.*, by giving credit for 10*l.* *Barry* and *Bebington* certainly went abundantly far, where a steward, by charging himself to his employer with the receipt of a small sum of money, was allowed to charge a third person with the admission of a right. But *Stead* and *Heaton* seems to be directly repugnant to the case, in which the receipt of part of the money on the bond, after the presumption had attached, was disallowed; for though, to a small extent, the entry made by persons interested had a tendency to charge themselves, it, to a much greater extent, had a tendency to induce a charge in their favour against the persons to whom it related. It was preserved and recorded as evidence of the submission to a disputed right. The general effect and object of it were to substantiate that right in themselves. And if one public body shall not be allowed to charge another public

public body by their entry of a debt, it would be absurd to let them obviate the objection, by subjoining the entry of a partial payment amounting to a recognition. If the persons who made the entry had appeared as witnesses to prove the fact, retaining the same character of inhabitancy, they would have been rejected as interested. Their death was allowed to give a weight to that as written evidence, which as oral testimony could not have been allowed; contrary to one of the most essential rules upon the subject, they were admitted to make evidence for themselves. As to entries in public books regularly and periodically kept, and perfectly free from all the imputations, which occur to an entry of such a nature as has last been considered, their character is so materially different, that the establishing a proposition respecting the one cannot fairly induce a material argument to affect the other.

The particular exceptions from the rules of evidence in general, which apply to cases of pedigree, and some other subjects, being equally connected with written and with hearsay evidence, the consideration of them is at present deferred.

## S E C T I O N VIII.

### *Of the Statute of Frauds.*

The advantages which result from fully and explicitly stating in writing, the object and terms of any civil transaction, are so obvious and considerable, that almost every system of jurisprudence manifests a decided preference to written memorials over verbal representations, in evidencing the occurrences of social intercourse.

The death of witnesses, the imperfections of their memory, their misconception, and sometimes their wilful misrepresentations of the communications, which they are called upon to testify, are productive of inconveniences which are strongly contrasted by the introduction of authentic monuments, in which the intention of the parties is supposed to speak for itself, and which are not to be affected either by the artful glosses, the inaccurate perceptions, or the natural infirmities, of casual observers. This general observation may be applied, with particular force, to the advantage of establishing a criterion for distinguishing between acts which are consummated by a mutual intention, conclusively fixed and determined, and acts of inchoate and preliminary communication; between the contracting an obligatory engagement, and the making a  
casual

casual intimation or suggestion. The same effect is in a considerable degree produced, by the use of known established tokens, which may easily and generally be understood, as marking a settled and certain determination; but whilst these are free from the dangers of misconception, they leave the subject exposed to the casualties of time; and consequently are inferior in their utility to the permanent evidence of an authentic writing. In all cases, therefore, where the nature of the subject indicates a probability, that a knowledge of the circumstances may be important at a distant period, it is matter of utility not only to shew a preference to the testimony of writing, but to render it an essential requisite.

There is also a material difference in respect to the danger of misrepresentation, between obligations founded merely upon a communication of intention, without the intervention of any positive acts, such as a contract for the sale of goods, to be delivered at a future period, and those which arise from a matter of fact, that has actually intervened, as the loan of a horse.

From these considerations, institutions of positive regulation have been established in different countries, for ascertaining the existence of agreements, intended to be obligatory upon the parties between whom they intervene; and although the regulations, thus framed, are often neglected by an injudicious confidence which operates to the detriment of individuals, and the advantage which is taken of them is too frequently in opposition to the principles of integrity, they are, in their general operation, of considerable benefit to the community.

In the forming systems for the purpose, while the advantages above referred to are properly estimated, the inconvenience of loading the ordinary occurrences of life with an unnecessary incumbrance, should not be entirely left out of the consideration; and while it may be proper to require that so important an object, as a contract for the future purchase of a considerable estate, shall be authenticated by writing, there would apparently be but little utility in prescribing a similar requisite, in order to compel a person to return a watch that he had borrowed, or pay for one which he had purchased and received.

The *French* ordonnance, which is the subject of the text in *Pothier*, that has occasioned these observations, seems to have laid rather too great a stress upon the first of these considerations, without paying sufficient regard to the other; and it is evident that the exclusion of all proof respecting matters of fact, arising upon contracts where the object exceeds so inconsiderable an amount as 100 livres, a little more than 4*l.* must often occasion a failure of justice, especially when it is carried so far as in the case adduced, of preventing

preventing a man from recovering the goods which he had deposited in the custody of a friend.

The statute of frauds, 29 *Ch. 2. c. 3*, which, with several other regulations, unconnected with the present inquiry, introduces a system founded upon an analogous principle, and I think was most probably suggested by the *French* ordonnance, is free from this imputation: for, while it excludes in several cases, a proof by oral testimony, with respect to matters of mere agreement, in their nature liable to misrepresentation, it leaves untouched the evidence which is founded upon matters of fact; and in respect to the most ordinary contract of society, the sale of goods, it admits the full completion of a mutual obligatory intention, to be evidenced by other tokens than a written agreement.

This statute (many parts of which are by no means penned with technical accuracy,) has been alternately the subject of panegyric, and reprehension; Lord *Kenyon* always spoke of it in terms of commendation; with Lord *Mansfield* it appears to have been by no means a favourite. It has certainly given rise to more contested questions than any statute in the book, except that respecting the settlements of the poor; and the Honourable *Daines Barrington*, many years ago remarked, in his observations on the statutes, that the explanation of it had not been attended with a smaller expence than 100,000*l.* A great part of this expence, however, may perhaps not be so justly imputed to the framers of the statute, as to the administration of it, upon a principle of relaxed construction.

Both the statute, and the ordonnance have, in their exposition been regarded, as rendering the compliance with their provisions rather a necessary evidence of the contracts to which they refer, than as an essential and constituent part of the contracts themselves; and exceptions have therefore been admitted, where the want of this evidence has been supplied by the judicial acknowledgment of the parties (*a*).

To proceed, after perhaps an unnecessary length of preface, to the provisions of the statute itself, so far as they are connected with the present object; it is enacted that all interests in land, created by parol only, and not put in writing, and signed by the parties creating the same, or their agents lawfully authorized in writing, shall only have the force of leases at will, *f. 1.* except leases not exceeding the term of three years from the making thereof, whereupon the rent reserved shall amount to at least two thirds of the annual value, *f. 2.* And that no action shall be brought to charge any executor, or administrator with damages

(*a*) See the preceding Treatise, No. 15, and Note.

out of his own estate, or to charge the defendant, upon any special promise, to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement, made in consideration of marriage, or upon any contract or sale of lands, or any interest in them, or upon any agreement not to be performed within one year from the making thereof, unless the agreement upon which such action is brought, or some note or memorandum thereof shall be made in writing, and signed by the party to be charged, or some other person by him lawfully authorised, *f.* 3.

In the exposition of these clauses, several exceptions have been introduced, where the object and effect of the statute seemed to be otherwise sufficiently secured; when the agreement was in a suit in equity admitted to be made, it was held that there could be no danger of fraud or perjury in carrying it into execution; and therefore the performance of it was specifically decreed, unless the statute was specially pleaded and relied upon as a bar. In recent cases, the Court of Chancery has shewn a disposition to be less strict, with regard to the mode of taking advantage of the statute, and it seems to be the prevalent opinion, that it is sufficient to claim the benefit of the statute in the answer; but the point is not absolutely settled. In case a defendant does not claim this benefit, in his answer to an original bill, he will not be allowed it by making such claim in answer to an amended bill. See *Cooth v. Jackson*, 6 *Ves.* 12, and the cases there cited. *Spurrier v. Fitzgerald*, *ib.* 548. If the defendant denies that any parol agreement ever took place, a court of equity will not inquire into the truth of that denial, *Cooth v. Jackson*, *ib. sup.*

Where the agreement has been in part performed, and is sufficiently established, the statute is in equity deemed not to apply (*a*); but acts alleged to constitute a partial performance, must appear to

(*a*) In *Foster v. Hale*, 3 *Ves.* 712. Sir R. P. Arden, Master of the Rolls, intimated it as his opinion that the court had gone rather too far in permitting part-performance and other circumstances, to take cases out of the statute, and then unavoidably perhaps, after establishing the agreement, to permit parol evidence of the contents of that agreement. As to part-performance, it might be evidence of some agreement but of what must be left to parol evidence. He always thought the court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compensation. Those cases are very dissatisfactory; it was very right to say the statute should not be an engine of fraud, therefore, compensation would have been very proper. They have therefore gone further, saying, it was clear there was some agreement and letting them prove it; but how does the circumstance, of a man having laid out a great deal of money, prove that he is to have a lease for 99 years? The common sense of the thing would have been to let them bring an action for the money.—In a former case Lord *Loughborough* said, the bent of his mind was strongly in favour of the wisdom of the statute, and therefore he was strongly against all the cases which had intrenched upon it. *Martimer v. Orchard*, 2 *Ves. Jun.* 243.

have been done on account of the agreement. What acts shall or shall not be considered, as amounting to such a partial performance, has been the subject of considerable discussion; the general result of which I shall state in the language of Mr. *Fonblanque*. "The general rule is that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory or ancillary to it. The giving of possession is therefore to be considered as an act of part-performance, but giving directions for conveyances, and going to view the estate, are not; payment of money is also said to be an act of part-performance. But it seems that payment of a sum by way of earnest is not (a).

The act of marriage is not, in itself, sufficient to dispense with any promise, in consideration of such marriage being in writing; the opposite construction would necessarily be a repeal of the statute, because a marriage must actually take place before the statute can apply.

I am not aware that there are any direct authorities to shew that this partial performance can be taken advantage of in a court of law. It may be contended, that the practice adopted upon the subject is founded upon circumstances peculiar to the power of courts of equity, in awarding a specific performance, though there are incidental opinions to the contrary (b).

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(a) Since writing the above it was held by Lord *Loughborough*, that paying five guineas in part of one hundred guineas to bind the bargain, and in part of the purchase money, was not a part-performance to take a contract out of the statute. *Main v. Milbourn*, 4 *Ves.* 720: and in a recent case, it was ruled by the Master of the rolls, that a purchaser of an estate by auction, did not, by paying part of the auction duty, pursuant to the conditions of sale, lose the benefit of the statute. *Buchmaster v. Harrop*, 7 *Ves.* 341. He observed further, that "even if the payment of the purchase money could be considered as part of the price, he did not see how that could bind the purchaser. In general, the party seeking performance, must shew a performance on his side, as a reason for the interference of the court in his favour; for the ground upon which the court acts is, fraud, in refusing to perform after performance by the other party. In *Lewin v. Martins*, 3 *Ark.* the purchaser had paid a considerable part of the purchase money, and therefore it was a fraud to refuse performance in the other side. In *Whaley v. Bagenutt*, 6 *Bro. P. C.* 45, which being before the House of Lords, must supersede the authority of every other case, it was held that the acts done by the defendant, did not entitle the plaintiff to have the agreement specifically performed."

It must however be clear that an act done, merely by one party, cannot give him a title against the other; and wherever such act does induce a right, the concurrence, encouragement, or acquiescence of the other party, must be necessarily supposed.

(b) In *Bradley v. St. Paul*, 1 *Ves. Jun.* 333. Mr. Justice *Buller*, sitting for the Lord Chancellor said, that as to part-performance, courts of law have lately adopted the same sort of reasoning that prevails in courts of equity, that there can be but one true construction of the Statute of frauds; whatever it is, it ought equally to hold in courts of law, and of equity, and that if it is settled in equity, that part-performance takes it out of the statute, the same rule should hold at law. Lord *Eldon*, in *Coub v. Jackson*, 6 *Ves.* 29, adhering to this opinion said, he had had reason to think the character of the law of this

The learned and judicious writer just referred to, suggested some important difficulties which may arise where the acts alleged to constitute a partial performance are admitted to be done; but the agreement upon which they are supposed to be founded, and consequently their application to such agreement is denied; or on the other hand, where the agreement is admitted, and the acts of performance denied, but, as he admits, without suggesting the means to remove or lessen them (a).

A letter admitting the agreement, and signed by the party, is held sufficient to satisfy the requisites of the statute, but it must contain the precise terms of the contract, *Precedent Ch. 560*; or refer to another paper, which contains those terms, *Vid. Tawney v. Crowther, 3 Bro. Ch. 318. Forster v. Hale, 3 Ves. 696.* And in the case of *Brodie v. St. Paul, 1 Ves. Jun. 326*, where the agent of the defendant read to the plaintiff a paper respecting a proposed lease, and an agreement was drawn up in reference to that paper, and the plaintiffs' bill prayed a performance of the agreement, according to the clauses that had been read to him, Mr. J. Buller said, that if the agreement is certain, and explained in writing signed by the parties (b), that binds them; if not, and evidence is necessary to prove what the terms were, to admit it, would effectually break in upon the statute, and introduce all the mischief, confusion, and uncertainty that the statute was intended to prevent; the only thing to support this case would be to prove by parol evidence, which of the covenants were read, and which were not: that is directly prohibited by the statute.

It must likewise appear that the other party accepted the terms, and acted in contemplation of them; if therefore, the husband claiming the benefit of the promise contained in a letter, was igno-

country, dividing itself into distinct courts of law and equity, had suffered more by courts of law acting upon what they conceive to be the rules of equity, than by any other circumstance. If you address yourself to the question, how courts of law are to execute the equitable jurisdiction upon this question, it is absolutely impossible they can exercise it. His Lordship then proceeded to shew that a court of equity cannot act against the defendant's denial of the agreement, whereas in every case, a court of law is to understand that a defendant does deny it. Subsequent to the opinion above expressed, by Mr. Justice Buller, the courts of law have, in several instances, shewn a strong disinclination to assume the jurisdiction, naturally belonging to a court of equity; and as courts of equity have themselves shewn, in recent cases, so strong an opinion upon the original deviation from the statute, I think it most probable that parol evidence of an agreement, and of the part-performance of it, would not now, in an action at law, be allowed to take a case out of the statute.

(a) The several cases in which verbal agreements have been enforced, notwithstanding the statute of frauds, are (so far as they come down) accurately collected in Mr. Pwoll's Law of Contracts. See also the note to *Pym v. Blackburne, 3 Ves. 34.*

(b) But in *Tawney v. Crowther*, the agreement referred to, and enforced, was not signed.

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rant of it at the time of the marriage, equity will not decree upon it, *Ayliffe v. Tracy*, 2 P. Wms. 65, neither will equity decree a portion upon a promise in a letter, if the defendant appear in the same letter to have endeavoured to prevent the marriage, though he was afterwards present at it. *Douglas v. Vincent*, 2 Vern. 202. It is a question whether courts of equity will decree an agreement, entered into by letter, if a deed appear to have been afterwards framed, (but not executed) varying the terms expressed in that letter, or if the terms be varied, by a distinct subsequent parol agreement, partly carried into execution (a).

In a very late case before the Court of King's Bench, it was held, that a promise in writing to pay the debt of another was not sufficient, as it did not state the plaintiff's forbearance, which was the consideration of it; since the statute requires the agreement (not merely the promise), or some note or memorandum of it, to be in writing; and the agreement is that which each party is to do or perform, and by which both parties are to be bound; for without the parol evidence, the defendant cannot be charged upon the written contract, for want of a consideration in law to support it; and the effect of the parol evidence is to make him liable, when the statute was passed with the very intent of avoiding such a charge, by requiring that the agreement, by which must be understood the whole agreement, should be in writing, *Wain v. Walter*, 5 East, 10.

It has been held to be a sufficient signing, if a person knowing the contents of a deed, sign it as witness only. 3 Atk. 503. (a) *Vid. Fonblanque*, B. I. c. 3. f. 10.

The mere perusing and altering a draft, or putting a deed into a solicitor's hands, to prepare a conveyance, is not sufficient to dispense with the signature of the party, *Hawkins v. Holmes*, 1 P. Wms. 770. *Redding v. Wilkes*, 3 Bro. Ch. 400. In a late case it was contended, that a person by writing loose instructions for a formal contract, comprizing his own name, as "Mr. Stokes, to repair, &c." amounted to a sufficient signature. It was properly held, that the signature required by the statute, was to have the effect of giving authenticity to the whole instrument; and where the name

(a) A parol variation to a written agreement, cannot be enforced in equity, *Cookes v. Mafcell*, 2 Vern. 34. In fact such a subsequent agreement is not less within the object of the statute, than an original agreement; and the same rule with respect to part performance, or other circumstances preventing the operation of the statute, ought equally to be applied in the one case and in the other. See *Rahjon v. Collins*, 7 Ves. 130, and the next section of this Appendix.

(b) This is contrary to the spirit of the decision in *Stokes v. Moor*, *infra*, and I think also contrary to the principle of the statute.

was inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found. But it could not be imagined that the name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required. *Stokes v. Moore, Cox's 1 P. Wms. 770. n.*

A person who has himself signed an agreement cannot object that it was not signed by the other party, as is clearly settled by a series of cases from *Hatton v. Gray, 2 Ch. Ca. 164.* to *Seton v. Slade, 7 Ves. 265.* This is a strong illustration of the principle, that the writing required by the statute is only the evidence, and not the essence of the contract; for it is an established rule that reciprocal contracts are not obligatory, unless both parties are equally bound.

In *Simon v. Metivier, 1 Bl. 599. 3 Burr. 1921,* an opinion was intimated in general terms, that the statute did not extend to sales by auction, but the case related to a sale of goods, the provision respecting which will be stated in a subsequent paragraph; and it is now settled that no such exception can be made with respect to land, and that the agent of the seller writing, does not prevent the operation of the statute. See *Walker v. Constable, 1 Bos. & Pul. 306.* *Buckmaster v. Harrop, 7 Ves. 341.*

In regard to the provision, that all leases of lands for a longer term than three years, shall only have the effect of estates *at will*; it has been held that, as estates at will are now only notional, and the payment of an annual rent constitutes a tenancy from year to year; the same effect shall be given to agreements for leases, which cannot operate to their full extent in consequence of the statute. *Vid. Clayton v. Blakey, 8 T. R. 3.* It has been also held that the other parts of the agreement, such as the amount of the rent, the days of entry, the liability to taxes and repairs, shall be applied to such tenancy from year to year, *Doe dem. Rigg v. Bell, 5 T. R. 471.*

The provision respecting agreements not to be performed within a year, does not extend to those which depend upon some uncertain event, which may or may not happen within that time, as death, marriage, the arrival of a ship; but only to such as in their nature and creation, are necessarily to be postponed to a more distant period. *Anon. 1 Salk. 280. Smith v. Westall, 1 Ld. Raym. 316. Fenton v. Emblers, 3 Burr. 1278.*

The decisions respecting the liability of a person to answer for the debt, default, or miscarriage of another, have drawn the line between undertakings as a principal, and as a surety; and which are denoted by the terms original and collateral undertakings. Where the whole obligation is confined to the person making the promise,

promise, though in respect of the benefit to another person; as if I direct a tradesman to furnish goods to my friend, and place them wholly to my account, the statute does not attach. *Burkemire v. Darnell*, 1 Salk. 27; but where the undertaking is only for better security; as a promise, that if the tradesman will furnish him with the goods, if he does not pay for them I will, it is void; it being clearly settled, that if the person for whose benefit the contract is made, is answerable at all, the other is wholly exempt; whether the promise is before or after the delivery of the goods, is perfectly immaterial. See *Matson v. Wharam*, 2 T. R. 80. The converse of this proposition must necessarily be true, and if it manifestly appears that the party undertaking is answerable, it is conclusive evidence that the other person is not. In the above mentioned case of *Burkemire v. Darnell*, it was ruled that a promise, that a third person who hired a horse should return him, was within the statute.

The statute has been held not to extend to a promise of making a specific satisfaction for an injury; as where an action for an assault was about to be tried, and a friend of the defendant agreed to pay the plaintiff a sum of money, to withdraw his proceedings; the promise, though not in writing, was adjudged to be obligatory. *Read v. Nash*, 1 Willf. 305. But almost immediately afterwards, it was held that a promise, under similar circumstances, to pay an actual subsisting debt could not be supported, as being contrary to the express provision of the statute. *Fish v. Hutchinson*, 2 Willf. 94.

Where the person who makes the undertaking, is interested jointly with others, his engagement is binding; the statute only applies to those promises which are made wholly on account of another. *Stephenson v. Squire*, 5 Mod. 213. Comb. 362.

A broker in possession of goods about to be sold, promised the landlord, if he would desist from distraining them for arrears of rent, he would pay the rent, and this case was held not to be within the statute. It was considered that the goods were the fund upon which the landlord had a lien, and that the broker became the bailiff of the landlord. *Williams v. Leper*, 3 Burr. 1886. And in a late case, where A. who had accepted bills for B., and held policies of assurance for his indemnity, gave up such bills to C. upon his promise to satisfy the acceptances, it was held that the promise of C. was not within the statute; and the case was considered as a purchase by the defendant, of the plaintiff's interest in the policies. *Catling v. Aubert*, 2 East, 325.

It is clearly established, that mutual promises to marry are not within the provision respecting promises in consideration of marriage.

By s. 7. it is provided that all declarations, or creations of trusts, or confidences of any lands, shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void; provided, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall arise, or result by the implication or construction of law, such trust shall be of the like force and effect, as if the statute had not been made. s. 8.

With respect to the principle which has been adopted, upon the first of these clauses; the fullest information is to be derived from the case of *Forster v. Hale*, 3 *Ves. Jun.* 696, in which it was held that an agreement for one person to be trustee for others, might be made out by letters in which he admitted himself to be such; and that according to the true meaning of the statute, it is sufficient if it appears in writing, under the hand of a person having a power to declare himself a trustee; and that is equivalent to a formal declaration of trust. The Master of the Rolls observed, that it is not required that the trust should be created in writing, and the words of the statute in this clause are very particular. It does not by any means require that all trusts should be created only in 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 in 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. In the particular case, his Honor, from several letters and papers, inferred an agreement that the lessee of a colliery, took it on account of himself and other persons, with whom he was engaged in partnership in a bank.

The common case of trusts by operation of law is, where an estate is purchased by one man, and the money paid for it by another. See the cases cited, 3 *Ves.* 765. Where a person purchased an estate in his own name, and insisted in answer to a bill, alleging that the purchase was made as agent for another person, that it was made on his own account; Lord *Northampton* refused to admit parol evidence of such agency, in opposition to the defendant's answer; but said, that if the plaintiff had paid any money, it would have been a reason with him to admit the evidence. See *Bartlett v. Pickersgill*, 5 *East*, 577. n. The defendant was afterwards convicted of perjury, upon his denial of the trust, and a petition was presented to the Lord Chancellor for a rehearing of the cause, but was refused.

Where a trustee purchases lands with the trust money, and takes  
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a conveyance in his own name, a trust will result,<sup>4</sup> and evidence may be given, *aliunde*; that the purchase was made with trust money, although denied by the defendant's answer. *Balguy v. Hamilton, Ryal v. Ryal*, cited in *Lans v. Dighton, Ambler*, 409. *Vid. Fonblanque's notes, Treatise of Equity*, B. II. c. 5. s. 1. \*

The statute also provides, that no contract for the sale of goods for the price of ten pounds or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note in writing be made and signed by the parties to be charged, or their agents. s. 17.

A person having ordered a carriage, when it was made, refused to take it; and this was held not to fall within the provisions of the statute, *Towers v. Osborne*, 1 Str. 506, and afterwards, upon the authority of that case, it was decided that the statute did not apply to a purchase of corn, which was to be thrashed before it was delivered, *Clayton v. Andrews*, 4 Bur. 2101. These cases professed to proceed upon a doctrine, that the statute only relates to contracts for the sale of goods, where the buyer is immediately answerable without time given, and the seller is to deliver the goods immediately. That doctrine is now completely exploded. Lord *Loughborough*, when Chief Justice of the Common Pleas, truly observed, that it was singular an idea should ever prevail, that the statute in this respect was only applicable to cases where the bargain was immediate; and that it would not be of much use unless it were to extend to executory contracts; for it is from bargains to be completed at a future period, that the uncertainty and confusion would probably arise, which the statute was designed to prevent. He also said, that preventing perjury was not the sole object of the statute; another object was to lay down a clear and positive rule, to determine when the contract of sale should be completed. Something direct and specific is to be done, that there may be no room for doubt or hesitation; *Rondeau v. Wyatt*, 2 H. Bl. 63. 1 H. Bl. 63. The Court of King's Bench have also adopted this reasoning, and held that delivering a sample of corn to a purchaser, could not dispense with the requisites of the statute, *Cooper v. Elston*, 7 T. R. 14. But it was agreed that the previous cases, though accompanied by insufficient reasoning, were properly decided; and that the statute is only applicable to mere contracts of sale, and not to those which in any degree consist of labour to be performed, as the building a carriage, or the threshing of corn.

Upon a sale of goods by auction, the auctioneer put down in the usual manner the name of the buyer, who came the next day and

and saw the goods weighed. It was held that the auctioneer was agent for the buyer as well as the seller, and that setting down his name was sufficient to take the case out of the statute, that the coming the next day and seeing the goods weighed, was very material; and an opinion was strongly intimated, that sales by auction were not within the statute, *Simon v. Metivier*, 3 *Burr.* 1921. 1 *Bl.* 598.

It may be fairly agreed that the weighing off was an effective delivery, and that this is a true foundation for the decision; but that entering the name by way of memorandum, and without any intention at the time, of considering that as an authentication by the signature of the party, or that sales by auction should be deemed an excepted case, are points which seem extremely disputable, especially since the statute of frauds has been regarded in a more favourable point of view, than it was by the judges who concurred in that determination. Sales by auction, and the delivery of a sample, or other token in confirmation of the sale, are cases which it might have been very reasonable to except; but the introducing implied exceptions, unless the implication is necessary to avoid a manifest absurdity of construction, is always attended with consequences infinitely more detrimental, than the particular inconveniences which it might occasionally prevent.

In a case which has occurred in the Court of Common Pleas, since making the above observations, it appeared that goods had been ordered from the defendants, who delivered a bill of parcels, intitled Mr. ———, Bought of *Jackson* and *Hankin*, which words were printed at the top, and that the defendants wrote a letter wishing to know when the order should be delivered; the case was ruled to be out of the statute. The court seemed to think that the printed name at the top was a sufficient signature; but decided, that as the Jury had connected the letter which did not state the terms of the contract, with the bill of parcels which did, the case was clearly taken out of the statute. *Sanderson v. Jackson*, 2 *Bos.* and *Pul.* 238. But surely with respect to the first point, (to use, with a slight variation, the terms of Lord Ch. Baron *Eyre*, in *Stokes v. Moore*.) a name inserted at the [top], of an instrument, and applicable to a particular purpose, could not be [intended to be] such an authentication as the statute required. As to the second point, although the letter certainly referred to the contract, it seems very doubtful whether it was intended to refer to the particular written evidence of the terms of such contract; and certainly it could not be collected from the letter itself, that there was any other writing to which a reference could be made. The point does not seem to have been distinctly

distinctly put to the jury, and as this part of the case is wholly decided upon the foundation of the jury having found such reference, the case amounts, as an authority, to no more than that the evidence in question was such, as it was proper to leave to the jury upon the point, whether the reference to the previous writing was intended or not.

Where a defendant agreed to buy a stack of hay, and afterwards contracted for the sale of it to another person, who contrary to his direction had cut and taken part of it away, the jury found that there had been an acceptance by the defendant; which opinion the court confirmed. Lord *Kenyon* said, that where goods are ponderous, and incapable of being delivered from one to another, there need not be an actual delivery, but it may be done by that which is tantamount; such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property; and there the defendant, by selling part of the property to another person, dealt with it as if it was in his own possession, *Chaplin v. Rogers*, 1 *East*, 192.

It has been ruled that if an entire promise is made by parol, part of which is within the statute of frauds, and part not (as a promise in consideration of forbearance, to pay part of the debt of another and certain charges which have been incurred, in calling meetings of creditors), the whole is void, *Chater v. Beckett*, 7 *T. R.* 201.

I shall have occasion in the following section, to make some further references to this statute, with regard to points connected with the general rule, respecting the explanation of written agreements by parol.

## SECTION VIII.

### *Of explaining Written Evidence by Parol.*

It is an established principle of the law of evidence, that verbal communications shall not be allowed to explain written agreements. The exposition of this principle in the text, shews a very considerable conformity between the law of *France* and that of *England*.

The rule or principle in question, is sometimes considered as originating from the statute of frauds, a supposition for which there is no fair foundation. That statute is limited in its operation to particular subjects; it avoids, in respect to those subjects, the common effects arising from a verbal communication; rendering it necessary that the transactions should be reduced to writing; and having no direct relation to an explanation of the writing by parol.

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The rule in question is general, and has no relation to the original necessity of the act being reduced into writing; but it existed in the law prior to such necessity being in any case introduced (a), and the effect of it is to exclude those dangers of misrepresentation from verbal testimony, which is the natural inducement of resorting to writing at all.

Where there are general heads, or minutes, not purporting to contain the entire substance of a transaction, I conceive that as a common rule, every verbal communication not inconsistent with the written minutes may be allowed; but if the case falls within the scope of the statute of frauds, the same necessity which exists in respect to a writing in general, requires that that writing shall be perfect and comprize the entire substance, and excludes that explanatory evidence, by verbal communications of notes otherwise imperfect or unintelligible, which would be exposed to all abuses that the statute was intended to prevent.

Therefore, as we have seen in the last section, an agreement referring to such parts of another instrument, as had been read by the one party to the other, was held to be within the prohibition of the statute, as it was imperfect without verbal evidence, but an instrument which is conformable to the statute, may by reference include the contents of another writing, which is not so, as was admitted in the same case, *Brodie v. St. Paul*, 1 Ves. Jun. 326.

Where a blank was left in a will for the name of a legatee, parol evidence to shew who was intended was disallowed, *Bathie v. Attorney General*, Bull. N. P. 298. 2 Atk. 240.

So where a testatrix made a disposition in favour of Lady ~~\_\_\_\_\_~~ by a will which contained other provisions for the benefit of Lady Hort, Lord Thurlow held, that he could not supply the blank by parol evidence, and said that if there was only a title given, it was the same as if it was a total blank, and that by a blank added to a general legacy, no person is referred to (b).

The recent case of *Wain v. Walters*, 5 East, 10, mentioned in the last section, in which it was held that a promise in writing to pay the debt of another was void, as within the statute, for not expressing the consideration of the promise, and that the

(a) See *Wollam v. Horn*, 7 Ves. 211. cited *post*.

(b) In *Abbott v. Massie*, 3 Ves. 148, upon a legacy to Mrs. G. Lord Loughborough, referred it to the Master to receive evidence, but legal evidence, who Mrs. G. was, but said he did not mean to tell the Master what evidence he was to receive. This case can hardly be reconciled with the two preceding, or I conceive with the true construction of the statute; an initial letter, morally speaking, is almost as indefinite as an absolute blank; and in all probability there are more persons whose surnames begin with the letter G., than who are distinguished by a title.

agreement of forbearance which was the consideration of the promise, could not be shewn by parol, is also referable to this distinction.

But where a blank was left in the bishop's register, of the name of a patron who presented to a church, it was allowed to supply the omission by parol testimony, for the presentation might have been by parol, and therefore it was not in effect to make that pass by parol, which the law requires to be done by writing, *Bishop of Meath v. Lord Belfield*, 1 *Wils.* 215. The reason here given supports the distinction for which I contend; the case itself is referable to a different principle, for the evidence was, not to explain a writing, but to prove a matter of fact, of which there was not any written evidence; for the blank rendered every thing which was said about the person presenting nonsense, and the only thing proved by the writing was the name of the clerk presented.

In conformity to the same principles, where verbal declarations were made respecting the intention of adhering to a will, concerning which the principal question was, whether it was revoked by a subsequent marriage, and the birth of a posthumous child; Lord *Kenyon* disclaimed paying any attention to those declarations, because letting in that kind of evidence, would be in direct opposition to the statute of frauds, which was made in order to prevent any thing depending on either the mistake or the perjury of a witness, *Vid. Lancashire v. Lancashire*, 5 *T. R.* 49.

There are some cases respecting the question, how far a written agreement may be varied by a subsequent agreement by parol, *Cookes v. Mascall*, 2 *Vern.* 34. *Jordan v. Sawkins*, 1 *Ves. Jun.* 402. 3 *Bro. Ch.* 388. *Robson v. Collins*, 7 *Ves.* 130. The expressions in some of these cases appear to be general, as referable to all written agreements, whereas it seems clear, that a distinction ought to be made with respect to cases, the subjects of which do or do not fall within the statute of frauds: and in fact in all the cases mentioned, the subjects in question were within the scope of the statute, and whenever that is the case it should seem, that the same provision which requires a writing originally, would also require a writing in case of variation; for an agreement varying the obligations arising from a former valid agreement, respecting a given subject, is as much an agreement respecting the subject as that first made, and requires the same formalities. But where an agreement is made in writing, without any legal necessity, and the whole might have originally rested in parol, there is no reason why a distinct subsequent agreement of variation, should not be as effectually made by parol, as the original agreement might have been: the variation

variation of a former subsisting agreement, is itself an original agreement, though relative to the subject of an anterior stipulation, and whatever is necessary or sufficient for the validity of the first agreement, ought equally to be so for the second. There is nothing in this opinion which militates against the rule at present under consideration. The object and principle of the rule is, that an act which, upon the face of it, purports to be a memorial of the full intention of the contracting parties, shall not, by other evidence of an inferior nature, be shewn not to be so; but the admission of evidence of any subsequent agreement is perfectly consistent with the supposition and conclusion of the law, that the written memorial is a full and correct representation of the transaction which it professes to state.

The true extent and nature of the rule seems to be the prevention of any evidence, which would qualify, vary, or (in case of apparent ambiguity) explain by the collateral representations of the parties, the effect and object of an instrument itself; but not the preclusion of other proof in respect to facts, of which the writing is merely evidence. If a release which takes effect by its own intrinsic force and operation, is conceived in general terms, it is not open to proof that it was intended to be conditional or particular; but if there is a receipt for a particular sum, or in full of all demands, that is merely evidence of a fact, and is open to contradiction or explanation. Thus it has been decided, that the surety for payment of an annuity, having joined in signing a receipt for the purchase money, might, in an action for the repetition of that money, the annuity being vacated, shew that no part of it was paid to him, *Stratton v. Rastall*, 2 T. R. 364.

It is hardly necessary to multiply instances of cases in which it has been held, upon the general rule, that no extrinsic evidence shall be allowed to vary the effect and purport of an instrument, from that which is to be collected upon the face of the instrument itself. To state a few of them: In *Lord Irnham v. Child*, 1 Bro. 92. *Lord Portmore v. Morris*, 2 Bro. Ch. 219. *Hare v. Sherwood*, 1 Ves. Jun. 241. 3 Bro. Ch. 368; a grantor of an annuity was not allowed to shew by parol evidence, that it was intended to be subject to redemption. So it has been held that no evidence could be allowed, that an agreement for a lease was to include more premises; or that a greater rent was to be paid than was actually expressed, *Meres v. Ansell*, 3 Wils. 275. *Preston v. Mercean*, 2 Bl. Rep. 1249, and in *Wooljam v. Hearn*, 7 Ves. 211. cited in note *infra*, Sir William Grant said, by the rule of law, independent of the statute, parol evidence cannot be received to contradict a written

a written agreement. To admit it for the purpose of proving, that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose, it was for the purpose of shutting out that inquiry, that the rule was adopted. Though the written instrument does not contain the terms, it must, in contemplation of law, be taken to contain the agreement, as furnishing better evidence than any parol can supply.

In *Joyes v. Statham*, 3 *Atk.* 388. Lord *Hardwicke*, in opposition to a bill, for the performance of an agreement written in the hand of the plaintiff, for a lease to the defendant, admitted parol evidence, that it ought to have been inserted in the agreement, that the rent was to be free from taxes. This decision proceeded chiefly upon the ground of fraud or mistake; but he intimated that if the defendant had been the plaintiff, he did not see but he might have been allowed the benefit of disclosing this to the court, because it was an agreement executory only, and as in leases there are always covenants relating to taxes, the Master will inquire what the agreement was as to taxes; and therefore, the proof offered here is not a variation of the agreement, but is explanatory only what those taxes were. This latter observation is clearly only an incidental doctrine, and therefore is not clothed with that high authority which naturally belongs to the judicial determinations of Lord *Hardwicke*. It is to be observed that the subject-matter is within the statute of frauds, and therefore requires an agreement, and that a complete agreement in writing. Where an agreement respecting a lease, contains no provision respecting taxes or other incidental subjects, the law prescribes the relative obligations of the parties, and to vary the operation of the law acting upon the agreement, would be attended with as great mischiefs and inconveniences, as admitting parol evidence in support of the claim for an augmentation or diminution of rent. And in *Rich v. Jackson*, 4 *Bro. Ch.* 514, it was determined by Lord *Loughborough*, that parol evidence could not be received, to shew that a rent mentioned in a written agreement, was intended to be free from taxes; so as to support a bill for the specific performance of an agreement with that variation. His Lordship said, that the hardness of the case, under special circumstances, may induce the court to refuse decreeing a specific performance, or to leave it to the plaintiff's remedy at law; but it is quite impossible to permit the rule of law to be broke in upon; and that requires that nothing should be added to the written agreement, unless in cases where there is a clear subsequent independent agreement varying the former; but not where it is of matter passing at the same time with the written agreement.

agreement. The Court of Common Pleas had before refused to admit the same parol evidence in an action between the same parties, whilst Lord *Loughborough* was Chief Justice.

The proposition, that a writing is open to contradiction or explanation, in regard to evidence of matter of fact, connected with and evidenced by the writing, is confirmed by some decisions of the Court of King's Bench, upon questions of settlement. The conveyance of an estate, expressed the purchase money to be less than 30*l.* by which no settlement would be gained, and evidence was held admissible to shew that a larger sum had been paid. *Rex v. Scammonden*, 3 *T. R.* 474. Two persons as church-wardens and overseers of the poor of the parish of *A.*, gave a certificate that a pauper belonged to the hamlet of *B.* within that parish, and evidence was allowed that the hamlet was a district maintaining its own poor, and that the persons giving the certificate were officers of the hamlet, not of the parish at large. *Rex v. Samborn*, 3 *T. R.* 609. An agreement for the payment of a sum of money upon entering into a written contract, was allowed to shew that the contract intended, was an apprenticeship so as to defeat a settlement, though the contract upon the face of it, might have only been for a service, in which case the settlement would have been gained. *Rex v. Laidon*, 8 *T. R.* 379. (a)

And in a very recent case, an averment was sustained that a charter-party, dated the 6th of *February*, containing a condition that the ship should sail on or before the 12th of *February*, was not executed until the 15th of *March*; whereby the performance of the condition was dispensed with. *Hall v. Axenove*, 4 *East*, 477. And if such a fact can be averred in pleading, it is a necessary consequence that it may be shewn in evidence, in cases where no averment is requisite.

Most of the cases upon the annuity act, are instances of contradicting the statement on the face of the deed, by extrinsic evidence.

The doctrine, that ambiguity in an instrument can only be solved by the contents of the instrument itself, and not by any verbal communications which took place at the time of making it, is confined to such ambiguity as appears upon the face of the instrument itself, and not to that which arising from external evidence may by such evidence be explained.

A case upon this subject arose from a testator having made a will, in which were dispositions for several persons, but only two wo-

(a) This case went rather farther in admitting evidence, that the person engaged was intended to be only employed in a particular trade.

men were mentioned, his wife and his niece. And then he devised a particular estate to *her* for life. The Lord Chancellor refused to receive parol evidence, as to which of the two was meant. *Castleton v. Turner*, cited, 2 *Ves.* 216.

The common illustration of the second part of the position, is a devise by a name and description equally applicable to two persons, or places, in which case parol evidence will be received, as to which of them was mentioned and intended. Where a testator devised 100*l.* to the four children of Mrs. Bamfield, and after the intervention of several other legacies, gave 300*l.* to the children of Mrs. B., and it appeared that Mrs. B. had four children by her husband B., and two by another husband P.; a declaration by the testator that he had provided for the four children of Mrs. B., but would give nothing to the P's., was held by Sir John Strange Master of the Rolls, proper evidence as to the 100*l.* legacy, to shew which four were meant; being only explanatory, but inadmissible as to the 300*l.* given in general terms, because contradictory; and it being urged that the evidence read was adapted to defeat the claim of the P's., as to both legacies, his Honor said, that it was the duty of the Court to distribute and divide, to regard it so far as it was apt and legal. Where not so, it was not binding. *Hampshire v. Pierce*, 2 *Ves.* 216.

Where a description is partially applicable to two persons, but totally to neither of them; (as an error in the redundant part of a description will not be allowed to vitiate a description otherwise sufficiently explicit, and only applicable to a single individual;) it has been held that this is such a latent ambiguity as falls within the rule of admitting parol evidence, though in the particular case the evidence was not sufficient to remove the ambiguity; and the will upon which it arose, was therefore held void for uncertainty. In that case the testator devised an estate to his granddaughter Mary Thomas of L., in M. parish; having no granddaughter Mary Thomas, but a great granddaughter Mary Thomas, living at a different place, and a granddaughter Elinor Evans, living at the place described. *Thomas v. Thomas*, 6 T. R. 671.

Where an object is sufficiently and correctly described, but the description also contains something further, which is erroneous; the disposition, as I have just now had occasion incidentally to observe, will be good notwithstanding such error. Thus if a grant is made to William, Bishop of Norwich, when the name of the Bishop is Richard, the grant is good, because the intention is sufficiently apparent. *Co. Lit.* So if a devise is made to John, the son of J. S., and J. S. has only one son, whose name is James, there is a sufficient disposition in favour of the son of J. S.

*Dowsett v. Sweet, Ambler, 175.* A testatrix gave a sixth of her effects to her niece *M. B.* for her life, and after her death one moiety to the niece's grandchildren, the children of her daughter *Mary*, the other moiety to the niece's daughter *Ann*; at the time of the will, the niece's daughter *Mary* was unmarried, but *Ann* was dead leaving issue; and the devise was construed to be in favour of *Mary*, and the children of *Ann*. Mr. *Ambler* in reporting the case observes, that if there is a certain description, and a further description added, it is immaterial whether such farther description be true or false. *Bradwin v. Harpers, Ambler, 374 (a)*. Also when property was given to *A.* and *B.*, legitimate children of ———, the persons mentioned by name were allowed to take, though in fact they were not legitimate. *Standen v. Standen, 2 Vesey Jun. 589 (b)*.

A description which is in itself erroneous, and not corrected by the context, may confer a sufficient title, provided the object intended is ascertained by verbal testimony, and there is no other to which the description is properly applicable: A very strong instance of this occurred in a case, where a will purported to be made in favour of *Catharine Yardley*, and evidence was allowed to shew that *Gertrude Yardley* was the person meant; no such person as *Catharine Yardley* appearing to claim the legacy. *Beaumont v. Fell, 2 P. Wms. 141*. Where a person who had had a brother *Edward*, then deceased, leaving children, and also a brother *William*, gave property to his brother *Edward*, it was held, upon evidence, that as he usually called *William Edward* or *Ned, William* should be allowed to take.

But where there is an existing subject, to which a description may be properly applied, parol evidence cannot be allowed, that a different subject was intended. Upon this principle, when Lord *Orford*, who had made two wills, one dated in 1752, and another in 1756, afterwards, by a codicil, confirmed his last will dated in 1752; evidence that the codicil was intended to refer to the last subsisting will, and that the other was brought from the person with whom

(a) I am aware that the cases mentioned in this paragraph do not depend upon the rule which is the present subject of examination, but they are incidentally connected with it, and in some degree render the questions respecting the application of the rule in other cases, more perspicuous.

(b) In *Kennet v. Abbott, 4 Ves. 802.* a woman made a will in favour of a person as being her husband, who it afterwards appeared had another wife, and Sir *R. Arden*, Master of the Rolls, held the disposition void. He admitted the general principle, that an erroneous description does not vitiate a legacy otherwise valid; but said, that under the circumstances, he was warranted to make a precedent, and to determine that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it.

it was deposited, and the codicil added thereto upon a supposition that it was the last, and without its being read to him, was held to be inadmissible. Lord *Kenyon*, in delivering his opinion, after some observations concerning the effect of the evidence, said, that the evidence proposed did not introduce any latent ambiguity; and they ought not to let in parol evidence, which, if admitted, instead of explaining an ambiguity, would only introduce a loose conjecture; but he disclaimed forming his opinion on the effect of the evidence offered; he went upon this ground, that there was no latent ambiguity introduced by parol evidence, to let in the parol evidence which was tendered. *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138.

There is another class of cases, where verbal evidence is allowed by courts of equity, to affect the operation of a writing, though the writing, upon the face of it, is not attended with any ambiguity. According to the technical phrase applied to this subject, parol evidence is admitted to rebut an equity; the meaning of which is, that where a certain presumption would, in general, be deduced from the nature of an act, such presumption may be repelled by the extrinsic evidence, shewing the intention to be otherwise. For instance, if a father by will gives a legacy to his child, and afterwards advances a portion to the same amount, the portion is presumed to be intended as a satisfaction for the legacy; but evidence may be given even of verbal conversations, to shew a contrary intention. *Vi. Ellison v. Cookson*, 1 Ves. Jun. 100 (a). So far the admission of parol evidence is only for the qualification of an act, and not the explanation of a writing; but the same doctrine is applied to the case, where a testator gives his executor a legacy, and makes no disposition of the residue of his effects. The general rule is, that an executor takes the residue when there is no express disposition; but as the giving a part is superfluous, when the same person is intended to have the whole, the legacy induces a presumption, that the general rule was not intended to operate, and that the residue is to be applied as in case of intestacy. Still this is only treated as a presumption, and the contrary intention may be shewn by evidence of verbal declarations. It is too late for any practical purposes, to examine the reasoning upon which this last distinction (which falls within the expression of rebutting an equity) was introduced and established; but it is certain that it is deduced from the civil law, in points where the civil law differs from the law of *England*; and the allowing a written instrument to derive a construction different from that which it would naturally import, in consequence, not of any relative character of the sub-

(a) See also *Clinton v. Hooper*, 1 Ves. Jun. 173.

ject, but merely of verbal declarations, cannot, on principles, be reconciled with the general tenor of our jurisprudence.

Evidence which is calculated to explain the subject of an instrument, is essentially different in its character, from evidence of verbal communications respecting it. It is a leading rule of construction, that all acts are to be expounded according to the subject-matter. Whatever, therefore, is an indication of the nature of the subject, is a proper medium for construing the contents of an instrument, and a just foundation for giving it a construction, considered relatively, different from that which it would receive, if considered abstractedly from the circumstances with which it is connected. Thus, when a lease was made, amongst other property, of a certain piece of ground, and the question was, whether a cellar under that piece of ground was or was not included, evidence that at the time of the lease, the cellar in question was in the occupation of another tenant was held admissible, to shew that it could not have been the intention of the parties that it should pass by the lease. *Doe v. Burt*, 1 T. R. 701.

With respect to wills, (the instruments which produce more questions of construction than all others united,) Lord *Mansfield*, in *Baldwin v. Karver*, *Coop.* 312, said, all cases on the construction of wills depend upon the particular penning of the wills themselves, and the state of the families to which they relate. And in the famous case of *Jones v. Morgan* (a), his lordship said, that to construe a will, the intent is to be taken from the whole will together, applied to the subject-matter to which the will relates (b); and Lord *Loughborough*, quoting that opinion, took notice of different cases in which certain words were

(a) Cited in *Lytton v. Lytton*, *infra*.

(b) Where a testator professes by his will to dispose of property, over which he in fact has not the power; and by the same will makes a valid disposition of other property, to the person intitled to the first, that person cannot claim the benefit of the will in the one respect, without acquiescing in it in the other; but is put to his election. It is also a general principle, that if a father who is under an obligation to provide certain portions for his children, makes a general disposition in their favour by will, the presumption is that this disposition is not accumulative, but only raises a case of election. The following case occurred, with respect to admitting extrinsic evidence in the application of these rules. Dr. *Hinchcliffe*, afterwards bishop of *Peterborough*, made a settlement under which his younger children were intitled to certain property. He afterwards made a will, with provisions in favour of these children, who claimed the benefit, both of the will and the settlement. Sir *R. Arden*, Master of the Rolls (who observed with great truth, that he was as jealous of the rules of evidence as any judge who ever sat in a court of equity,) admitted the evidence of an account which the testator made regularly, at first yearly, and afterwards half yearly, of the state of his property;—to shew that he supposed and regarded the property included in the settlement as his own, observing that this was evidence, not for the purpose of explaining the will itself, for which it was clear that it could not be admitted, but to shew the circumstances under which he made his will. *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516, and see the cases there cited.

held to apply to a failure of issue at a certain period, though taking the words strictly, and construing them blindly, without considering the circumstances, would have imported a general failure of issue, and the limitation attached to them would have been void; and said, that the circumstances of the testator and his family have always been taken into consideration in these cases. *Vid. Lytton v. Lytton, 4 Bro. Ch. 1.*

It will be unnecessary to enumerate particular cases, in which the situation of a family, or the description of property (*a*) have according to this principle been taken into consideration: the principle itself being allowed, the application of the instances is matter of construction, and unconnected with the subject under discussion.

But though evidence may be material, as to the nature or description of property, or as to the party having or not having property of a given character (*b*), evidence concerning the value or amount, falls under a different consideration. In one case Lord *Mansfield* went into an inquiry of value, as the foundation for an argument that property of such small value could not be intended to be the subject of such limitations, as a construction one way would introduce. *Oates v. Brydon, 3 Bur. 1895.* But in a subsequent case, where evidence was offered of the value of an estate, charged with sums of money for the sisters of the devisee, in order to shew that, according to that value, there would be an equality of distribution, from which circumstance the propriety of a particular construction was inferred, his lordship, in concurrence with the other judges of the King's Bench, held that it was nugatory and inadmissible, and that it proved nothing at all; though it laid a circumstance before the court, which might have had its weight if the Court were called upon to make a will for the testatrix. *Doe v. Fylder, Cowp. 833.* And in *Goodtitle v. Edmonds, 7 T. R. 635,* Lord *Kenyon* said, that in *Oates v. Brydon,* after the argument, and before the decision of the case, Lord *Mansfield* (certainly from the most earnest wish to do justice between the parties) directed certain inquiries to be made, respecting the value of the estate devised, which at the time gave dissatisfaction to the profession, who thought that the rules of law ought to prevail in the construction of the will, whether the estate devised by it were of the value of 20*l.* or of 2000*l. per annum*; but that he (Lord *K.*) believed that, in subsequent cases, Lord *Mansfield* had doubted whether, in the decision of that case, he had proceeded upon substantial grounds.

(*a*) See the collection of cases on this subject, *Perrell on Devises, 477.*

(*b*) *Vid. Baugh v. Read, Ves. Jun. 260.*

Lord *Loughborough* also, in a case which, in former stages had been before Lord *Thurlow* and Lord *Kenyon*, observed, that they had very properly refused an inquiry into the amount of the testator's property, at the time of his making his will, for it was too vague to calculate, that a man must be supposed to attach a contingent interest, not fairly to be deemed a property, merely because his calculation, as to what he might die possessed of, had eventually failed. *Standen v. Standen*, 2 *Ves. Jun.* 593.

Another circumstance which may be taken into consideration, for the exposition of written instruments, is usage. Every instrument, is presumed, in its general terms, to refer to the known and established usage respecting the subject to which it relates, and should be construed accordingly. Therefore, upon policies of insurance, though the literal or general import of terms might lead to one conclusion, the particular course of trade may warrant another. A general warranty to depart with convoy, may be qualified by joining convoy, at the nearest usual place of rendezvous, *Lotbulier's case*, 2 *Salk.* 443. A policy on an *East India* voyage, may admit many things to be done in conformity to the usage of that trade, which in cases of an ordinary policy, conceived in the same terms, would be a deviation. *Salvador v. Hopkins*, 3 *Bur.* 1707. The customary mode of conducting the fishery at *Newfoundland*, was held to warrant similar acts upon the newly established fishery at *Labrador*. *Noble v. Kennoyway*, *Doug.* 492. (a)

A sailor having contracted for a voyage, upon a note for an entire sum, during the course of it; it was suggested that it was customary, upon similar occasions, to make an apportionment; the result of an inquiry upon the subject, was not sufficient to raise the principal question upon the effect of such usage; but Lord *Kenyon* observed, that if the Court were assured that such notes were in universal use, and that the commercial world had received and acted upon them in a different sense, (from that which he inferred upon the particular contest,) he should give up his own opinion; and the other judges expressed themselves to the same effect, *Cutler v. Powell*, 6 *T. R.* 320.

The effect of local custom was strongly recognized in a case where a lease had been made for a given term, and it was held,

(a) See *Robertson v. French*, 4 *Esq.* 130, in which Lord *Ellenborough*, applying himself to a suggestion, that there were peculiar rules for the construction of policies of insurance, said, the same rule of construction which applies to all other instruments, applies equally to a policy of insurance, that it is to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which are to be understood in their plain ordinary and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense of the same words. See Lord *Hills'* observations on this subject, *Anderson v. Fitcher*, 2 *Bos. & Pul.* 164.

that

that the tenant might avail himself of a custom in the parish, to take the way-going crop after the expiration of his term. It was said, that the custom did not alter or contradict the agreement in the lease, it only superadded a right which was consequential to the taking. *Wiggleworth v. Dallison, Doug.* 201.

Evidence of usage, however, ought not to be allowed to contradict the express and unequivocal terms of a written instrument. The common form of a policy of insurance expresses, that the insurance on the ship shall continue until she is moored twenty-four hours, and on the goods till safely landed. Lord *Kenyon* (contrary to his own opinion, and in deference to what was suggested to be the effect of former authorities) admitted evidence of a usage, that the risk on the goods, as well as the ship, expired in twenty-four hours; but the Court of King's Bench ruled, that the evidence was inadmissible, and granted a new trial. *Vid. Parkinson v. Collier, Park. Inf.* 314.

In *Donaldson v. Forster, Abbot on Shipping* 170. Lord *Kenyon*, in an action upon a charter-party, which stipulated that the merchant should have the exclusive use of the ship and cabin, admitted evidence of its being the constant usage, under such charter-parties, to allow the master to take out a few articles for his private trade; and thinking the usage proved, directed a verdict accordingly; but one of the jury dissenting, the case was compromised. This case appears to me to be in direct opposition to that last mentioned, the terms of the instrument being in both cases equally unequivocal; and I think it is also contrary to the genuine principles of law. In many cases, a sufficient distinction is not made between the usage of courtesy, which in its essence is voluntary, such as christmas boxes, and giving money to chaise-drivers, and chamber-maids; and the usage which, being attached to the nature or subject of a contract, forms a part of the contract itself, unless the positive expressions are inconsistent with such a construction; but in either case, where there is such inconsistency, it would seem, according to the principles of accurate reasoning, that the effect of usage (the real character of which is only to supply an inference, for fixing the true construction of general or ambiguous expressions) should not be allowed to controul the express provisions of the contract. The following passage in *Valin*, B. 3. Tit. 3. Art. 22. is referable to the above distinction. "In case of long voyages, it has even become a usage (*il est meme passé en usage*) not to pay the freight until three months after the delivery of the goods; the motive of which usage is to give the debtor of the freight a suitable time for paying it, by the sale of his goods. It is true that this usage does not make the law, and that whenever the owner, or master have demanded the freight within the

three months, the Admiralty has decided in their favour, without regard to this supposed usage, which is only a matter of forbearance or courtesy."

I have known a learned judge decide at the assizes, that a master could not insist upon his servant, who was hired for a year, remaining with him after giving a month's notice, or refuse the payment of a proportionate part of his wages; it being common to engage with servants, subject to the liberty of parting upon a month's notice. But this appeared to me at the time (and the impression has been confirmed by frequent reflection since) to be an instance of allowing the frequency of particular stipulations, or a habit generally acquiesced in for the sake of mutual convenience and accommodation, improperly to controul the regular operation of the law upon the express terms of a positive contract. In fact nothing can be more completely indefinite than the character and quality of that usage which is allowed to give a definite character to other subjects. The usage or local custom, known to the common law, is as definite as a circle or triangle; but for distinguishing the usage which has such extensive influence in modern practice, from acts which are the mere result of frequent convenience, careless acquiescence, imposition or abuse, no adequate criterion has been as yet established. See some observations upon this subject, which I have extracted from the view of the decisions of Lord *Mansfield*, in the following Number of this Appendix.

Contemporaneous and subsequently continuing usage, with regard to the carrying of ancient instruments into execution, is also considered as proper evidence to explain doubtful words in the instruments themselves. This kind of usage is very different, in its principle, from that already adverted to; the one being referable to the antecedent nature of the subject, the other being merely evidence of the construction and exposition which have in practice been given to the particular instrument.

Mr. *Peake* takes notice, that the first instance which he finds of this doctrine, of explaining instruments by the usage under them, being acted upon, is the case of the *Attorney General v. Parker*, 3 *Atk.* 576. In that case the presentation to the curacy of *Clerkenwell*, was given by a deed about ninety years before to the parishioners and inhabitants. Lord *Hardwicke*, after taking notice of the extensive signification which may be applied to each of these terms, said, "Some sort of limitation is allowed by both sides, to have been put by usage on the liberality of this grant; and in the construction of ancient grants and deeds, there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by."

The corporation of *Portsmouth* consists of a select body, and an indefinite number of burgesses. In *Rex v. Varly, Cowp.* 248, the question was, whether an act, committed by charter to the mayor, aldermen and burgesses, or the greater part of them, was well executed by the majority present at a regular meeting, although that meeting did not include a majority of the subsisting number; the usage was in favour of the act, which also appeared to the Court to be the true construction of the charter. Lord *Mansfield* said, supposing the words of the charter doubtful, the usage is of great force, not that usage can overturn the clear words of a charter, but if they are doubtful, the usage under the charter will tend to explain the meaning of them, especially in a case like this, where the corporation before consisted of an indefinite number of burgesses by prescription; and the charter added no new members but only incorporated the old ones.

In *Gape v. Handley, 2 R.* 288. *n.* it appeared that the presentation to the rectory of *St. Alban's*, was given by charter to the mayor and burgesses; and the question being, whether the right was to be exercised by all the burgesses, or only by the mayor and aldermen, Lord *Mansfield* said, "The usage is uniform: if the charter was doubtful, supposing the question to have arisen recently, the usage is a strong information of the true construction." In *Blankley v. Winstanley, 3 T. R.* 279. the question was, whether the justices of the county of *Leicester*, had a concurrent jurisdiction with those of the borough? The Court, upon the construction of the charter, were of opinion that they had.—Buller *J.* said, "Usage, consistent with the charter, has prevailed for 190 years past; and if the words of the charter were more disputable than they are, I think that ought to govern the case. There are cases in which the Court has held, that settled usage would go a great way to controul the words of a charter. And it is for the sake of quieting corporations, that this Court has always upheld long usage where it was possible, though recent usage would perhaps not have much weight."

In *Withnell v. Gartham, 6 T. R.* the power of appointing a school-master at *Skipton*, was given to the minister and church-wardens; the point in dispute was, whether all the church-wardens must concur, or whether the act of the majority was sufficient. The jury found the usage to be in favour of an appointment by a majority; this accorded with the opinion of the court upon the construction. In speaking of the usage, Lord *Kenyon* said, it was insisted it must be rejected, because no usage could be let in to explain a private deed; but that there was no difference between a private deed and the king's charter. In both cases, evidence of usage

usage must be given to expound them. Mr. Justice *Lawrence* said, "It is clear that if there be any ambiguity in this deed, usage is admissible to explain it. And the argument of convenience from this or that construction of a deed, creates that sort of ambiguity that should be explained by usage." He added, "that although it was contended that this usage ought not to be conclusive on *Lincoln College*, to whom the right devolved in default of the church-wardens, there was no reason why they should not be bound by it; for if it had at all times prevailed, instances must have occurred in which they had had an opportunity of disputing it, if they had thought proper; and having always acquiesced, they are now concluded."

In *Rex v. Osbourne*, 4 *East*, 327. it appeared that the power of electing aldermen of *Kingston upon Hull*, was committed to the mayor and commonalty. According to the opinion of the court, and the usage under the charter, the term *commonalty* includes the aldermen. Lord *Ellenborough* said, that even without resorting to any assistance from contemporaneous, and subsequently continuing usage, (to which however in such cases, upon the best authorities in the law, resort may allowably be had,) on the face of the charter itself, by a fair construction of it, commonalty does include the aldermen.

It is observable that in all the preceding cases, except that of the *Attorney General v. Parker*, (where the exclusive latitude of the terms was such, that both parties found it necessary to restrain them, by resorting to an alleged usage in their own favour,) the recourse to usage was only applied to as an auxiliary argument; and that the opinion founded upon the mere construction of the instruments themselves, was conformable to the usage under them. In the case of *The King v. Bellringer*, 4 *T. R.* 810. the charter of *Bodmin* gave a power to a definite body, which was exercised by a majority of the subsisting body, but not by a majority of the definite number; the replication impeaching this act, alleged that by usage no election had been made, or could be made by less than a majority of the definite number. The Court declined deciding upon the validity of the usage alleged, or upon the manner of pleading it, because they held that, by the construction of the charter, exclusive of the usage, a majority of the definite number was requisite. Mr. Justice *Lawrence*, upon that case being cited in *The King v. Osbourne* said, that the usage there was not to explain a doubtful word in an old charter, but to give a construction to the general terms of it. It is perfectly evident that nothing was decided upon this subject in *The King v. Bellringer*, the usage and the construction being, as in the other cases above cited, in unison.

unifon. But in *The King v. Miller*, 6 T. R. 268, where an act of parliament constituted a body of 48 persons who, in conjunction with others, were empowered to do corporate acts in the town of *Northampton*; and a usage was pleaded, according to which the attendance of a majority of the number of 48, directed by the act would not be requisite, and which usage had subsisted for 300 years, it was held that such a majority was requisite under the act, and that the case would not be affected by the usage; former cases having decided in favour of the necessity of the majority of a definite body attending in the performance of acts delegated to such body, as a general question. Mr. J. *Grose* said, he admitted that where there is any doubt in a statute or charter, it may be explained by usage; but there was no doubt on the words of this statute, and if the usage were to be received, it would be for the purpose of creating, not of explaining a doubt.

Here the usage was not allowed to prevail, being in opposition to what was held the true construction of the charter, as deduced from the general law established with reference to the subject in preceding cases. So that, upon a general view of the subject, the actual effect of usage under a particular instrument, in explaining the instrument itself, appears to be very confined indeed; although very frequent opinions have been, by great authorities, expressed in favour of it. The general principle which is to regulate the admission of it, is in itself sufficiently vague; whether the words of an instrument are clear or doubtful, is a question, the exposition of which will often depend upon the particular character and mode of thinking of the individuals to whom it is addressed; embracing every variety, from the decisive impetuosity which doubts of nothing, to the fluctuating imbecillity which doubts of every thing. It has often been said, that the law has no doubts, and that every doubt which occurs in a judicial inquiry, is only that of the individual. The last case which has been cited shews, that the clearness which excludes the evidence of usage, is not merely that which results from the particular point in question being so precisely defined in the instrument as to leave no latitude for the application of the general rules of interpretation; but also, that which is deduced from preceding determinations, upon the effect of general expressions, though such determinations may have been made long after the date of the instrument in dispute, and refer to points which professional persons have regarded as subjects of great uncertainty. Is the admissibility of explaining a charter by usage, to be regulated then by the time when the question occurs? If, previously to the time of deciding *The King v. Bellringer*, the Court had regarded it

It as a doubtful point, whether the act of the majority attending was sufficient, without the majority of the definite number being requisite, a similar case had occurred to that from *Northampton*, upon which the Court had considered themselves relieved from deciding the general question; because, being a matter of doubt, the subject ought, in the particular case, to be decided by usage; and afterwards, the general question had necessarily, or casually become the subject of a judicial determination, by which the doubt before existing had been removed, and then a third case had occurred, similar to the first; would it be said that, in consequence of the clearness now thrown upon the subject, the evidence of usage would be inadmissible? Or, blinking still further the application of a general principle, would it be decided, that as there was already a precedent, that under those particular circumstances usage should be allowed to prevail, that precedent should not be disturbed, although, if the first case had happened then, the law having received a new light, it should have been determined differently?

This latter solution would only be a different statement of the same proposition, that the decision of the case would be made dependant upon the time of its decision, upon a term sooner or later, nay, possibly upon the casual arrangement of the cases upon the same day; for the improbability of a particular occurrence cannot affect the exposition of the principle. And the decision upon the ground of usage, which was right in the first instance, because the construction was then doubtful, might become wrong upon an appeal, because the doubt had been removed by an intermediate decision upon the general question.

Some decisions of Lord *Mansfield* had proceeded upon the principle, that a court of law might take notice of equitable titles in ejectment, if the equity were clear, but not if it were doubtful. One of the first things that the present writer heard in *Westminster-Hall*, was a protest by Lord *Kenyon* against the admission of such a distinction; which occasioned Mr. *Bearcroft* to make the observation, that what was clear, and what was doubtful in equity, was itself frequently very far from a clear question. How far the rights of parties may be bound by such acquiescence, as is stated by Mr. Justice *Lawrence*, in *Withnell v. Gartham*, may deserve very serious consideration, when a case shall arise depending upon that point. To raise the point, the acquiescence must be assumed to be in acts contrary to the true construction of the instrument; the number of instances, and the duration of time, in which they must have occurred is left perfectly undefined. Certainty, and repose are desirable objects, but where no statute of limitations intervenes, the

the foundation and basis of the title itself is intitled to a greater share of judicial regard than the mere submission, through mistake, indolence, or apprehension of expence, to a succession of acts in opposition to it. The principal case in which usage can be legitimately resorted to is, where the instrument contains expressions in themselves vague and undeterminate, such as inhabitants, burgesses, commonalty; but susceptible of precision by an exposition of the state of the subject to which they were intended to refer. In the case of the borough of *Preston*, it was resolved by the House of Commons, that the right of election was in the inhabitants at large. At a subsequent period, the House refused evidence to shew, from the circumstances of the contest upon which that resolution took place and all anterior and subsequent usage, that the persons who claimed under the denomination of inhabitants, were the freemen in opposition to a select body. A committee afterwards decided, that the right was in the inhabitants at large, but as that description was too vague and uncertain, they recommended passing an act of parliament to define it. No such act has passed, and under the authority of these determinations, every resident, in whatever quality, not disabled by the general law, at present votes in the elections, which is a right more extensive than exists in any other place. Here the explanations by usage would have been properly introduced, it would have been merely explanatory of the subject matter, to which the first resolution was intended to refer; and it is not probable that a court of law, acting upon true judicial principles, would have excluded it.

The above class of cases, is referable to subjects which are in some degree of a public nature. In the case of *Cooke v. Booth*, *Cowp.* 819. the exposition of an instrument by the usage which had prevailed under it, was extended to a subject entirely of a private nature; a lease contained a covenant of renewal, the question was, whether the subsequent lease was to contain the same covenant? There having been several successive renewals, the Court of King's Bench decided, that the parties had thereby put the construction upon it, and should therefore be bound. This was substituting the apprehension of a party, as to the legal construction of an instrument, for such construction itself; but the late and present Master of the Rolls have entered their protests against such a principle, and there is little probability of the precedent being adhered to. *Vid.* 3 *Ves.* 298. 6 *Ves.* 237.

The rule concerning explaining written instruments by extrinsic evidence, upon which I have thought it expedient to dilate with so much particularity, is confined to questions upon the effect and exposition

exposition of instruments admitted to be valid, and not to questions respecting their validity, which may be dependant on external circumstances, and consequently upon verbal testimony.

That an instrument was extorted by force, or obtained by fraud, is an objection which no apparent regularity can obviate.

There are several instances, by which this position may be illustrated with respect to fraud, but it may be sufficient to refer to the well known doctrine respecting policies of insurance being vitiated by the misrepresentation of a material circumstance, and to a recent case in which parol evidence of a testator, asking whether the will which he signed was the same as a former one, and of his being falsely answered that it was, was held admissible; the object of the evidence being to shew that the will was obtained by fraud, and not to explain its contents. *Doe v. Allen*, 8 T. R. 147 (a).

A contract which upon the face of it is regular, may be impeached as usurious. And generally any thing which shews the illegality of a transaction, may be allowed to impeach the obligations resulting from it, even as between the contracting parties, however formal and regular in its appearance. This subject was examined with great ability, by Lord Ch. J. *Wilmot*, in a case which shewed the ultimate object of a bond, to be the suppression of a prosecution for perjury, and which was before alluded to in discussing the doctrine of illegal contracts, *Collins v. Blantern*, 2 *Wils.* 347. Where an instrument is so drawn as upon the face of it to elude the stamp duty, as by dating a bill of exchange drawn in *England* at *Hamburgh*, the party to it is not precluded from impeaching the instrument, by shewing the

(a) In *Young v. Clark*, *Proc. Chan.* 530. the Court of Chancery refused to execute a written agreement for a lease, it appearing that the tenant had artfully kept the owner in the dark, with respect to the value. So Lord *Hardwicke* refused to execute a contract for the sale of timber, entered into upon a false representation, that *A.* and *B.* had valued it at 350*l.*, whereas in fact they had valued it at only 250*l.*, *Buxton v. Lister*, 3 *Atk.* 383. So Lord *Thurlow*, to execute a purchase of an estate, represented to be of the neat value of 90*l.* a-year, there being an industrious concealment of the necessary repair of a wall, to protect the estate from the sea at great expence, *Shirley v. Stratton*, 1 *Bro. Ch.* 440. But Sir *William Grant*, Master of the Rolls, in *Wollam v. Hearn*, 7 *Ves.* 211. refused to vary, at the instance of the plaintiff, a written agreement for a lease of 70*l.* a-year, and to substitute a lease for 60*l.* upon the ground of the defendant having represented that 70*l.* was the rent he paid himself, when it was only 60*l.*; and distinguished between the cases, where a defendant alleges the fraud as a defence against performing an agreement, and those where a plaintiff comes to enforce an agreement, according to the representation. This distinction is evidently founded upon the most correct reasoning, for fraud and misrepresentation are only objections which vitiate a contract, and do not constitute and induce one. To intitle the plaintiff to a lease, at the rent paid by the defendant, it is necessary to shew a positive agreement for that purpose, attended by the legal requisites; shewing that a different agreement was improperly obtained, is a very different thing from that. With respect to this subject, I think there can be no legitimate difference between the decision of a Court of Law, and a Court of Equity.

truth even against a fair indorsee. *Jordaine v. Lushbrook*, 7 T. R. 601.

As to the last position of *Pothier*, the principle upon which it is founded, viz. that two persons shall not, by any colourable proceeding, affect the consequential rights of a third, is so materially connected with the essential demands of justice, that it may be confidently stated as an invariable rule of law.

## SECTION IX.

### *Of the Examination of Witnesses.*

According to the law of *France*, witnesses could not in general be examined in a civil cause, without a previous judgment for the purpose, founded upon the allegations of the party requiring such proof, and an examination of the written documents which might either constitute a commencement of proof by writing, the nature of which is shewn in the preceding treatise, Part IV. c. 2. Art. 4. or which being decisive of the cause might exclude all verbal evidence to the contrary. From this judgment admitting proof by witnesses, an appeal might be, and frequently was, instituted. In the *Causés Celebres*, there are a great many cases respecting the admissibility of proof by witnesses, in what are called the questions of state, that is of birth, marriage, and all other personal qualities, respecting which very great credit was given to the public registers, so as frequently to exclude parties from offering proof in itself of a very convincing nature, either in opposition to such registers, or without laying a foundation for it from them. Previous to the admission of verbal testimony, the judge decided upon its relevancy to the matter in dispute, and the admitting such evidence to be given, necessarily indicated an opinion that it might be important in the decision of the cause, and that the other admitted facts were not sufficient for a full determination, without the assistance of the proposed examination, or, notwithstanding, any testimony which it might produce. Thus in the famous case of the *Prince de Conti*; the prince claimed the property of the late Duke de *Longueville*, or as he is more generally called in the cause, the *Abbé d'Orleans*, under a testamentary disposition, the validity of which was open to several difficult questions of law, and alleged that the testator, when he made a subsequent will, was in a state of insanity, which fact he required, and was admitted to prove by witnesses. Upon an appeal from the judgment, *M. d'Aguesseau* observed,

observed, that although the original court had not expressly decided, that the Prince *de Conti* had a valid title under the first will, they had decided it tacitly; for unless the will was good he had no title, and would not have been admitted to prove a fact, which would have been absolutely indifferent to him, since however certain the insanity might be, he could derive no benefit from it. The parliament having decided generally in favour of the judgment, it was agitated upon a second appeal, how far their decision had settled the point, upon the validity of the first will; upon which the same learned person, after mentioning his former opinion said, he considered that they had before determined that question, because it would have been contrary to justice, to admit the Prince *de Conti* to go into proof, in which he had not any interest, if the first testament were void; without first examining, not only the appearance but the solidity of his right, and being persuaded that that right was certain in itself, and only required the assistance of witnesses to destroy the obstacle which might be opposed to it. He then shewed that the first question was absolutely preliminary to the second, and that the parliament would never have directed an examination of the fact, which was the object of the latter, without having come to a determination of the former. "Without that (said he) you would have involved the parties in useless delays, in immense expence, and when they had satisfied your sentence, when one of the parties had examined 84 witnesses, and the other 76, it would remain to be said, the question is not to be decided by the fact, but by the law. Thus the permission which you had granted would be useless and dangerous, contrary to equity and justice."

So far as I have been able to obtain an acquaintance with the proceedings of our ecclesiastical courts, the examination of witnesses is there conducted upon the same principles. Whatever difference exists between our courts and those of *France*, and whatever necessary general preference may be justly due to the former, I conceive that an attention to the principles that have been just cited, might in many cases be attended with infinite utility; and that it is greatly the interest of suitors, to endeavour to bring their case before the court, in such a manner as to obtain, if possible, its judgment upon an undisputed fact, which may be decisive of the fate of the cause, and prevent an unnecessary accumulation of expence in the earliest possible stage of the proceeding; and that the public interest calls imperiously upon the courts themselves, to give their countenance to such an arrangement. With the highest admiration of the penetrating wisdom, and the impartial justice  
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of Lord *Kenyon*, I have been frequently struck with the impropriety, as it appeared to me, of his adopting a line of conduct founded upon the opposite system, and in my former publication on the decisions of Lord *Mansfield*, took occasion to advert to my impressions upon that subject, having repeatedly observed that, when he had abundant materials to warrant a conclusion, which might be decisive of the matter in dispute, whatever might be the result of an inquiry into a fact remaining in controversy, he declined exercising his judgment upon those materials, generally resorting to the observation of its being inconvenient to decide by piece-meal. This refusal to exercise a judgment, until the existence or non-existence of a particular fact was ascertained, naturally occasioned an expence and delay, which being unnecessary, it was highly important to avoid, in cases where, notwithstanding the result of the inquiry, so far as regarded the fact in question, might be unfavourable to one of the parties, it must frequently have occurred, that that party was intitled to the judgment, upon the other undisputed circumstances which were previously ascertained. The two following cases which I quote from memory will illustrate the tendency of the preceding observations. In the case of *The Corporation of Liverpool v. Golightly*, *Mich. 1791*, the question was, whether the right of making bye laws, in that corporation, was vested in the select body, or in the burgeses at large? The counsel for the plaintiff contended, that the words of the charter were so clear in favour of the latter proposition, that no evidence of usage could be admitted to support a different construction; and Mr. Baron *Thomson*, at the assizes, decided in favour of that opinion. Upon an application to the Court of King's Bench, a new trial was granted for the purpose of receiving the evidence of usage, but without giving an opinion, whether, when received, it could be admitted, however convincing, to have any effect; whereas, if the Court had concurred in the argument which was submitted to them, that no possible evidence of usage could influence the case, the examination would have been wholly nugatory; so that the postponing the conclusion upon that point might have been attended with all the inconveniences above adverted to. The subsequent abandonment of the case, from a deficiency of the funds appropriated to the contest, prevented the point itself being ever brought to a decision.

In the case of *Kilshaw v. Dean*, *Mich. 1797*, a factor of the plaintiff had disposed of goods to the defendant under circumstances which, it was contended did not affect the property, upon the principle that a factor can only bind the goods of his principal.

pal, so far as he acts within the scope of his authority ; and this, without any regard to the question of the party dealing with him, having no notice of the character in which he holds the goods, of which principle the inability of a factor to pawn is a common instance; the argument being conducted upon this point, and upon the right of the plaintiff to recover, even admitting a want of notice in the defendant. Lord *Kenyon* conceiving a probability that the defendant had notice, directed an inquiry to be made in the *West Indies* respecting that circumstance ; refusing to give an opinion upon the general proposition involved in the case, until that fact was ascertained ; the delay occasioned by which threatened very serious inconveniences to the party concerned : whereas, if the opinion of the court had concurred with the plaintiff's argument, assuming the supposition of a want of notice, such inquiry was absolutely indifferent.

The case of *Webb v. Fox*, 7 T. R. 391. affords another instance, of expressing an opinion having the same tendency. To an action of trover, the defendant pleaded the general issue, and also that the plaintiff was a bankrupt. Upon a demurrer to the latter plea, Lord *Kenyon* said, he could not commend the mode in which the question was brought before the court, since the whole of the case might be gone into upon the general issue ; whereas the defendants, in addition to the plea of not guilty, pleaded a special plea [which he said, would have been bad upon special demurrer, as amounting to the general issue,] and which would be attended with additional expence to the parties.—Now it is clear, that in case the Court had decided in favour of the plea, much expence would have been saved, because the allegations of the parties in the first instance, would have brought the point before the court in as perfect a state as it could have been brought, by the great additional expence of a trial, and a special case. I remember his Lordship expressing his disapprobation of the two pleas, with more severity of manner than appears by the report. The question which I recollect his having asked,—Why, if the special plea was preferred, was the general issue added } might have received the very easy answer that, although the defendant might expect, by the special plea, to obtain a cheap and early decision of the cause, it would not have been judicious to have therefore abandoned every other ground of defence. It must not be entirely taken for granted, from the doctrine in the above case, that the special plea would have been bad upon special demurrer ; for there are many instances in the books, of matters being specially pleaded in trover, which were, if any defence, a defence available upon the general issue.

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The case of *Hatton v. Morse, r. Salk.* 394. indicates the true principle upon these subjects, an attention to which might frequently be productive of the effect, which I have been desirous to promote in making the preceding observations. *Per Holt* Ch. Justice :—" In debt, the defendant may plead a release, because it admits the contract which is a colour of action, and yet he might give it in evidence on *nil debet*. So in *assumpsit*, the defendant may plead payment, because it admits the *assumpsit*, and yet he may give it in evidence on *non assumpsit*." Cases must very frequently occur, in which the application of these principles would be very important and desirable, by bringing upon the record, at the smallest possible expence, the real question in dispute between the contesting parties.

The preceding observations may also be applied to the practice of Courts of Equity; in which the defendant may, if the plaintiff's bill does not state a sufficient case to intitle him to relief, demur to the sufficiency of it; but this right is restricted in a manner that seems very inconsistent with a due attention to the important principle, that the administration of justice should be conducted with the least expence and delay, compatible with the preservation of its essential purposes; for it is laid down by Lord *Loughborough*, that a demurrer must be founded upon this, that it is a short, certain, clear proposition, that the bill would be dismissed with costs at the hearing. *Brooke v. Hewitt*, 3 *Ves.* 255. The reason which he assigned, for not deciding upon the demurrer in the particular case was, that it was not a dry point of law but was a case of circumstances, in which a minute variation of circumstances might either induce the Court to modify the relief, or to give no relief at all.—But it certainly cannot, in any mode of administering justice, be unreasonable to expect that a party claiming relief, shall be required to allege a case, which admitting it to be true, shall intitle him to the assistance which he claims; and that those who are invested with judicial authority should, at the instance of the opposite party, pronounce a decision upon the sufficiency of the charge, without involving the parties in a serious expence, and subjecting them to an anxious delay, the final result of which may be a judgment upon grounds that would equally have been open to decision upon the original statement. To instance a case in which this inconveniencce occurred, not upon any judicial determination, but upon the previous opinion of very respectable counsel, founded upon the established practice.—A person born before the marriage of her father and mother, claimed the benefit of a provision in his will in favour of his children;

then; there were a great number of circumstances in the case, which must satisfy every mind of the real intention, that she should be included; and it was wished originally, in an amicable suit, to state all these circumstances in the bill, so that a judgment might have been obtained upon demurrer, whether the natural import of the expressions of the will could receive a modification from the peculiar circumstances of the subject to which it was applied. But upon consideration, that a Court of Equity would not decide a question of this nature upon demurrer, it was thought requisite to go into a tedious and expensive examination of all the circumstances raising the question in dispute; and the result of that examination was a judgment, that the Lord Chancellor had no doubt of the intention, but that it was impossible in a court of justice, to hold that an illegitimate child could take equally with lawful children, upon a devise to children; *Cartwright v. Vawdrey*, 5 Ves. 530. a decision which, consistently with the real purposes of justice, though not with the usage of the court, might have been equally made upon the original allegations.

I have thought it advisable to dwell with some particularity upon this subject: for, although I have not the presumption to imagine that any suggestions of mine will alter the course of judicial proceeding, the object, with which these suggestions are connected, must be allowed to be of very material importance, by all who have had an opportunity of observing the frequency with which the expence of litigation becomes a more serious consideration than the original matter of dispute; and with the failure which claims supported by the substantial principles of justice must often experience, from the inability or terror of sustaining the requisite expences of asserting them; and if there is a possibility that the attention of the profession may be beneficially directed to the subject, the statement of these considerations will have received a sufficient apology.

The examination of witnesses may be either taken privately before a judge or officer, as is the case in chancery proceedings, or publicly, and in open court, as in trials at common law. In particular cases, a witness is, by special authority, examined before an officer, or commissioners for the purposes of a trial at common law; as where the witness resides, or is going abroad, or where his evidence is taken, by virtue of a bill in equity, for the perpetuating testimony; in these cases, the written depositions cannot be read, if there is an opportunity of examining the witness, in the accustomed manner at the trial; and the death, or absence of the witness must be shewn, or circumstances must be laid before the court, from which they may be inferred.

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The depositions which have been regularly taken, in a former proceeding, between the same parties, are properly admissible in evidence, where the examination of the witnesses cannot be had, in the immediate proceeding; and parol evidence may, under similar circumstances, be given with respect to what a deceased witness, or I conceive a witness residing out of the kingdom, swore upon a former trial between the same parties: such evidence is not admissible in a criminal prosecution.

In those cases the party against whom the evidence is adduced, cannot, in general, be deemed to suffer any material prejudice; for he had a full opportunity of sifting the testimony, by cross examination, at the time of its being originally given, which would, in many respects, and indeed in every respect, except the observations which may arise upon the demeanour of the witness, be attended with the same advantage, as if such testimony had been first adduced in the immediate proceeding. But there are cases where parties are affected by testimony, which they had not any opportunity of scrutinizing, and by the admission of which they may receive a material prejudice.

The statute 5 Geo. 3. c. 30. contains a provision for entering on record the depositions taken upon commissions of bankrupt, and directs, that in case of the death of the witnesses proving the bankruptcy, a true copy of such depositions shall, upon all occasions, be given in evidence to prove such bankruptcy. It has been held in the exposition of this statute, that the depositions are evidence, not only of the fact of committing the act of bankruptcy, but also of the time of its being committed. *Janfon v. Wilson, Doug.* 244.

By the annual mutiny act, it is provided that two or more justices of peace, where any soldier shall be quartered, in case such soldier has a wife, or children, may summon him to make oath of his settlement; and an attested copy of such affidavit shall be at any time admitted as evidence of such settlement, and such soldier shall not be again obliged to make any other oath respecting his settlement.

By the statutes of *Philip* and *Mary*, justices of peace are directed, in the case of persons being brought before them for felony, to take the examinations of the witnesses in writing. These statutes do not contain any provision for the examinations being admitted as evidence, in case of the inability of the witness to attend at the subsequent trial; and there certainly is a very great use in taking such examinations, for the purpose of assisting the judge at the trial, and in preventing the corruption and prævarication of witnesses,

without its being necessarily regarded as the object of the statutes, that the examinations themselves should be admitted as evidence upon the trial; but in point of practice, it is now established that such examinations, if taken in the presence of the party charged, shall be admitted as evidence, in case of the witness's death in the mean time. I rather think that this practice originated from its being taken for granted, without due examination, that the statutes were intended to have this operation; and that afterwards, the practice being established, it was not thought proper to disturb it; for in the case of *The King v. Paine*, *Salk.* 281. upon offering such an examination in the case of a misdemeanor, it was said by the Court of King's Bench, upon advice with the judges of the Common Pleas, that in case of felony, such depositions before a justice, if the deponent die, may be used in evidence by the statutes of *Philip and Mary*; but that cannot be extended farther than the particular case of felony. But it is evident that in this case, it was unnecessary to consider whether the depositions could be admitted as evidence in cases of felony; the judges correctly adverted to the circumstance, that the provision of the statutes was inapplicable to the case of misdemeanours; and the question whether, because an examination is directed to be taken, it shall, under given circumstances, be received in evidence, was perfectly irrelevant; so that what was said upon this subject was merely incidental. It appears by a note of *Mr. Peake*, 2 ed. pa. 93. that it is the practice to receive in evidence the depositions which were taken before the coroner by a witness who is dead, whether the party charged was present or not.

The question, whether the examination of a pauper respecting his settlement, taken before two justices who did not remove him, was admissible upon an appeal from an order, afterwards made, the pauper having become insane, (which was regarded as equivalent to his being dead) received a very elaborate decision in the famous case of *The King v. Eriswell*, 3 *T. R.* 373. upon which the judges were equally divided. The judges whose opinions were in favour of admitting the evidence, went upon the extensive principle of admitting even hearsay evidence, upon questions of this description. *Mr. Justice Grose*, who took the opposite side, partly founded his opinion upon the examination being extrajudicial, and it might be collected, that if it had been taken for the purpose of an order of removal, he would have thought it admissible; but *Lord Kenyon* distinctly expressed his opinion, that even if the examination had been taken to found an order of removal upon it, it would have been no better than a mere declaration of the party. I conceive that this  
point

point may now be considered as at rest ; for although it has not been expressly decided, that an examination taken before magistrates, as the foundation of an order of removal, cannot be read in evidence after the pauper's death, the point appears to be the clear result of the decisions which have actually taken place. In *The King v. Nunham Courtney*, 1 *East*, 373. the pauper, whose examination was taken, absconded between the removal and the appeal ; the Court, without giving any formal judgment, expressed a decided opinion against the admissibility of the evidence ; which was acquiesced in by the counsel. In *The King v. Ferry Frystone*, 2 *East*, 54. the examination was not taken for the purpose of removal, and the pauper was dead, the Court rejected the evidence ; and Lord *Kenyon* said, that it was true that in the case of *Nunham Courtney*, there was no evidence that the person, whose examination was taken, was dead ; but the opinion of the Court against the general doctrine of the two judges who supported the reception of the evidence in the former case, was pretty broadly hinted. The case of *The King v. Abergavilly*, 2 *East*, 63. was also that of a written examination never acted upon. These cases certainly strongly manifest the disposition of the court, and it seems to be pretty clear that the decisions were not founded upon the minor circumstance, in the two last, of the examinations having been extrajudicial, or in the first, upon the distinction between the pauper's death or his having absconded, but upon the more general principle which includes the death of the pauper, after a regular examination. I have known a court of quarter-sessions admit the evidence of such an examination, and refuse a case, upon the recititude of doing so, out of tender regard to the litigant townships ; as the dispute regarded only the settlement of a single individual, and the expence of agitating the question, would probably amount to more than that of maintaining the pauper.

In *The King v. Ravenstone*, 5 *T. R.* 373. it was ruled that the examination, before birth, of a woman with child, is, in case of her death, evidence against the putative father.

In *Breedon v. Gill*, 1 Lord *Raym.* 219. 2 *Salk.* 555. the commissioners of appeal proceeded upon the minutes of evidence taken before the commissioners of excise, which the Court of King's Bench thought wrong, and granted a prohibition as to the admission thereof. But *Holt*, Ch. J. said, that his private opinion was, that if the witnesses were dead, or could not be found, then the commissioners of appeal might make use of the depositions ; but that not being before him judicially, he would not give a judicial opinion.—Whoever has had an opportunity of attending courts of

judicature, and also of seeing the private examinations which are taken upon many of the occasions above alluded to, must be convinced of the great danger of suffering any public or private interests to be affected by such examinations. Wherever the narration of a witness may be the subject of objection, on account of his want of veracity, the failure which justice must experience from the want of an opportunity of trying the fact by a minute examination of circumstances, open to contradiction, by fixing the witness to particulars of time and place, and all other topics not comprized in a general sweeping account, will be manifest to the most cursory observers. When an objection to the veracity of the witnesses, who have been believed upon the first examination, is the very cause and motive of the appeal, the dead letter narrative, taken by a clerk in the excise, or by a country justice, exhibits none of those prevarications of manner, none of those indications of insincerity, upon which an adequate judgment, in many cases, so essentially depends.

But even when all suspicion of veracity is supposed to be out of the question, how very unsatisfactory is the *ex parte* account of a witness taken under circumstances, in which the adverse party had not a fair opportunity of cross examination, or in which such an examination, being unusual, could not reasonably be expected to have taken place.

In the examinations taken before magistrates in cases of felony, the object of inquiry is not the acquittal or conviction of the prisoner, but the propriety of confining him for the purpose of trial; he has not those assistances for analysing the proofs which are adduced against him, which exist upon a solemn trial, where he can call in aid the exertions of judicious advocates, and is sure of the protection of a learned and impartial judge. The minute investigation of the material facts may have even been deemed irrelevant to the immediate purpose of the inquiry; the combating of the evidence by professional assistance, or by adverse testimony, is frequently disallowed; and it is a very hard measure, that an authentic record may be taken of the evidence which tends to criminate, while there is not an equal opportunity of preserving the materials of defence. In one point of view, the admission of these examinations may not be very objectionable, that is, in respect to their producing a manifestation of the demeanour of the prisoner, upon the occasion of hearing them, when his silence may be justly regarded as a mark of acquiescence; but then the examinations ought to be treated, not as immediate evidence of the facts related, but as evidence, of certain facts being imputed to the prisoner in his

his presence, and of his conduct upon receiving the imputation; and even in this point of view, the subject cannot be treated with too much caution.

The decision of the event by the materiality of facts disclosed, on cross-examination, is a matter of perpetual occurrence; a witness before a magistrate, deposes to a prisoner's confession; he would depose the same upon the trial; but upon the interposition of the judge, it appears that the confession was improperly obtained, and the evidence is rejected, but the witness is dead, the deposition is produced, and the prisoner, upon the strength of it, is convicted.

In cases of settlement, nothing can be more unsatisfactory than the examinations, which are usually produced upon an *ex parte* proceeding, instituted by a parish for its own convenience, and deposited privately in its chest. *A. B. swears, that he gained a settlement in C., by being hired for a year, and serving a year to D. E. now deceased.* A very slight perusal of the settlement law will shew how intricate a system is established, with respect to the definition of a hiring and service for a year; and how inadequate a person who has been engaged in any employment must commonly be to form a judgment upon the complex proposition of law and fact resulting from any given combination of circumstances. It would certainly not be unreasonable in future mutiny acts to provide, that an examination, taken under them, should be transmitted, within a definite time, to the parish which it purports to charge, and that the officers of such parish should be allowed to require a second examination, at which they might have an opportunity, with professional assistance, to make a more particular inquiry.

The positive directions of a permanent statute have fixed the law upon this subject with respect to cases of bankruptcy, and there can be but one opinion as to the propriety of carrying that law into execution, according to the true construction of its intention; but with respect to the expediency of such a law, and its connection with the fair exposition of truth, the experience of every lawyer must furnish many instances of a set of cut-and-dried depositions being unable to stand the test of an open cross-examination.

The only remaining topic arising from the preceding cases is, the examination in cases of bastardy; which certainly has not any particular reasons of exception, from the general observations respecting the unsatisfactory character of *ex parte* depositions.

It is a general requisite to the examination of witnesses, that their testimony shall be given upon oath; but the manner in which the oath is commonly administered, is not very much calculated to impress the mind with the solemnity of its obligation.

Infidels who profess no religion that can bind their consciences to speak truth cannot be witnesses. But when any person professes a religion that will be a tie upon him, he shall be admitted as a witness, and sworn according to the ceremonies of his own religion; for it would be ridiculous to swear a witness upon the holy Evangelists, who did not believe those writings to be sacred. The *Jews* are always sworn upon the *Old Testament*, *Mahometans* on the *Koran*, those of the *Gentoo* religion, according to the ceremonies of that religion, &c. *Bull. N. P.* 282. See a very full and instructive discussion of this subject, in *Omichund v. Barber*, 1 *Atk.* 21. 2 *Eq. Ab.* 397.

The affirmation of *Quakers* is by *Stat. 7 & 8. W. & M.* rendered admissible, where an oath is required from others, except in criminal cases; which exception has been held to extend to the case of an appeal for murder, *Str.* 854. a motion for an attachment for non-performance of an award, *Str.* 441. a motion for an information, for a misdemeanour, *Str.* 872. articles of the peace, *Str.* 527. a rule to answer the matters of an affidavit, *Str.* 946. and an affidavit in defence of another, but not in defence of themselves against a criminal information, 2 *Bur.* 1117. It is held not to extend to a case respecting the appointment of an overseer, *Str.* 1219. or a penal action, *Atcheson v. Everett*, *Covp.* 382. Lord *Mansfield*, in that case, took a very comprehensive view of the subject, and seemed to dissent from some of the preceding cases of exclusion. By the same case, it appears that kissing the book is not essential to an oath; but any other solemnity, which a witness may think more binding, will be admitted.

In some Roman Catholic countries a notion prevails, that an oath imposes no obligation, in point of conscience, unless the person swearing has a crucifix before him. I have been informed of an instance which took place before the persons relating it to me, of a *Portuguese* who, upon the customary examination taken before commissioners, upon bringing in a vessel as prize, gave a full and distinct account of the neutrality of the vessel; but upon a suggestion of the prevalence of the notion above mentioned, a crucifix was exhibited to him, which induced him instantly to retract what he had said, and admit a case of enemy's property.

Many learned persons differ in opinion with respect to the comparative advantage of a public examination in open court, and a  
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private examination before a judge or commissioners, each commonly adopting the side which has been familiar to his own habits of practice. Sir *William Blackstone* strongly maintains the advantage of the former, as more conducive to the clearing up of truth; and observes, that a witness may frequently depose that in private which he will be ashamed to testify in a public tribunal. He also takes notice, that the occasional questions of the judge, the jury, and the counsel, propounded to the witness on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial; and that by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclination of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. *Commentaries*, III. 373.

Dr. *Brown* takes the opposite side, and after observing that the witnesses in the Ecclesiastical Courts, are to be secretly and separately examined, not in the presence of the parties or other witnesses, and that their depositions, after being read over to them article by article, and they asked whether there be any thing which they wish to alter or amend, are to be signed by the witness, and be afterwards repeated before the judge, *i. e.* asked again in the open court by the judge, whether there be any thing which he wishes to alter or correct; subjoins the following note. "How much is this preferable, in some respects, to an examination at *Nisi Prius*, where every incautious or hasty expression is instantly belaboured to the jury, and insisted upon, without giving time to the witnesses to correct a particle, or if he attempts to do it, perjury or prevarication is immediately charged on him?" *Lectures on Civil Law*, Vol. I. p. 479.

Sir *W. Blackstone*, in the place above cited, speaks of the power of a witness to correct and explain his meaning if misunderstood, as one of the advantages of open examination, in preference to the evidence appearing in the language of an artful, or careless scribe. So far as the respective examinations may be supposed to be taken with proper care and attention, and by persons of adequate ability I conceive that, with respect to this power of correction, the advantage is on the side of the written examination.

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If the subject of the examination requires a considerable portion of time to be allotted to it, an inconvenience is also likely to result, in the usual arrangement of business, from the limited portion of time employed in trials at *Nisi Prius*, the pressure of other business, and the want of an opportunity of admitting those relaxations and intermissions, which an adequate attention to the subject will naturally require, a consideration which often renders it necessary, for the purposes of justice, to submit cases of this description to arbitration, when an assiduous attention of many days, or even weeks, is often found requisite for the examination of a case, which, upon an open trial, must be disposed of in a few hours, or if necessarily protracted beyond that time, must be continued, without an adequate allowance for the remissions of attention, which nature absolutely demands.

In this, as in many other cases already alluded to in the present number, the rule which is established on either side, upon a principle of general preference, must, in a great many instances, fail in the particular application. The latent fraud which would escape detection in the formality of a private examination will often become conspicuous from the well-timed impression of a judicious question before a public auditory; but the truth which is overwhelmed by the petulance and insult, that sometimes accompany the practice of public examination, may exert its full influence where the circumstances that excited confusion and timidity are removed. I think the general balance is strongly in favour of a public examination, but that the abuses and inconveniences to which such an examination is liable, require a constant and zealous attention of the Court, in their correction or suppression.

I am apprehensive that the following observations upon the testimony of witnesses which have occurred to me, if not during an extensive practice, at least during an attentive observation of the proceedings of courts of justice, will appear very vague and unsatisfactory as applied to the extent and importance of the subject of them; and at the same time will, from the space which they occupy, be condemned for their diffuseness and prolixity; but although I am conscious of my inability to afford such a view of this subject as would correspond with my wishes, I am desirous of offering such a contribution towards it as accords with the more humble limits of my power.

All regard to testimony supposes the general proposition, that witnesses, not having any motives for asserting what is false or suppressing what is true, having had an adequate opportunity of observing the subject to which they depose; having actually observed it with

adequate attention, and having a distinct and perfect memory with respect to it, relate what they have seen, or heard with accuracy and fidelity; and the veracity of testimony, given by persons fully answering this description, is received and acted upon as a sufficient test of moral and judicial certainty. If a person, wholly indifferent to the event of a cause, should depose that within the preceding hour, he had seen one of the parties with whom he was perfectly well acquainted, execute a release, the fact of such execution would be admitted as a certain truth.

But in judicial inquiries, recourse must often necessarily be had to testimony, not completely answering the description which has been given, or with respect to which the application of that description may not be fully ascertained; and the scale of testimony descends from that high assurance, which is for all moral purposes equivalent to certainty, through every gradation of inferior testimony, to that which leaves the judgment completely in suspense, and from thence, through all the degrees between the slightest preponderance on the side of incredulity, to the extreme of self-convicted falsehood.

If a perfect and absolute assurance that a witness completely answered the above description, were in every case to be regarded as an essential preliminary to the credence of his evidence, the incredulity would, in numerous instances, be in opposition to the actual truth of the thing related. Such an incredulity would be the effect and sign of imprudence, in the ordinary intercourse of life; in the administration of law, it would frequently occasion a failure of right, and consequently merit the appellation of injustice.

Testimony therefore will, for either purpose, be in general regarded as accurate and true, unless there is reason, from its own inherent qualities, or from extrinsic circumstances, for forming an opposite conclusion, or at least, for suspending the judgment.

If there is an adequate opportunity for arriving at certainty, or obtaining further information respecting the truth of evidence, upon which the judgment is divided, the mind will require the satisfaction of which the subject is susceptible, either in confirmation of the fact asserted, or in contradiction of it, and the satisfaction expected will be in proportion to the importance of the object, to the degree of doubt attending the testimony afforded, and the nature of the opportunities for dispelling, or diminishing it.

But if there is no further opportunity of acquiring an absolute knowledge

knowledge of the truth, consistent with the purpose for which opinion must become the motive of action, the mind must decide according to the extent of its ability, upon the testimony actually before it, comparing the general reason for admitting, with the particular reasons for rejecting it, and these, with other particular reasons in support of it, and forming the judgment according to the due preponderance, without permitting the effect of that preponderance to be destroyed by the inferior reasons, which, previous to the moment of decision, may appear to be opposed to it.

This preponderance may admit of degrees, and the justness of the decision will depend upon the degree of preponderance, compared to the degree of importance attached to the decision.

Where the rejection of a fact as false, which eventually may be true, might be attended with material detriment, but the reception of it as true, if eventually it might be false, would be perfectly insignificant, the conduct will not only be influenced by the existence of a slight preponderance in favour of the assertion, but in opposition to a slight, or according to the increasing magnitude of the object, even a great preponderance against it; or reversing the supposition, where the reception as true, of what may be eventually false, would be materially detrimental, but the rejection as false, of what might eventually be true, would be perfectly insignificant; the abstract degrees of preponderance in support of the fact, would be less regarded than the danger of the conclusion. In matters of mere speculation, the decision is immaterial, in matters of practice essentially otherwise.

To adopt that conclusion which is supported by the strongest evidence, is, in matters of personal concern, the indication of wisdom and prudence; in deciding upon the fate or interest of others, to exert the strongest and most patient efforts of the mind, for the purpose of attaining a similar conclusion, is the indispensable attribute of justice.

In the intercourse of life, and in the administration of justice; the general assent to the veracity of positive testimony will be a correct rule of conduct, which in most cases will be confirmed by subsequent observations and experience. But as this general rule is, in a great many particular cases fallacious, as the application of it is frequently perverted by deception and error, it equally becomes the province of prudence, and of justice, to exert a proper and adequate caution for opposing and counteracting these exceptions, without permitting the excess of caution to defeat the benefit of the rule.

In some cases the spirit of caution is adopted by the law itself,  
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which adverting to general causes that are deemed to have a tendency unfavourable to the adequate manifestation of truth, prescribes rules of authenticity wholly excluding the admission of less authentic testimony, regulates the number of witnesses which shall be required for the establishment of a disputable fact, or excludes the testimony of those, whose interest or wishes may have an influence upon their relation, in opposition to the natural operation of sincerity. By this exclusion truth is often frustrated, as in the general reception of evidence it is often disguised and perverted; but in both cases, the general principle of conduct is to provide for the greatest promotion and preservation of it upon the whole. The degrees of precaution vary in different communities, according to the habits of the people, or the spirit and disposition of the individual law. But in all communities there is a limit to the principle of restriction, and where that ends, the principle of precaution must begin, confiding to the discretion and prudence of the judge, the exercise of that discrimination which can be no further regulated by the mandatory provision of the law; and it may not be unreasonable to observe, that where the latitude of the law is most extensive in the admission of evidence, it becomes requisite that the caution and circumspection of the judge shall be proportionately extensive in the reception of it; as being the only preservative against those abuses, which, in a more rigid system, are prevented under similar circumstances by exclusion.

The combining a proper confidence, then, with a proper caution at the time of writing the sentence, is the ground or object of judicial duty.

In adverting to the description of a witness, whose testimony was regarded as equivalent to moral certainty, I, in the first place, supposed him to be wholly indifferent to the event; but it very frequently occurs that those who are most interested in the event, have the most accurate knowledge of the subject. The testimony of these, it is the general policy of almost every system of jurisprudence to exclude. Others intimately connected with the interested party, and beyond the reach of exclusion, whilst they may be able materially to illustrate the subject of inquiry, cannot but entertain a wish upon the result; and even those who are originally indifferent will, in most cases, have an inclination in support of the cause for which they are produced. This is peculiarly the case, where the party or his attorney, and the witnesses have travelled together to an assizes, or are living together in an assize town;

or even when the witnesses themselves are together, as is commonly the case for some time previous to the trial; the cause in which they are to be examined becomes the natural and usual topic of their conversation, and the success of it, generally speaking, cannot be a matter of absolute indifference. Where the wishes are anxiously engaged in favour of an event, the opinions are seldom wholly uninfluenced. A philosopher sees in a stronger form of view the facts which favour his system; an advocate, though avowedly arguing not upon his own impressions, but upon the grounds most favourable to his client, becomes really impressed with the truth of the proposition which he is engaged to sustain; and a witness, under the circumstances above alluded to, sees the truth through the medium of his wishes. It is the regular habit of the bar to exclude the witnesses from their consultations; in order to prevent their testimony being biased by the views which they might receive of the bearings of the cause; but the other conversations in which they are engaged present that object to their mind. Some practitioners, to insure the success of their cause, interrogate the witnesses again and again, without any sinister motive, and merely with a wish to assist the accuracy of their examination. Others more judicious having once, by careful investigation, informed themselves of the truth, trust to the natural and unprepared effusion of it. It is very easy to lay down a general maxim, that a witness ought to divest himself even of involuntary wishes, that he ought in the manner, as well as the substance, of his narrative, to adhere to a succinct, impartial account of the truth; but still the infirmities of human nature will have their operation, and a witness, in the short period allotted to his examination, will, in many cases, with a mind unaffected by the slightest intention of a wilful deviation from veracity, give an aspect to his relations derived from the previous influence of his wishes upon his opinion; and if this circumstance will occur, as in numerous instances it unquestionably will, with respect to persons who are duly sensible of the nature of their obligation, how much more extensive will be the influence of similar considerations, with respect to those who are indifferent to it? The inference which I wish to deduce from the preceding observations, is the propriety of receiving, with adequate circumspection, that part of the testimony which may probably be influenced by such considerations as have been alluded to, without unduly discrediting the substantial parts of the relation, which may be entirely free from any rational objection. I am perfectly aware of the general adoption of the maxim, that if the witness wilfully

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deviates from truth in any particular, the whole credit of his testimony is destroyed, and shall have occasion more particularly to allude to it; but the true application of the maxim is only referable to those deviations, which result from the actual depravity of the mind, and does not extend to its involuntary infirmities. To illustrate my general idea by the particular application of it. Two witnesses may give a correct narrative of the same event, so far as their moral veracity is concerned, yet leave a very different impression upon the minds of their hearers; the mere manner of narration with respect to looks, tones, and gestures, will produce the difference. The friend of an injured party will describe, with feeling and interest, the subject of his complaint; his previous sentiments give the subject an exaggerated representation to his own mind, which he communicates to his hearers; the friend of his assailant sees, in a striking point of view, the provocation which to the other had appeared trivial and insignificant, and the conduct occasioned by it will appear in very mitigated colours; and from a mere indifference in the mode of his relation, will produce a precisely opposite impression; while an unconnected bye-stander will give a representation perfectly accordant with the others in its general substance, but presenting the correct medium between the excess of the one, and the extenuation of the other. His own narration will receive a degree of vivacity or sluggishness from his constitutional character, but will not be influenced by those considerations which actuate the others. Wherever, therefore, the judgment and opinion may be involuntarily, and unconsciously affected by the habits or relations of the witness, a suspicion may be reasonably entertained of the justness of his narration, so far as the operation of these causes may be imputed to him, without invalidating the general credit in his veracity.

To this observation may be added, the readiness which appears in adducing what is favourable to the party on whose behalf the witness feels an interest, and a reluctance in disclosing what is adverse to him. I admit the duty of a perfect equality and indifference, but I conceive the deviations from that duty are referable, in many cases, to the sources which I have already alluded to. A witness is placed in a situation to which he is utterly unaccustomed, he cannot possess the presence of mind, and the composure of an indifferent spectator, or control at pleasure, the tendencies of his disposition; the difference of his manner, with respect to the two parts of a subject, will properly exercise the discrimination of those who are to decide upon his testimony; they will endeavour to correct the effect of his partiality; but will not urge the charge of falsehood and prevarication, beyond the designed and

wilful dereliction of integrity. I trust that I have expressed myself with sufficient distinctness, to prevent its being supposed that I am becoming the advocate for intentional misrepresentation, or deliberate suppression; I wish only to inculcate the principle of preventing the natural infirmities of the character having a more extensive influence upon the credit of testimony, than they may reasonably be supposed to have upon its truth.

There are some particular subjects, in which the suspicion of involuntary bias in a witness will be stronger than in others. It will evidently be least in plain matters of fact, as whether a carriage was on the right or left side of the road. It will be strongest when it relates to *manner*, as whether the driver, who is himself the witness, was conducting himself properly or otherwise. The evidence of conversation and expressions ought to be received with very considerable circumspection, so far as any thing depends upon its circumstantial accuracy. It very rarely occurs that two persons will relate the same conversation in the same manner. The particular phraseology of the relator will always blend itself with the relation; and nothing is more common than for the impression of conversation to be influenced by the previous disposition of the parties to it or the hearers of it. The accounts which are published in the news-papers, of the proceedings in parliament, or courts of justice, on the day preceding, vary considerably from each other, not merely in the taking a more or less comprehensive view of particular parts, but also in the substance of the statement relative to the same particulars, and even in the order of the speakers; and the general correctness of the representation is very seldom assented to by those who, from having been present, have an opportunity of confirming or contradicting it.

Nothing is more natural than to apply what we hear according to what we wish, to construe an expression of civility as an offer of service, the recommendation of a customer, as a promise for the payment of his account. The statute of frauds has interposed its authority, to prevent the effect of this misconception in several cases particularly enumerated. The principle of that statute, may be judiciously applied to the effect of evidence, in several cases without the limit of its provisions, but subject to the mischief against which it was intended as a remedy; evidence of promises, and acknowledgments, is almost always given by persons who are in a situation which prevents their being absolutely indifferent respecting the effect; and who will, in many cases, unconsciously give a turn to the conversations which they relate, by no means accordant with the impressions which the speakers intended to convey. To receive the representations of these persons as literally correct, to  
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consider the expressions which they relate, as having the same authentic certainty as a written document, will therefore, in many cases, lead to a conclusion repugnant to the truth, and consequently the attention given to such evidence will, according to the just principles of ratiocination, be much less than that which is due to the plain affirmative or negative of an unequivocal matter of fact.

There is one kind of testimony to which the preceding observation emphatically applies, and which is often subject to the additional imputation of an intentional want of fairness of conduct. I mean the acknowledgments which are obtained by persons connected with the law, on behalf of the parties for whom they are engaged. Such acknowledgments only deserve a full attention, when it appears that they were made with perfect freedom, and with perfect plainness. The disingenuous artifices which are made use of to entrap a person into expressions to be used in evidence against him, the eagerness to make a direct and positive application of an ambiguous expression, to strain into a promise or acknowledgment, what was never intended to convey that impression to the mind, cannot be too narrowly watched, or too strongly discountenanced. Nothing is more calculated to excite an unfavourable opinion, than to see an attorney stand up to support his falling cause, by supplying all deficiencies of proof, from some supposed conversation with the adverse party; and, according to the apt metaphor commonly applied to the subject, pinning the basket. A reputable attorney will be cautious of engaging in conversation with the adverse party, except in the presence of his own professional adviser, and will be still more cautious in avoiding any unfair representation of it; but however strongly the general respectability of the profession may inculcate the propriety of this practice, experience evinces that there are many particular exceptions; and the caution which is advisable with respect to crediting the testimony of persons, whose situation is in some degree a pledge for the propriety of their conduct, becomes requisite, in a still higher degree, with respect to the inferior officers of the law; a set of persons among whom there are many instances of probity of character, and propriety of conduct, but who, in general, find their greatest interest in their adroitness to serve the parties by whom they are engaged. It would tend greatly to advance the credit of all evidence given of such acknowledgments, if they were immediately taken down in writing, and communicated to the party making them; and in case any dissent was expressed, or explanation offered, that should be added to the minute; in short, it is desirable that an accurate memorial should be made of the transaction, and of

the demeanour of the party, before the impression of the memory could be perverted; and what is still more important, before the testimony could be influenced, by a view of its materiality, derived from the subsequent aspect of the cause. The preceding observations may be extended, in a remarkable degree, to the inferior retainers of police, who generally feel a strong interest in the conviction of persons charged with criminal offences, and are apt to suppose their own reputation for assiduity and activity connected with that event. It would conduce to the purity of justice in this respect, if no accounts of the declarations of prisoners to these persons were received upon a trial, which were not stated and reduced into writing upon the examination of the prisoner before the magistrate, and the prisoner's declaration respecting which, at that time, was also carefully recorded. The magistrates should likewise be very particular in stating, on the examination, the circumstances and manner in which the declaration was obtained, and not be satisfied with the common-place questions, of whether there were any threats or promises; since the legal objection is, in terms, often carefully avoided, while the spirit and principle of it have their full operation and effect. Courts of justice, generally, with great propriety direct a jury to lay out of their mind any representation of officers of police, respecting the alarm or agitation manifested by a person, on being charged with any offence, a subject which is often very eagerly presented to them; correctly observing, that innocence may not be less agitated by an unexpected charge, than criminality alarmed by detection. The evidence of persons who depose to their scientific knowledge of any matters in dispute is, in many cases, subject to be influenced by their wishes, in favour of the party adducing them. It has been the observation of a great advocate, now advanced to a high judicial situation, respecting the conflicting testimony of surveyors produced by the opposite parties, that these persons were only advocates upon oath. The course of practice certainly furnishes many instances of the truth and propriety of the observation; the proper correction of this inconvenience is to apply the attention, rather to the conviction, which these advocates produce upon the mind, by the justice and consistency of their arguments, than to give to their testimony the authority which is due to an indifferent relation of an obvious matter of fact.

The above observations will sufficiently indicate the principle which I have endeavoured to establish, in favour of a distinction, between the caution which should be applied in the reception of evidence, from persons who may naturally be supposed to be not indifferent in the event of an inquiry, and the absolute discredit of their testimony.

The opportunity of observation, the accuracy with which that observation has been conducted, and the fidelity of memory with which it is related, are also circumstances which should naturally form a material ingredient in the credit which it should receive. It is very certain, that the mind is often deceived by its impressions upon these subjects: and that upon examination and inquiry, its most firm opinions are found erroneous; for the truth of which position the most satisfactory test will be afforded, by referring each individual to the evidence of his own experience. The well known anecdote of Sir *Walter Raleigh*, who suppressed the second volume of his *History of the World*, upon finding himself deceived in the nature of an occurrence, of which he had supposed that he had an accurate knowledge from his own observation, is a constant lesson as to the propriety of a minute examination into the accuracy which the mind of a person possesses respecting the subject of his relation; but it is a more important caution upon the necessity of distinguishing between misconception, and misrepresentation; and against rejecting the general testimony, as unworthy of reception from its want of veracity, when the only imputation to which it is justly subject, is a mistaken conception respecting some incidental particular. The discordancy of witnesses upon the same fact, is therefore very frequently ascribed to a mere difference of observation or memory. The immediate attention of one person being directed to one part of a subject, and another to another, a different impression is left upon their minds; each, by the frame and course of his attention, will have a less lively idea, and a less retentive memory, and consequently will be, in a greater degree, subject to the influence of mistake, with respect to that part of the subject which has had the smaller portion of his regard, than with respect to the other upon which his mind has been more immediately occupied. A greater or a less degree of attention will also be pointed to the subject itself, without reference to the distinction between the different parts of it, according to the mind being in other respects free or engaged, according to habit, inclination, or an infinite variety of other causes being calculated, or otherwise to create an interest in the occurrence. Hence will result a difference of narrative, which so far as it is resolvable into this cause, will rather be an indication of veracity, than induce a suspicion of falsehood. The distinction between the inconsistency that results from representations having no solid foundation in truth, and which therefore accompanies every part of a narrative, not included in the previous arrangement, and the variation which may be ascribed to a difference in the impressions of the mind respecting a real occurrence, often calls for the most judicious discrimination. But

though a discordancy referable to the causes which have been mentioned, is certainly no indication of falsehood, it is sometimes too strongly relied upon as a manifestation of truth, and as demonstrating that there has been no previous concert; whereas, it is almost impossible for a previous concert to embrace every incidental circumstance, which may be introduced into the examination as a test of veracity. I conceive that this discrepancy is, in general, only a negative quality, leaving the testimony of which it forms a part, to stand or fall by its merits in other particulars. I have heard of a mode sometimes adopted, (and the mention of which is not so much calculated to promote the practice, as to defeat it,) of giving to a mere fabrication all the circumstances which will insure an apparent veracity, by the consistency of the relation, without giving it the appearance of a concerted narrative. It is said, that in order to prove an *alibi*, (a defence the most conclusive if true, but the most readily counterfeited,) several associates of the prisoner meet together under circumstances in which they mean to state the prisoner to have been, the prisoner being represented by another person; nothing is more easy to fix, in concert, than the time to which the relation shall refer; and the actual occurrences at this rehearsal form the basis of the consistency upon the trial. The person of the prisoner, and the date of the event, are the only subjects misrepresented; and every other circumstance being founded upon truth, will equally stand the test of examination, as a relation of the most substantial veracity.

I have already alluded to circumstances, with respect to which the impression of the mind is materially influenced by the previous disposition, referring particularly to the report of conversations. The observations which were then made will, in many cases, be applicable where the cause alluded to has not any operation, and where the want of accuracy may result from causes wholly unconnected with any bias upon the testimony; of which the principal is the negative cause of a want of adequate attention, or perception. How generally does it occur that we mistake, at the very instant, the meaning intended to be conveyed, by expressions directed immediately to ourselves, and of how many private animosities is this circumstance the cause? How great then is the caution which ought to be applied to the relation of particular expressions, to which the hearers, at the time of their occurrence, were in no wise interested to attend, or which, from their situation, they were liable to misconceive; and how slightly does an inaccuracy, or discordancy in this particular, affect the general credit of their testimony? An instance lately occurred of a person who deposed, that he heard a gentleman of high character and respectability, the second in a  
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duel which proved unhappily fatal, say to his principal, in returning from the field, *By God it does me good*—this was adduced as the indication of a mind peculiarly malignant. The testimony did not receive credit, but the gentleman alluded to, upon revolving in his mind what could have been the occasion of it, recollected having said, with reference to the state of his health, and some circumstances connected with the occurrence of the morning, *This will do me no good.*—Without affirming the authenticity of this latter fact, nothing can be more manifest than the probability of the explanation, while on the other hand nothing could have been more improbable, than an intentional falsehood on the part of the witness. And if particular expressions are so liable to misconception, in the moment of their occurrence, it is clear that the danger of unintentional misrepresentation is greatly increased by the imperfection of the memory.

Another subject upon which many instances of mistake occur, both in the course of private experience and of judicial inquiry, is the identity of persons. Mistakes upon this subject not unfrequently occur, with respect to persons with whom we are previously familiar, but with whom we had no immediate communication upon the occasion related. The mere impression of personal resemblance, in those of whom we had had no previous knowledge, is evidently much more fallacious. Some years ago a person was tried at the *Old Bailey* for a robbery, and his person was positively deposed to; his defence consisted in proving, most indisputably, that at the particular time he was upon his trial, at that bar, upon a different charge. There are a great many modern instances of positive and sincere testimony upon criminal charges, with respect to the identity of persons, whose absence was manifested by the most convincing evidence. Upon these occasions, it appears most judicious to receive the evidence of identity with considerable distrust, unless it is accompanied by circumstances incontestibly applying to the particular person, who is the object of inquiry already alluded to.

According to the difference of habits, and characters, the minds of individuals are directed with greater or less attention to subjects of different kinds, and their testimony respecting these is susceptible of correspondent variations of accuracy; and therefore minuteness of recollection, upon one particular of a transaction, is not repugnant to a considerable uncertainty in another. In some, a particular distinctness with respect to dates is contrasted by an unusual forgetfulness with respect to names or persons. Others again have a very imperfect memory with respect to all these, but a minute recollection of circumstances. However fair it may be in an ad-

vocate, to take advantage of the variations resulting from the particular character of the memory, the interests of truth require the judge to fix the effects of these discrepancies at their proper value, to distinguish between the accuracy and inaccuracy of the different parts of the narration, and to prevent an inaccuracy in circumstances being mistaken for a dereliction of veracity in the substance.

It is the property of the memory, like the attention, to be in general more immediately engaged by particular parts of a subject, which present themselves naturally and spontaneously, whilst others are only brought into recollection by the effect of exertion, or may lie wholly dormant. It very seldom happens that all the circumstances of a transaction occur, with equal readiness, to the mind; and therefore the omitting to mention a circumstance in the first account, is by no means a convincing argument of its intentional suppression. In general, a witness comes into a court with the memory strongly bent upon those parts of a cause which have occurred to him as material. The revival of other circumstances is the result of a particular examination respecting them; and according to the usual operations of the mind, they will unfold themselves, gradually at first, with indistinctness, and afterwards with precision, unless this natural progress is prevented by an intimidating and acrimonious course of inquiry.

It is to this ground of accuracy of observation and recollection, that the preference of positive to negative evidence is principally to be referred; for it is much more probable, that a person may not have observed an occurrence which actually did take place, or having observed it, may not have recollected it, than that another should imagine circumstances which had no foundation in existence; and it is only to this kind of negative, which is accounted for by the want of observation or recollection, that the preference properly applies: for, if the ground of denying the truth of an assertion is an actual positive observation in opposition to it, this testimony is, to all rational purposes, as much affirmative, as that which it is opposed to. Thus, if a witness alleges a person to have been drunk at a given time, and another declares that he was not drunk; it is an affirmative declaration that he was sober, and the weight of credit must be decided according to other circumstances. A distinct account from the witness asserting the party not to be drunk, that he had been in a coach with him all night, and for several hours in the morning, up to the time in question; and that he had not tasted any intoxicating liquor, would be more convincing than the general declaration of a state of drunkenness. With respect to the permanent nature of a subject, negative evidence is as strong as affirmative, if the nature of the subject is such that the

the former is equally free from the suspicion of error with the latter. A person swearing that there is no bridge over the *Thames*, between *London* and *Blackfriars*, would be entitled to as much attention, as another swearing that there is a bridge between *London* and *Westminster*; and the same observation, which is so palpable with respect to the instances alluded to, ought equally to prevail in other cases referable to the same principle.

It sometimes occurs, that a witness, having a given fact proposed to him, will not swear positively to the non-existence of it; when the fact is of such a nature, that if true, it cannot be supposed but that he must have known and recollected it. Thus if a witness was asked, whether since the commencement of the trial, he had told a person present that he was come to perjure himself; there can be no doubt but that he can with sincerity only answer yes, or no; but there are many cases in which it is equally evident, to those capable of forming an adequate judgment, that the recollection of the existence, or non-existence of a given fact, must be perfectly distinct; but in which the witness, from a superabundance of caution, expresses himself with doubt and hesitation; and in fact I observe this kind of hesitation to be very general, in persons of confined habits of thinking when examined upon such topics. They are then plied with a set of questions about, *If it had been so, must you not have recollected, &c. &c.* asked in a manner which increases their embarrassment; but the answer to which is not so much an act of testimony as of reasoning. Where proof is actually given of a fact, that the witness could not but know and recollect, his expressing himself in terms of doubt and uncertainty, is to be regarded as an act of wilful misrepresentation; on the other hand, if no such proof is given, and the testimony is, in other respects, unsuspecting, and the witness is not a person who, from his situation and understanding, cannot but be aware of the power of giving a direct affirmative, or negative; it should be taken as the result of his testimony, that the fact did not exist; or at all events, it should not be taken for granted that it did, from a witness declaring that he could not swear that *it was not so*.

Evidence of reasoning is also referable to the same general topic. A witness's testimony of a fact may be positive, though the reason he expresses for it is false or absurd. I have heard a witness, when cross-examined, as to his reason for knowing cloaths which had been stolen from him, refer to a matter of general description, which of course was followed up with, *Had no other person ever cloaths of that description?* The judge, in his observations to the jury observed, that a witness, in assigning reasons for facts of which he must have a positive knowledge, as  
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the identity of his own cloaths, often gave the worst reason that could be imagined; but the absurdity of the reason ascribed, did not diminish the weight of the testimony of actual knowledge. But where the evidence necessarily resolves itself into matter of reasoning, the case is materially different, for there the failure of the reason prevents the subsistence of the conclusion which is founded upon it. To instance a case which occurred in the same Court with the preceding. A witness swore that a person examined on the other side, was not fit to be believed upon his oath; and being asked his reason said, that he had never made a good fence since he came to his farm.

Where a witness is examined as to his reason, intention, or opinion upon some past occasion, it will often happen that he states such reason, as appears to him most plausible at the time of his examination. If the reason inquired for relates to some positive fact out of the ordinary course of occurrences, the reason and motive can be, in most cases, remembered, with as much distinctness and accuracy as the fact; but I have known persons interrogated with some severity, as to their reason for not doing something, to which the nature of the thing supplies the answer, that no adequate motive occurred to induce them actually to do it; but the witness, perplexed, and confused by the question, will, in an indistinct and hesitating manner, give some answer which induces an unfavourable impression with respect to his veracity. This observation occurred to me in hearing a trial, where a witness who had made a shaft, for the purpose of getting brine under the land of the defendant, made certain observations and experiments, to ascertain that he did not carry it under the land of the plaintiff, and these observations being such, as if true, were, from the nature of the subject, conclusive with respect to the inference deduced from them, he was interrogated as to his reasons for not doing various other things suggested to him at the trial. Sometimes an intention is inquired into, respecting an occurrence at a distant period, upon which, in all probability, there did not exist any intention at all; as where a person, who had 40 years before engaged her son to serve another for a given time to learn a trade, was asked, whether she did not intend that he should be an apprentice? To this, being, as usual, desirous of getting to an end of her examination, she answered, *yes*; whereas it was highly improbable that she should have any intention, with respect to those distinctions between service and apprenticeship, which have been introduced into the settlement law; instead of merely designing that there should be a service and instruction upon the terms agreed upon, according to which terms the son would have acquired a settlement by service;

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yet from this answer, *yes*, a bench of justices was induced to decide the contract to be a defective apprenticeship.

And here it may be proper to advert to a distinction, which has often occurred to me, and was referable to the preceding case, between the words used by, and proceeding from the witness as his own, and his giving an answer of *yes*, or *no*, to the question proposed to him; the former being the indication of his own impressions and recollection upon the subject of inquiry, the latter being the result, the adoption, or rejection of an extrinsic suggestion. It is therefore not an accurate representation of the testimony of a witness, to state that he had given a narrative in language apparently his own, when he had merely given an affirmative or negative answer to the language of another. Such a conversion of expressions can only be an adequate delineation of the testimony, upon the supposition of the witness having distinctly and fully comprehended the language presented to him, and of his assent or dissent to it, being a perfect representation of the ideas previously existing in his mind. There is a peculiar danger of this kind of perversion, when a summary, and *ex parte* representation, taken at one time, is introduced in evidence at another.

The preceding observations have been chiefly referable to testimony upon mere matters of fact, but these are often blended with matters of judgment; and the latter are themselves, in many cases, the sole object of examination. The adequacy of the judgment must therefore be assented to before any confidence can be placed in the result of it; and this confidence will depend upon the apparent or acknowledged talent of the witness, and his opportunity of forming an adequate opinion, which latter circumstance will be materially influenced, by the nature of the subject to which it is applied. In general, every person exercising an occupation is supposed to be conversant with the subject of it, and his opinion is abided by, unless contradicted by others intitled to an equal confidence; or unless there are intrinsic circumstances for disputing it; *cuiuslibet in arte sua credendum est*.

But upon the conflict of testimony, a judgment is often to be pronounced according to the apparent relative competence of the respective witnesses; this judgment ought not to be hastily referred to the fluency of their expressions, or the plausibility of their manner; since a patient attention will often perceive, that the most accurate knowledge is not always accompanied by the greatest facility of communicating it. The opportunity which results from the actual observation of a particular subject, is evidently more to be relied upon, supposing the judgment to be equal, than that which is founded upon relation, and much more than that

that which is referable to mere hypothesis. A consistency with undisputed facts is one of the most advantageous tests, of the confidence which ought to be reposed in the decisions of the judgment, but it is often dangerous for those who are to decide, acting upon their own inadequate conceptions, hastily to deduce a charge of inconsistency, in opposition to the opinions of technical experience. Wherever such an inconsistency is supposed to exist, it should be fully pointed out, for the purpose of receiving such elucidation as the witness may be enabled to afford, without reserving it for matter of subsequent observation, which may probably be erroneous.

The testimony of a witness, with respect to subjects upon which he has a peculiar knowledge, is sometimes received with dissatisfaction on account of his deposing to the existence of distinctions, or *criteria*, which are not perceptible to those by whom he is examined; and which, because they cannot discern, they will not suppose to exist; but this is an improper standard of judgment, for every person can, with instantaneous facility, discover the casual variations in subjects with which he is habitually familiar, and these in circumstances so minute that they would not be susceptible of communication to a common observer. The *Arab* or *Indian* will trace, through the forest or desert, the footsteps of which the members of cultivated society cannot discern the slightest impression. The mariner will describe the particulars of a vessel, which to the passenger appears a speck in the horizon; the lawyer, and the physician in the objects of their respective professions, the botanist in his plants, the chemist in the contents of his laboratory, will perceive a materiality in distinctions, of which, to those who are unaccustomed to their different pursuits, they cannot convey an intelligible description. The mind in weighing the capacity of an expert, with relation to the subject of his art, should not decide upon the apparent uncertainty of the new and adventitious object of its attention, but upon comparison with its own facility of observation, upon subjects with which it is most familiarly conversant. There are few subjects in which, independently of experience, or the conclusions of precise and accurate reasoning, there would be a greater apprehension of uncertainty, or a stronger suspicion of guess and conjecture, than the art of decyphering, yet it is an art which, (at least in its lowest application, of a substitution of letters,) depends upon principles as certain, and almost as easy of communication, as the lowest rule of arithmetic. The weakness of those who circumscribe the bounds of possibility and veracity by the limits of their own perception, is often illustrated by applying the fable of the horse, who was torn to pieces, for asserting in the torrid zone, that in other climates the men were white,

white, and that passengers could travel over the surface of rivers.

There are also many cases in which witnesses speak from judgment and opinion, without reference to any technical knowledge; such, for instance, is evidence of character, and all other testimony amounting to a general conclusion upon particular facts; when this conclusion is accompanied by a narrative of facts from the same witness, the sufficiency of the conclusion is a matter perfectly distinct from the reality of the facts; an advocate who would impeach the veracity of the facts, makes but little progress, by shewing the weakness of the conclusion, and on the other hand, the advocate who relies upon the facts, is not precluded from disputing the conclusion. This may be illustrated by the following case, which I have known to occur in practice; a person deposed to having entered into a service under circumstances which, in point of law, would amount to a general hiring, which is equivalent to a hiring for a year; but she also declared that she was not hired at all; the latter part of her testimony was evidently no more than the judgment of an ignorant witness, as to the legal import of the term *hiring*, to which she attached the idea of an engagement made in a certain manner, or for a certain time expressly mentioned; but it was contended and successfully, in a Court of Quarter Sessions, that it was impossible to pronounce in favour of the acquisition of a settlement upon this evidence, as the witness upon whose testimony the whole depended, declared that there was not any hiring, and those who produced her, and relied upon her evidence, were bound to take the whole together.

In deciding upon the truth of evidence, much stress is laid upon the inherent probability of it, a criterion which, within its proper limits, is attended with great utility, but which, like all other general *criteria*, may be carried too far; for where a testimony is direct and positive, where the circumstances to which it relates are palpable and not calculated to excite delusion, where the witness had a perfect opportunity of knowledge, where he has no motive to misrepresent, and still further, where the representation militates against the usual motives of conduct; where several witnesses, of unimpeached integrity, free from all suspicion of collusion, speaking from detached and uncommunicated knowledge, concur in the attestation; where the fact attested concurs with other undisputed phenomena, not reconcilable with the supposition of its falsehood; the previous and insulated probability of the fact asserted is a less powerful motive for the decision, than the positive conviction resulting from the force of the testimony; the rejection of which would be founded upon a much higher degree of improbability, than

than that which it professes to correct. Such I conceive to be the summary of the argument, which is usually applied to a subject of a much superior nature to that of my present investigation, but the principles of which may be properly adapted to inferior objects of ordinary disputation. It is seldom that a case will occur, in which the improbability of falsehood will advance to that high degree of certainty, which is involved in the preceding enumeration, but each of the circumstances alluded to will have their influence in forming a decision between the abstract improbability of the fact related, and the particular improbability of the immediate relation under all its circumstances being false. I have witnessed several cases which called for the practical application of this distinction; the one which at present occurs to me, is an action against a man for sowing the field of another with dock seeds; a fact which was positively sworn to by a casual observer, and confirmed, amongst other circumstances, by the growth of the docks, in the course which he had taken; it was contended to be highly improbable, that any man should be guilty of such malignant conduct; but it was answered, that it was much more improbable that the witness, who had no connection with the one party, or animosity against the other, should gratuitously involve himself in perjury, in attesting the fact which was so corroborated.

A topic connected with the preceding observations, which relate to the subject of the testimony, as existing in the mind of the witness, and intended to be the object of his representation, is the correctness of the language used by the witness in conveying his sentiments, and of his conception of the questions proposed to him. The degree of accuracy with which the language represents the sentiments, is a proper subject of inquiry, before the terms made use of are construed with too literal precision; and the incorrectness of language, or conception, should be carefully distinguished from misrepresentation or evasion; an observation which might seem to be unnecessary from its obvious propriety, and the little danger which may be supposed to exist of a contrary practice. But the fact is otherwise, and a mutual misconception, either real or affected, is frequently the ground of cavil on the one side, or the screen for equivocation on the other. When the latter is the fact, it is very seldom successful, the equivocation is kept up for a second or two, and the exposure of it, very properly, throws a general discredit on the whole testimony of the witness; but the want of a patient and temperate attention, may often permit this imputation to fall where it is not justly merited, and where a careful examination of the meaning intended to be expressed would completely remove it. What has been before observed with respect to language as being the

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the subject, may, in some degree, be applied to it as the medium of evidence; but the error resulting from its inaccuracy or misconception is, from the difference of the occasion, much more easily susceptible of correction. Peculiar modes of speech, either personal or provincial, metaphorical language, a greater or smaller latitude in the acceptation of terms, the mutual substitution of definite and indefinite expressions, are some of the causes which contribute to the uncertainty at present under consideration. In some parts of the country, it is, with persons in the inferior station of life, an ordinary mode of speech to say, that they believe a fact, of which they have the most positive assurance. When this expression slips out on a judicial examination, we commonly hear the question, *Believe! are you not sure of it?* and an answer in the affirmative is followed up with, *then why do you say you believe?* A question very proper, when there is a suspicion that the terms of the answer were intentionally evasive; but the corrective is frequently applied, when in fact the cause of complaint does not exist. Sometimes, the mode of phraseology which gives an exaggerated or extenuated representation of a subject, without any consciousness of an intention to deceive, originates from those views of a subject which are connected with a disposition respecting the event, and which have already been the subject of observation.

The same general observation, which has already been so often traced in its different applications, of a distinction between inaccuracy and misrepresentation, applies to the conviction subsisting in the mind from the representation of others, where the fact is regarded as certain, and is represented as existing, although the source of the witness's knowledge prevents its being a matter of legitimate evidence. I conceive that this inaccuracy often escapes undetected; the witness speaking in general terms of the existence of the fact, and there being no suspicion of his doing so otherwise than from his own observation. Some facts we speak of as assuredly true without objection, of which our knowledge is almost necessarily derived from reputation, as, for instance, the death of a person; the supposed notoriety of some other facts, induces us to think and speak of them with the same degree of assurance as of this, which, though an infraction of the legal rules of evidence, is no transgression of the moral obligation of veracity, although it is sometimes represented as such, in the course of a capitious cross-examination.

The manner and deportment of witnesses is very commonly a principal ground of assent to, or dissent from their testimony; and is doubtless a very natural indication of the existence or the want of sincerity. That the disposition of the witness will have an influence on

his manner is undisputed ; the adequate observation of it is however a matter requiring the most skilful and judicious discernment ; the detection of affected plausibility, and the assistance of constitutional timidity, are objects which respectively import, in an eminent degree, the proper administration of justice. A perfect judgment of the causes of a person's demeanour upon a particular occasion, can only be formed by those who have a previous knowledge of his general habits and character, and in this respect an intelligent jury is of great advantage ; since being assembled from different parts of the country, some of them will, in most cases, have at least a general knowledge of the witnesses who appear before them. It would be greatly beyond the limits of my power, to trace even a slight outline of this extensive subject, but a few detached observations, founded upon my impressions respecting it, may not be wholly irrelevant. In deciding upon the demeanour of a witness, considerable allowance is to be made for the unaccustomed situation in which he is placed, and the impressions which it may be calculated to make upon his mind. To some persons this public appearance is a matter of indifference, but by many it is regarded with an apprehension, productive of embarrassment and agitation, which, to unskilful observers, may appear the result of insincerity. This embarrassment will sometimes attach itself in a peculiar degree, to those who are accustomed to appear before the public in a different situation, and who are therefore habitually anxious respecting the impression which they may induce. It is an anecdote of *Garrick*, that when examined as a witness respecting the nature of a free benefit, he was incapable of giving an intelligible testimony. In deciding upon the demeanour of witnesses, much attention is due to the mode of interrogation, and the popular opinion respecting the person who is engaged in it. An asperity in the particular conduct of the counsel or the judge, or even the reputation of it with respect to the former, will necessarily produce an effect upon the sensations and deportment of the witness ; and an apprehension of the ridicule which frequently affixes itself permanently to the character, is often a predominant sensation of the witness upon his examination. Good sense, when fully exercised, will correct these apprehensions, and satisfy the witness that violence and ridicule will be ineffectual, when opposed to the plain and unaffected language of truth ; but the dictates of good sense are often an insufficient preservative against constitutional timidity.

A resolution to appear undaunted, and repel the expected aggression of counsel by insolence, a foolish inclination to make a theatrical exhibition of wit and humour, exciting the horse-laugh of the bye-standers, a moroseness and fullness of temper, will give an

an unfavourable aspect to the manner of a witness, when there is no intentional want of veracity in the matter. The real absurdity of a witness's demeanour or mode of representation, will often diminish the proper impression of the facts for which it is necessary to resort to his testimony, and particularly in cases where there is a latitude of discretion, as in questions of damages; the judgment is often practically biased, by the sentiment of ridicule being a test of truth. A due regard to the principles of justice will however prevent the fair demands of a party from being affected by the fullness or absurdity of the witnesses, whom he is necessitated to adduce in support of it; and will lead the mind to a studious discrimination, between the fact which is the subject of inquiry, and the accidental circumstances which may accompany the relation of it.

The judgment upon a witness's manner is not unfrequently framed by a contrast between a cool and steady narration, and a fluttering hesitation; this judgment may, however, often be fallacious, for a witness who has prepared his story, may have sufficiently arranged the particulars of it in his mind, while another who has an opportunity of contradicting it, if false, is surprized and confounded by the unexpected statement. In a case where I had an opportunity of knowing the real facts, I have seen a witness give a steady and collected representation of a supposed conversation in a perfectly simple and unaffected manner; the opposite witness, when suddenly interrogated as to the existence of such a conversation, began with, *Not that I recollect, I do not believe it upon my honour*, and a great many other exclamations in such a confused, suspicious manner, that even those who, from their private knowledge, had the most indisputable confidence of the veracity with which he told them upon coming out of court, that there was not a syllable of truth in the conversation related, perfectly acquiesced in the propriety of a decision founded upon the opinion of his falsehood.

The following passage from *Lavater* is not inapplicable to the purpose of the present inquiry. After remarking that guilt is probably more daring than innocence, but the voice of innocence has greater *energy and more convincing powers*, the look of innocence is more serene and bright than that of the guilty liar; he states an instance of two young persons, who more than once came before him, and most solemnly affirmed, the one, "Thou art the father of my child," the other, "I never had any knowledge of thee." On the one hand, says he, I beheld the persuasive look of innocence, the indescribable look that so expressively said, "And dar'st thou

deny it !” I beheld on the contrary, a clouded and insolent look, I heard the rude, the loud voice of presumption, but which, like the look was unconvincing, hollow, that with forced tones answered, “ Yes, I dare ?” I viewed the manner of standing, the motion of the hands, particularly the undecided step, and at the moment when I awfully described the solemnity of an oath, at that moment I saw, in the motion of the lips, the downcast look, the manner of standing of the one party, and the open, astonished, firm, penetrating, warm, calm look, that silently exclaimed, *Lord Jesus !* and wilt thou swear ? “ I saw, I heard, I felt guilt and innocence.” A citation from *Lavater* will be thought rather a singular occurrence in a law book, but it will not be here irrelevant to observe, that whatever opinion may be formed of the philosophical system of Physiognomy, the practical influence of it is extremely extensive, both in the common intercourse of life, and in the administration of justice. Mr. *Balmanno* has introduced, by way of note to Sir *Wm. Jones’s Law of Bailments*, the following passage from *Halbed’s Code of Gentoo Laws*, which is not inapposite to our present purpose. “ When two persons, upon a quarrel, refer to arbitrators, those arbitrators, at the time of examination, shall observe both the plaintiff and defendant narrowly, and take notice if either and which of them, when he is speaking, hath his voice falter in his throat, or his colour change, or his forehead sweat, or the hair of his body stand erect, or a trembling come over his limbs, or his eyes water ; or if, during the trial, he cannot stand still in his place, or frequently licks and moistens his tongue, or hath his face grow dry, or in speaking to one point wavers and shuffles to another, or if any person puts a question to him, is unable to return an answer, from the circumstances of such commotions they shall distinguish the guilty party.”

That testimony is very open to suspicion, which is given by a person who is evidently meditating upon the materiality and tendency of his answer, before he will let it be given (a) ; or on the other hand who bolts out with precipitancy, before he hears the question, an answer indicating a catechised preparation ; the effect of either of these circumstances singly is greatly increased by their combination in different parts of the same testimony. But even that previous study of an answer, which has been mentioned, will have a different effect, according to the character, and situation, and habits, of the person who is examined. I have, in an earlier part of this discus-

(a) A *Welsh* witness who intends to give unfair testimony, always affects an ignorance of the *English* language, in consequence of which the effect of cross-examination is not only weakened by the intervention of an interpreter ; but the witness has time to collect and prepare his answers.

sion, taken notice of circumstances calculated to influence the disposition, and which, though by no means justifying prevarication in any case, diminish the suspicion of a want of substantial veracity, which results from a want of propriety in incidental particulars. The suspicion of fabrication rises highest, when the witness is one of those inferior retainers of the law, who are commonly attendant upon courts of judicature, who have a cunning acuteness in the observation of its proceedings, and who, from their occupation, are frequently in the habits of swearing to facts, in their own nature liable to misrepresentation, and placed beyond the reach of detection or contradiction.

The general character of witnesses is also a circumstance which has naturally a considerable influence upon the credit of their testimony; and we shall have occasion to mention, in a subsequent section, certain cases in which the testimony of persons convicted of particular offences is absolutely excluded, upon a legal presumption, that those who have been capable of such acts will not be influenced by any moral or religious obligation to adhere to the dictates of truth, when any circumstances may occur to influence their minds in opposition to it. I think it is by no means desirable to extend this principle of exclusion, for, in general cases, the rejection of any person as a witness does not operate to the prejudice of himself, but of the public or private interests which may be concerned in the disclosure of the facts of which he has a knowledge; and even in the most depraved members of society the natural influence of truth, and the temporal risks of perjury will be a security against the commission of gratuitous falsehood. But wherever there is reasonable ground to suppose a bias in the mind, with respect to the effect of the testimony, a previous criminality of conduct will very justly excite suspicions of its veracity; and the mind will naturally refuse its assent to declarations made by those whose disposition in favour of the event cannot be supposed to be counteracted by a superior sense of obligation. I have already observed, that to assent to a given proposition we require a preponderance of testimony in support of it; in questions therefore respecting the credit of a witness, the want of assent is not founded upon an assurance that his testimony is false, but from the want of an adequate assurance that it is true. Where it is distinctly ascertained that the witness is indifferent with respect to the event, or where it appears that his wishes would naturally induce in opposition to his testimony, the general inclination to veracity might be, in most cases, a sufficient assurance of the facts deposed to by a person even of the most exceptionable character; but the testimony

will be properly open to suspicion, not only when a person of this description distinctly appears to have a collateral motive for desiring a decision in support of his testimony, but also whenever there is not a sufficient reason for presuming the contrary; for the inducements which may operate upon a mind susceptible of corrupt influence cannot easily be detected, although they may actually exist. It is the want of an adequate assurance that the testimony is true, which very properly occasions a great degree of caution to be applied to the testimony of accomplices in criminal prosecutions; and induces courts, and juries, to disregard such testimony, except so far as it is confirmed by circumstances affecting the parties accused, deposed to by witnesses of irreproachable character. There is not in these cases a positive suspicion, arising from the nature of the evidence itself, that it is actually false; but there is a manifest want of those principles of duty and obligation, which are the strongest assurance of its being true; the actual motive is almost always in favour of truth, if it is clear that the witness had some companion in his offence; and it has not, in any instance, occurred to me, to suspect that evidence of this description, which I have had an opportunity of hearing, was fabricated; but there is no doubt that it frequently might be so, if a less jealous caution was exercised in its reception.

It is an established rule, that witnesses examined with a view to discredit the testimony of others, cannot be admitted to depose to particular facts of criminality, but can only express their general opinion, whether the party is or is not entitled to be believed upon his oath; but the other side, who, to support the testimony, may inquire what are the reasons of disbelief, which sometimes, as in a case above adverted to, are ridiculous enough. If it is declined to inquire into these reasons, there is pretty considerable ground to presume a consciousness that the opinion is founded upon adequate motives. I have heard witnesses asked, whether they had ever known the persons against whose veracity they depose, give false evidence in a court of justice; and upon their answering in the negative, it was intimated to the jury, that the testimony to their discredit was absolutely frivolous; whereas, if the question had been, what were the reasons upon which the discredit was founded, a fraudulent conduct might have been shewn which indicated the want of moral and religious principle, and consequently affected the strongest ground of reliance upon testimony. When witnesses speak to the character of others, not only their own character, but their ability, and opportunity to form an adequate judgment, are circumstances very proper to be taken into consideration.

It is a rule of law, that witnesses cannot be asked any questions which tend to subject themselves to punishment, or as it is usually expressed to criminate themselves; but whether they may be asked if they have already received a punishment, which does not disqualify their testimony, or whether they may be interrogated as to any circumstances of improper conduct, not immediately connected with the subject of their examination, and also, whether their refusal to answer inquiries upon these subjects can be observed upon as affecting the credit of their testimony, are questions of great importance upon which there is a very considerable difference of opinion. Some judges are very strongly of opinion, that these inquiries ought not be allowed; but it has been understood to be the more prevalent opinion of the bench, as it certainly is very generally the opinion of the profession, that they are admissible and proper; and this latter opinion is clearly supported by the course of practice which has actually prevailed. Mr. Peake, in the second edition of his *Law of Evidence*, states the arguments in support of these opposite opinions, in a very fair and perspicuous manner; and the right and propriety of the examinations alluded to are maintained with considerable ability in a pamphlet intitled, *An Argument in favour of the Rights of Cross-Examination*. I have at all times felt a very considerable difficulty in the consideration of this subject; but as a knowledge of a witness's habits and pursuits, his conduct and disposition, will naturally influence the regard which is paid to his assertions; I think that the preponderance of argument is in favour of the opinion, that an examination, by which these may be ascertained cannot, upon any general principles, be suppressed as irrelevant or improper; and that those arguments respecting a witness's conduct ought not to be rejected, which may tend to determine the regard that the mind, without reference to technical rules, or legal considerations, would pay to his testimony. At the same time, I think that this is a liberty which, like all others, will be best secured by a cautious vigilance in repressing its abuse, by a refusal of advocates to adopt the passions, and prejudices of their clients, and to injure a witness by reproaches and insinuations, that cannot reasonably be expected to influence the fair decision of the cause; and by the Court shewing a marked discontinuance to the adoption of a different line of conduct, calculated only to occasion an unnecessary pain and injury to the witness, without promoting the rights or interests of the party.

The situation of a witness in life is also a circumstance which frequently influence the regard that is paid to his testimony, especially with respect to matters of judgment and observation;

and even with respect to mere veracity it is not wholly indifferent ; for although, in the abstract, the testimony of every person is to be regarded as true, and the sense of obligation may be equally strong in every condition of society ; the temporal disadvantages arising from the detection of falsehood or prevarication, independent of the terrors of legal punishment, will frequently depend upon, or be connected with a person's rank and station ; and therefore all considerations of credit, connected with the evidence itself, will be, and constantly are, materially influenced by this circumstance. The effect of a bias in favour of the event of a cause, resulting from the situation of a witness, will be more or less strong in proportion to his being more or less subject to temptation ; the comparison between the relation itself and its probability, will be made with greater minuteness, in proportion to the stake in society which is engaged in support of its veracity. The influence of situation is most strong in case of conflicting testimony ; for supposing other circumstances to be equal in every respect, there is no doubt but that a considerable diversity of situation would have considerable influence in directing the balance of credit ; and to illustrate the position by an extreme instance, few persons would hesitate in regarding the narrative of a clergyman on the one side, with superior credit, to that of a bailiff's follower on the other.

The number of witnesses, and their concurrence in support of a given assertion, is also a subject of material importance in deciding upon the credit of their testimony ; for the improbability of two witnesses concerned in the same falsehood, or being influenced by the same mistake, is much less than that of the falsehood or mistake of either of them individually ; and the improbability increases in proportion with the number. But in the contrasting of contradictory testimony, the mere consideration of number is held subordinate to that of the indications of individual veracity, and the maxim that *ponderantur, non numerantur testes*, is of very frequent practical application. Other circumstances being equal, the preponderance of numbers is certainly intitled to the advantage, and sometimes this preponderance will be sufficiently great to counterbalance an apparent superiority in other circumstances on the opposite side ; and although nothing can be more remote from the subject in discussion than the application of the strict rules of mathematical equality or proportion, a fair attention to the principles of those rules is often of considerable importance. The degree of influence or indifference of the respective witnesses, their apparent veracity, their demeanour, their character, their situation, the probability of their relation, are circumstances, all of which

which are to be carefully and attentively brought into the account. The opportunity of confederacy, or the want of such opportunity, is a most important consideration in determining the effect of numbers. The concurrence in speaking of one observation of one detached fact, is of much inferior value to the concurrence of persons speaking from detached and separate observations, of different facts leading to the same conclusion. I have already had occasion to advert to the accordance or variation of witnesses speaking of the same occurrence, to the difference between that inconsistency which essentially fastens itself upon the substance of the relation, and that which may be fairly referable to different degrees of accuracy or minuteness, in the observation or memory of facts which have actually occurred; and to the unity and accordance, which being too strict and circumstantial, are inconsistent with that diversity of observation and expression, that naturally occurs in the unprepared account of a real transaction, affords an indication of concert and design (a). It is not an unfrequent observation, that if one of the witnesses in support of a cause is not intitled to be credited, the discredit attaches to the cause, and extends to other witnesses apparently unexceptionable. This kind of objection is, I think, sometimes applied too generally, and without using that caution and discrimination which the principle of it essentially requires. In case the impeachment of the veracity of a particular witness results from circumstances that indicate management and fabrication in the cause itself; in case the perjury of the witness implies the subornation of the party; the whole system may be regarded as tainted and corrupt, unless there are any, in other respects, superior reasons for believing the contrary; and the mere absence of circumstances of suspicion, directly affecting the other witnesses, will not destroy the presumption of falsity that has attached itself to the cause. But if the imputation upon the particular witness is merely personal; if it results from considerations

(a) The following passage of the famous law, 3 ff. de testibus, is materially applicable to this subject. *Testium fides diligenter examinanda est. Ideoque in persona eorum exploranda erunt in primis conditio cujusque; utrum quis decurio, an plebeius sit, & an honestæ & inculpatae vitæ, an vero notatus quis, & reprehensibilis; an locuples vel egens sit, ut lucri causa quid facile admittat: vel an inimicus ei sit, adversus quem testimonium fert, vel amicus ei sit pro quo testimonium dat. Nam si careat suspitione testimonium, vel propter personam, a qua fertur, quod honesta sit, vel propter causam, quod neque lucri, neque gratiæ, neque inimicitie causa sit, admittendum est. § 1. Ideoque. D. Hadrianus Vivio Varo Legato provincie Siciliae rescripsit, eum qui judicat, magis posse scire quanta fides habenda sit testibus. Verba epistolæ hæc sunt. "Tu magis scire potes, quanta fides habenda sit testibus: qui & cujus dignitatis & cujus æstimationis fiat: & qui simpliciter visi sint dicere, utrum unum eundemque meditatam sermonem attulerint; an ad ea quæ interrogaveras extempore verisimilia responderint."*

foreign to the immediate cause; if it is founded upon some collateral motive of his own, and no suspicion of subornation can be fairly entertained; the cause, in other respects, should be at liberty to stand or fall upon its general merits, without being affected by the peculiar objection; in the same manner as a series of reasoning, in itself perfect and complete, is not affected by the collateral addition of an untenable argument.

The conflict of opposite witnesses is the grand source of forensic altercation. In adverting to the circumstances which influence the credit of witnesses individually or collectively, I have necessarily had occasion to mention their opposition. Without going through the particulars again, it will be sufficient generally to observe, that whatever principles of reasoning are correct and proper, when examining the veracity or accuracy of an individual witness or a number of witnesses uncontradicted, become more peculiarly important in determining the balance of credit, with respect to veracity, or the superior degree of accuracy, upon matters of judgment and observation, in cases of conflict and opposition. The general ground of credit, founded upon the presumption that a witness speaks with truth and accuracy is destroyed, when the respective assertions are in opposition to each other, and therefore cannot both be true. Whatever therefore may establish or diminish the confidence in a witness, whose testimony is uncontradicted, will determine the preference in cases of opposition; but the respective grounds of assent or discredit are sometimes so equally balanced, that the mind cannot, with satisfaction, pronounce a judgment between them; and all that can be recommended is a calm, patient, and anxious investigation. Where the possibility of mistake on the one side is contrasted with the imputation of perjury on the other, and there are no collateral circumstances to fix the determination, there can be no doubt but that a casual error is to be deemed more probable than a wilful misrepresentation. When the judgment, after every exertion, is reduced to the necessity of deciding, that on the one side or the other, there has been an intentional falsehood, and no satisfactory reasons occur for fixing the superiority of credit; the last resource is to obliterate wholly the conflicting testimony, and to determine upon the want of a preponderance in proof, according to the rules which must have prevailed in the total absence of it. The result of an investigation of evidence will, after the most enlightened and painful research, be in many cases, unfortunately at variance with the actual truth, but in proportion to the dangers of error inherent in the very frame and nature of the subject, should be the care and anxiety

anxiety exercised in the avoidance of such error as may proceed from an excess of confidence on the one hand or of caution on the other; and although that care and anxiety will often fail in their particular application, the perfection of human precaution will be attained, if they are so conducted that, according to the principles of reason and experience, they may be expected in general to succeed.

To the above observations, in which I have endeavoured to sketch some of the principles that may not be undeserving attention, in forming a judgment upon the accuracy and veracity of evidence, and which are deduced from the nature of the subject itself, it remains to subjoin a few others, originally founded upon the same principles, but more immediately connected with positive rules of practical authority. In the examination of witnesses, a distinction is made with respect to the party by whom they are called, it being, in general, inadmissible for a party to put what are termed leading questions to the witnesses adduced by himself, although such questions are perfectly allowable upon a cross-examination. It is sometimes laid down that leading questions are those which are to be answered by a mere affirmative or negative, and in which consequently the answer is fully suggested by the question. I think however that this description, and the objection founded upon it, are sometimes applied more extensively than the principle upon which they are founded requires; the good sense of the rule is perfectly manifest, with respect to all cases where the question propounded involves an answer immediately bearing upon the merits of the cause, and indicating to the witness a representation which will best accord with the interests of the party; but where the questions are merely introductory, where the mere answer of yes, or no, will leave the point of the case precisely as it found it, and can only be material as laying the foundation for a further inquiry; the reason of the objection does not occur, and the objection itself appears to be ill-founded; and the making it can only proceed from a captious and petulant disposition to interrupt the course of examination. If a witness is asked generally with reference to a particular occasion, whether a person said any thing, the answer *yes* or *no*, cannot very materially advance the interest of the party; and can only serve as the foundation for the more general question, of what it was that was said. But I have very frequently known this preliminary question excite a clamorous interposition for correcting the supposed impropriety, by telling the advocate that his question should be, What did the person say? A question which necessarily supposes the existence of the general fact of something having

having been said, which possibly may not be the fact. I think that, according to the principles of good sense and fair reasoning, the restriction ought not to be extended to cases, to which the occasion of it cannot be deemed to apply; and that if the objection does not prompt an answer bearing upon the subject in dispute, if the negative or affirmative answer will be perfectly indifferent, except as serving for a foundation of further inquiry; the Court would best consult the ends of justice, by discouraging a conduct that can have no other effect than a frivolous altercation, distracting the attention of the advocate on the one side, and giving the other an opportunity of shewing off his talents for interruption; and exhibiting a pertness which may impress the bystanders with an idea of spirit and ingenuity.

It is said, that if a witness deposes falsely in any part of his testimony, the whole of it is to be rejected; and this is certainly correct so far as the falsehood supposes the guilt of perjury; the ground of credit being there destroyed; but if nothing can be imputed to the witness but error, inaccuracy, or embarrassment; if there does not appear to be a real intention to deceive or misrepresent; neither the objection nor the reason for it applies. The argument is sometimes urged with considerable vehemence, that a party who relies upon the testimony of a witness, must take it altogether, and cannot rely upon the one part and reject the other; whereas there is no inconsistency in asserting the general veracity of a narrative, and contending for the inaccuracy of some of its incidental particulars; much less is a party to be driven from his reliance upon the matters of fact related by a witness, because he contends that the witness is ill founded in his reasonings and inferences deduced from them, as I have endeavoured to illustrate in a preceding part of the present section.

It is a general rule that a party cannot call witnesses to the discredit of others, whom he has before examined; but if a witness proves facts in a cause which make against the party who calls him, that party, as well as the other, may call other witnesses to contradict him as to those facts; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first; but the impeachment of his credit is incidental and consequential only. *Bull. 297. Penke, 126.* I think it probable that an exception would be allowed to the rule of exclusion above mentioned, in the case of instrumented witnesses denying their attestation; for as these are witnesses whom it is necessarily incumbent on the party to produce, and the nature of their testimony is attended with suspicion, the discredit of their characters is a strong corroboration

roboration of the evidence, which it is competent to give from other sources, of the authenticity of the instrument.

An exception to the restriction above mentioned, against putting leading questions, is allowed in the case of the witness's appearing to be unwilling to depose the truth in favour of the party by whom they are adduced. This unwillingness is commonly to be decided by the judge, according to his impression of the demeanour of the witness, upon the trial. The situation of the witness, and the inducements which he may have for withholding a fair account, are also very proper circumstances to be taken into consideration in forming this decision. A son will not be very forward in stating the misconduct of his father, of which he has been the only witness; a servant will not, in an action against his master, be very ready to acknowledge the negligence committed by himself. I conceive that the principle which requires a party to abide by the whole of what his own witness has sworn, or wholly to abandon it, is also, in this case, subject to an exception; for there certainly is no testimony the veracity of which is less suspicious, than the admission extorted from an unwilling witness; and it would materially prejudice the interests of justice, if a witness of this description could place the party producing him in the dilemma of either abandoning the benefit of the truth which has been with difficulty obtained, or of adopting all the falsehood which the witness may have the iniquity to mix up with it. The proper course seems to be to regard the evidence of an unwilling witness in the same light as that of a witness adduced by the adverse party, respecting which it is a settled principle, that you may believe what makes against his point who swears, without believing what makes for it. *Bermon v. Woodbridge, Doug. 781.*

The cross-examination of witnesses adduced by the opposite party is a subject of the utmost nicety, with respect both to the conduct of the advocate, and the discrimination of those who are to form a judgment; and it is in this part of the cause that most of the observations already suggested principally arise. The original examination of the witness, (except in the case of his giving an unwilling testimony,) seldom gives much room for observation; the statement is for the most part sufficiently explicit and direct. Sometimes that interest which he may feel in the event will be apparent, and thus assist the effect of the cross-examination; sometimes a real carelessness and indifference upon the subject will produce an indolence of deportment; and a want of exertion for the recollection of material occurrences injurious to the party adducing him, in the same manner as it has the effect of preventing a full and adequate

quate representation of his case ; but wherever this occurs there is very little ground to expect that his cross-examination will lead to any conclusions unfavourable to the veracity of his statement. This indifference is not unfrequently assumed ; whenever that is the case, it seldom fails to be detected and exposed in the course of a judicious cross-examination. If there is no apprehension that a witness has any other disposition than to give a plain and succinct declaration of the truth, nor any wish in the advocate to convey a different impression ; but his cross-examination is merely for the purpose of explanation, or for ascertaining further facts of which he may be supposed to have a knowledge, it is not to be materially distinguished from his examination in chief. The peculiar character of cross-examination only attaches when it is suspected that the witness is guilty of a perjury, or at least misrepresentation or suppression of facts, or when it is wished to convey that impression to the jury ; and it is a matter of daily experience that this purpose is effected by an able and judicious cross-examination, in many cases where the purposes of justice would be eluded upon any different mode of inquiry. The abuses to which this procedure is liable are the subject of very frequent complaint, but it would be absolutely impossible, by any general rules, to apply a preventative to these abuses, without destroying the liberty upon which the benefits above adverted to essentially depend : and all that can be effected by the interposition of the Court, is a discouragement of any virulence towards the witnesses which is not justified by the nature of the cause, and a sedulous attention to remove from the minds of the jury the impressions which are rather to be imputed to the vehemence of the advocate, than to the prevarication of the witness. Whatever can elicit the actual dispositions of the witness with respect to the event, whatever can detect the operation of a concerted plan of testimony, or bring into light the incidental facts and circumstances that the witness may be supposed to have repressed ; in short, whatever may be expected fairly to promote the real manifestation of the merits of the cause, is not only justifiable but meritorious ; but I conceive that a client has no right to expect from his counsel an endeavour to assist his cause, or what is a more frequent object, to gratify his passions by unmerited abuse ; by embarrassing or intimidating witnesses, of whose veracity he has no real suspicion, or by conveying an impression of discredit which he does not actually feel ; and that where such expectations are intimated, there is an imperious duty upon the advocate, who, while the protector of private right, is also the minister of public justice, which requires them to be repelled. Considering the subject merely

as a matter of discretion, the adoption of an unfair conduct in cross-examination has often an effect repugnant to the interests which it professes to promote. In the case of *Hunter v. Keboe*, before the Court of King's Bench in *Ireland, Mic. 1794. Ridgeway, &c. 350*, Lord *Clonmell* observed that cross-examination had gone to an unreasonable length, but he had in general permitted gentlemen to go as far as they pleased, because if there was an honest case on the other side it would do them no good. But however unfavourable an injudicious asperity of cross-examination may be to the advancement of the cause, it, for the most part, is congenial to the wishes of the party, the neglect of it is regarded as an indifference to his interest and a dereliction of duty; and the practice of it is one of the surest harbingers of professional success.

The benefits of cross-examination are sometimes defeated by the interposition of the Court, to require an explanation of the motive and object of the questions proposed, or to pronounce a judgment upon them immediately: whereas experience frequently shews that it is only by an indirect, and apparently irrelevant inquiry, that a witness can be brought to divulge the truth which he had prepared himself to conceal; the explanation of the motives and tendency of the question furnishes the witness with a caution that may wholly defeat the object of it, which might have been successfully attained, if the gradual progress, from immateriality to materiality, was withheld from his observation. The importance of an inquiry may sometimes be strongly felt by an advocate, and upon very reasonable grounds, from his own instructions with respect to the bearing and circumstances of the cause, which the judge, acting only upon the impressions of what has already been disclosed, cannot by any possibility anticipate. The full exposition of the motives can only be attained by a premature exposition of the case that is to be brought forward, and even when that can be done without prejudice to the party, the endeavour to satisfy the Court would have the common effect of an interruption of the regular course of inquiry, and instead of assisting the accurate discussion of the question, would, in all probability, terminate in confused and desultory altercation.

## SECTION X.

*Of Cases in which two Witnesses are necessary.*

The necessity of proving a case by two witnesses must, like many of the other cautions which have been introduced into the law of evidence, very frequently occasion a failure of justice; and as a general principle, independent of all considerations of a judicial nature, there can be no doubt but that the mind will give a full assent to the declaration of a single individual of an unimpeached character, having no influence which can come in conflict with his disposition to veracity, speaking of facts which he had an adequate opportunity to observe, and which contain in themselves no internal violation of probability. Where any of these qualities are wanting to the testimony, it will of course be examined with greater circumspection; and the caution applied in its reception will increase in proportion to its departure from the combination of circumstances which produce an implicit reliance upon its truth, and to the nature of the consequences which may result from the error of too implicit an assent, giving due consideration to the effects of the opposite error of too suspicious a distrust. Where the testimony is in support of the imputation of guilt, it will be weighed with greater scruple, than when it tends to the manifestation of innocence. The assent to the testimony will also be regulated by the opportunity which the nature of the subject affords, of further elucidation, for where any circumstances, connected with the nature and object of the evidence, are calculated to induce suspicion, and the fact asserted must, if true, be susceptible of confirmation, the mere omission to give it the support that may be reasonably expected is an additional reason for its discredit. But the reasons which operate to produce a dissatisfaction with testimony, as being inadequate and inconclusive upon an examination of its nature and tendency, are very insufficient to warrant its rejection upon the ground of a general preliminary objection; which is as unreasonable, as to refuse the assistance of the strongest light which can be artificially procured, under circumstances that render it impossible to procure the assistance of the light of day.

It is an observation of *Lofft* in a note to *Gilbert*, after citing the opinions of *Beccaria* in favour of requiring two witnesses, and of *Blackstone* against it, that those laws, which condemn to death on the deposition of a single witness, are fatal to liberty. In right reason there should be two, because a witness who affirms, and the accused who denies, make an equal balance, and a third must incline the scale. It might perhaps be said with greater justice, that the

the absolute and indiscriminate exclusion of a single witness in every capital case, would if not fatal, at least be dangerous to security; as the opportunity of a solitary situation would enable a miscreant to perpetrate a robbery, or a rape with impunity, however respectable the character of the person who suffered the violence, and however assured by previous knowledge of the identity of the offender. The supposed equality between the denial of the accused and the testimony of the witness is merely fanciful, unless it can be asserted, that there is an equal inducement to make a false accusation, for the purpose of destroying an individual, with whom there was no previous animosity, and to deny the commission of a crime, for which a party is justly liable to undergo punishment, between (as I have seen it observed in a publication of Mr. *Christian*) a person who by his falsehood has every thing to lose and nothing to gain, and one who has every thing to gain and nothing to lose.

The general rule of the *Roman* law which rejects the proof by a single witness as insufficient, is followed in the *English* courts which adopt that law as the basis of their proceedings; but it is said, by Sir *William Blackstone*, that to extricate itself out of the absurdity of universally requiring two witnesses, the modern practice of the civil law courts has plunged itself into another, for as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one, though never so clear and positive, *semiplena probatio* only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses, when they have only one to any single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf; and administer to him what is called the suppletory oath; and if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device, satisfying at once the forms of the *Roman* law, and acknowledging the superior reasonableness of the law of *England*; which permits one witness to be sufficient where no more can be had, and to avoid all temptation of perjury, lays it down as an invariable rule that, *nemo testis debet esse in propria causa*. I am not at present enabled to ascertain the accuracy of the learned commentator's statement respecting the practice of the *English* courts of civil law, but if the party can insist, *de jure*, upon his own oath being received as a sufficient confirmation of the testimony of a single witness, the application of the suppletory oath is considerably varied from its original institution, according to which it could only be administered at the discretion of the judge.

The semiproofs mentioned by *Pothier*, and which will admit of confirmation by the oath of the party, are written documents, such as the books of tradesmen. I conceive that there are no passages in the text of the civil law, which warrant the judge in deciding upon the testimony of a single witness confirmed by the suppletory oath. *Pothier*, No. 833. observes, that the doctors mention the deposition of a single witness who is a person of credit, as a proof which may be completed by the oath of the plaintiff; but refers to the passage to which this Section is an Appendix, as shewing that by the law of *France* this is only allowed in matters of very slight importance; such as trespasses where the damage does not exceed 20 sols by day, or 40 sols by night. *Mascardus* in support of the position, that the oath of one witness is a semiproof, which, with the addition of the suppletory oath, will be sufficient, refers to *L. Theopompus, 14. de dote prælegat. L. Jusjurand. 9 Cod. de Test. and law 1. ad fin. ff. Testamento quemadmodum aperiantur.* The first of these laws relates to the case where a testator directed that *Polianus*, who knew his intention, should provide for the portion to be given to his daughter; and *Polianus*, upon being called upon by the daughter's husband, deposed that it was the father's intention, that she should have an equal portion with her elder sister, which was decreed accordingly; but the law has no reference whatever to the suppletory oath, and in this case *Polianus* was not an accidental witness, but a person whose knowledge of a fact formed an essential ingredient in the cause. The law 9. *Cod.* directs that witnesses, previous to their deposition, shall be bound by the sanction of an oath, and that credit should be given in preference to the witnesses of greater respectability. It adds, that the emperor (*Constantine*,) had formerly ordained no judge should, in any cause, easily suffer the testimony of a single witness to be admitted, and that he now forbids the answer of a single witness being at all received, even where he is a person of the highest credit. *Jurisjurandi religione testes, priusquam perhibeant testimonium jamdudum arctari præcepimus; et ut honestioribus potius testibus fides adhibeatur, § 1. Simili modo sanximus, ut unius testimonium nemo judicum in quacunque causa facile patiatur admitti. Et nunc manifeste sancimus ut unius omnino testis responsio non audiat, etiamsi præclare curiæ honore præfulgeat.* The operation of this law is evidently a direct exclusion of the testimony of a single witness; and very little can be inferred from the recital of the former prohibition, against easily receiving such testimony in favour of the position, that it was in general previously allowed, accompanied by the sanction of the suppletory oath. I am at a loss to conjecture upon what founda-

tion the reference is made to the title *Quemadmodum testamenta aperiantur*, for there is not either in the digest or code, any passage under that title which has the slightest relation to the subject, and it is not probable that any direct authority would have escaped the laborious industry of *Mascardus*. But whatever the true conclusion upon this point may be, it must always be remembered that it was a distinguishing character of the suppletory oath, that it was in the discretion of the judge not only whether it should be administered at all, but also to which of the parties it should be administered; and that, supposing the testimony of a single witness to be a sufficient semiproof, the judge, instead of admitting the party producing the witness to depose that his testimony was true, might put it to the opposite party to swear that it was false.

I have felt a disappointment in not receiving information, upon the modern practice upon this subject, from the lectures of *Dr. Brown*.

The common law courts in the exercise of their prohibitory jurisdiction, (which in some cases appears formerly to have been carried beyond its legitimate limits,) have interfered to controul the civil law courts, in the exercise of their regular practice of requiring a proof by two witnesses. A more correct principle seems to have prevailed in *Roberts's case*, *Cro. Jac.* 269. 12 Co. 65. where upon a suit for subtraction of tithes a prohibition was applied for, because there was only one witness to prove the lease, but was not allowed, because it is a rule, that where the cognizance of the principal is, the cognizance of the accessory necessarily follows, and that when the original cause belongs to the spiritual court, though matter triable at the common law ariseth, depending on the original cause, yet it shall be determined by that court, and the surmise that a party has but one witness is not a sufficient cause for a prohibition, where the ecclesiastical court hath jurisdiction of the principal.

But in the subsequent case of *Richardson v. Desborough*, 1 *Ventr.* 291. the spiritual court having refused the proof of *plene administravit* by one witness, a prohibition was granted, for that where the matter to be proved (which falls in incidentally in a cause before them in the spiritual court) is temporal, they ought not to refuse such proof as the common law allows. In *Shotter v. Friend*, 2 *Salk.* 547. a prohibition was granted to the spiritual court, because they would not allow the proof of a payment of a legacy by one witness, and the court said, they may follow their own rules in things which are originally in their cognizance, but if any collateral matter doth arise, as concerning the payment of a legacy, if proof be

by one witness, they ought to allow it. The same principles were laid down incidentally in the case of *Breedon v. Gill*, 1 Lord Raym. 221. in which it was said, that if the spiritual court require more than one witness to prove the revocation of a nuncupative will, the King's Bench will not intermeddle, but if in a suit for a legacy payment or a release be pleaded, if they do not admit of proof by one witness, the King's Bench grants a prohibition.

It is so much the fashion in all matters of controversy, between the courts of common law and those following the practice of the civil law, to imagine that the former who have certainly the power have also the right on their side, that the expression of a doubt respecting the propriety with which the controuling power has been exercised, if it has the honour of being noticed at all, will most probably be noticed with disapprobation; but it should always be recollected that the power and course of procedure of the spiritual court, with respect to the objects of its jurisdiction, are as much a part of the law of *England* as the authority and practice of any other tribunal whatsoever, and every part of the law of the land is equally sacred. Whatever may be the wisdom of the practice which requires in general a proof by two witnesses; it is, with respect to these courts, an established part of their constitution, and therefore an established part of the constitution of the kingdom, and when there is a conflict between the practice of the respective courts, with regard to the proof of facts upon which they have, whether originally or incidentally, a concurrent jurisdiction, it is not to be taken for granted that the course of the one is improper and illegal, because it happens to differ from that of the other. Similarity of proceeding is, generally speaking, a desirable, but is often a subordinate object; and when such similarity is required, it ought to be considered whether it can be carried through in all its leading features, before it is required to be applied to any one of them; for otherwise the partial similitude may only increase the effect of the general want of resemblance. It is an essential part of the common law of evidence, not merely that the testimony of one witness shall be received, but that the witness shall be examined *viva voce* in open court, with all those opportunities of sifting the truth and accuracy of his narrative, which are incident to a public cross-examination; whereas the examination in the spiritual court is in private, and upon prepared interrogations where the advocate is wholly incapable of trying the credit of witnesses, by questions suggested from his demeanour and course of narrative upon his original examination; the evidence can only be encountered by questions prepared by anticipation, upon a view of the allegations respecting which the witness is to depose, but the necessity

fity for a concurrence of two witnesses, may in some degree counteract the disadvantage of not having an adequate opportunity to scrutinize, in the most effectual manner, the testimony of each witness individually. In the common law courts the decision is by a jury, who were originally required to come from the neighbourhood; and who were supposed to have a knowledge of the parties and the witnesses, and of the credit due to them, and in some degree also (however justly the principle of the supposition may be discountenanced in modern practice) a knowledge of the facts of the cause, whereas the judge of the spiritual court has nothing to guide his decision, but the dead letter written examinations, which are adduced before him: the conformity required from these courts, then, in the admission of a single witness, is very defective and imperfect, unless it can be also extended to the introduction of the jury and the *viva voce* examination. In the subjects, with respect to which the conformity is required, there appears to be an assumption of authority which the principle applied to them is insufficient to support; for although *plene administravit* is a question which, according to the nature of the demand, may be cognizable by either court indifferently, legacies are the peculiar province of the spiritual court, in total exclusion of the courts of common law, and therefore the controul of the courts of common law, with respect to subjects wholly foreign to their own authority, upon the pretence that the cognizance of the courts to which they peculiarly belong, is only incidental, cannot upon any correct principles of reasoning be reconciled to the doctrine which is professedly entertained; and here it may be recollected, that the concurrent power exercised upon this subject even by the court of chancery, is of no great antiquity, and that the controuling power in some degree assumed by it is comparatively recent.

The courts of equity are not in general classed amongst the courts of civil law, but with the same mode of examination they have adopted the same principle of requiring a disputed fact to be proved by the oath of two witnesses, subject to the power of referring the case to the courts of common law, to be tried in the ordinary form by *viva voce* examination before a jury; and in some late cases, the adoption of the doctrines and principles of equity, in courts of common law, has been censured as founded upon an imperfect and therefore erroneous analogy; inasmuch as the answer of a defendant can in equity only be contradicted by two witnesses, whereas the demand at common law may be sufficiently established by the evidence of one. I am by no means disposed to contend in favour of the incroachment by courts of common law, upon the province of courts of equity, and am fully aware of all the incon-

veniences of adopting the partial imitation of a proceeding, where the whole system with which it is connected cannot, so far as relates to the particular subject, be equally embraced, but with respect to this particular objection, of a difference in the proof to be required, I do not feel the weight of the argument. If it can be ascertained that the fact inquired after is properly and without incroachment the object of any given jurisdiction, the mode of ascertaining that fact may be properly left to the established constitution of the jurisdiction itself, and the defects and disadvantages on the one side may be counterbalanced by the superiority in another: thus, to revert to the distinction mentioned with respect to the preceding subject, the disadvantage (supposing it to be one) of admitting a proof by one witness, may be counterbalanced by the advantage of a *viva voce* examination and the assistance of a jury.

The general rule that a decree shall not be made against the answer of the defendant upon the oath of one witness, is fully established by a series of cases, from 3 *Ch. Ca.* 123. *Allam v. Jourdon*, 1 *Vern.* 161. to *Mortimer v. Orchard*, 2 *Ves. Jun.* 243. But this rule is only applied where the answer contains a full and positive denial; for where a defendant only denied notice to herself, and it was proved by a single witness that notice had been given to a person, who in the opinion of the court was fully proved to be her agent, this was held sufficient. Lord *Hardwicke* said, that the rule which had been stated was generally true, but that it admits of this distinction, where the defendant's answer is a clear denial of a fact, which is proved only by one witness, the court will not decree against the answer. But where it is not a positive denial of the same fact, but admits of a difference that it is only a denial with respect to herself, whereas in other respects it will equally affect her, there are several cases where the court on one undoubted witness will decree against that answer: then here she denies only personal notice which is a negative pregnant, that still there may be notice to her agent, and is a fact equally material. *Le Neve v. Le Neve*, 1 *Ves.* 64. 3 *Atk.* 646.

In *Arnot v. Biscoe*, 1 *Ves.* 95. the same illustrious person said, if the single evidence is denied by the answer, there is not sufficient to decree upon, and the bill must be dismissed; but the answer is not *ad diem*, the charge being positive, and the answer only to belief, which is not sufficient to contradict what is positively sworn, nor could the defendant be convicted of perjury thereon, but there being some doubt on the evidence, his Lordship directed an issue.

In *Reech v. Kennegal*, 1 *Ves.* 123. Lord *Hardwicke* said, the answer must be a positive denial and rest singly thereon. In these

two last cases, as in many other instances in *Vesey's Reports*, there is no distinct statement of the circumstances upon which the opinions were founded. In a prior case of *Hine v. Dodd*, 2 *Atk.* 275. his Lordship seems to have rather deviated from the principle just referred to, for a witness swore positively to the defendant having acknowledged notice of a prior deed not registered, and Lord *Hardwicke* said, "Undoubtedly this is material evidence, but then it is only one witness against the answer of the defendant; it is true his answer is very loose, by referring from one answer to another; but in the last he swears to his belief, that he did not know of the fact." But a principal ground of decision was, that the register act of deeds in *Middlesex*, gives priority to the instrument first registered, and although courts of equity give relief in cases of notice, his Lordship seemed to think that something more than this evidence of the defendant's confession against his answer as to his belief, was necessary to take the case of the act. This case, therefore, cannot be properly considered as laying down any rule in opposition to the doctrine before adverted to.

In *Walton v. Hobbs*, 3 *Atk.* 19. *Janfon v. Rany*, *id.* 140. Lord *Hardwicke* held that the rule did not apply, as the evidence produced by the plaintiff was supported and corroborated by a great many concurring circumstances, but no explanation is given in either of the cases with respect to what those circumstances were, or how they appeared to the court, whether from the internal probability of the case itself, the admissions in the answer, or the testimony of witnesses. It does not seem, in any of the equity cases, to have been the subject of discussion whether the proof by different witnesses of different facts, leading to one conclusion, is to be regarded as a sufficient compliance with the rule, which requires two witnesses in opposition to the defendant's answer.

In *Pember v. Mathers*, 1 *Bro. Ch.* 52. the bill was filed by the original lessees of a term, against their assignee for the specific performance of an agreement, to execute a bond of indemnity against the covenants of the original lease; this agreement was denied by the answer and proved by one witness; and Lord *Thurlow* at first expressed his opinion that the plaintiff ought to have a decree, upon the principle that the rule was subject to the modification, that if there are circumstances sufficient to turn the scale, it ought to be turned, the oath of (the bye-stander with circumstances corroborating it, being better than that of an interested person; but upon a suggestion from the defendant's counsel, that a particular person was present at the transaction besides the witness who had been examined, he directed an issue. The only confirmatory circumstance in that case was, that arising from the nature of the

contract itself, according to which the vendor would expect to have no more connection with the original lessor. The Lord Chancellor stated the general rule to be, that where the defendant in express terms negatives the allegations of the bill, the court will neither make a decree, nor send it to a trial at law.

In *Ibbotson v. Rhodes*, 2 *Vern.* 554. 1 *Eq. Ab.* 229. the Lord Keeper in directing an issue, where the answer denied a notice which was proved by one witness, directed that the plaintiff should admit the defendant's answer to be read at the trial, not as evidence, for that could not be, neither should they admit it to be true, but to be sworn so that the defendant might have the benefit of his oath at law as in equity, if it would weigh any thing with the jury. In the case of Lord *Milton v. Edgeworth*, vi. *B. P. C. Old Edit.* v. 313. *N. Edit.* the Court of Exchequer in Ireland having directed an issue generally on a question, whether there had been an agreement for reducing the interest on a mortgage from 8 to 6 per cent. which was proved by one witness on behalf of the defendant, with confirmatory circumstances, the House of Lords confirmed the direction, with the addition, that the appellant (the original defendant) should be at liberty on the trial to read an answer in a former cause, by the person under whom the plaintiff claimed, in confirmation of the fact alleged. This case, according to the report of *Pember v. Mathers*, was referred to by Lord *Thurlow*, as confirmatory of a general practice, that where the court sends a fact proved by one witness to a trial at law, it orders the answer to be read in evidence. But it is clear that the decision by no means warrants that inference; the witness was for the defendant in support of his answer, and not for the plaintiff in opposition to it; the answer directed to be read, was that in a former cause, and made by a person under whom the plaintiff claimed, and would therefore manifestly be evidence *de jure*, and without any direction at all. As Lord *Thurlow* was counsel in the cause, and the early part of Mr. *Brown's Chancery Reports* is by no means distinguished for correctness, it is much more probable that the error is imputable to the reporter than to the Lord Chancellor. In *Only v. Walker*, 3 *Atk.* 407. an agreement for a composition was proved by one witness, but as stated by the reporter, there was the circumstance of the defendant's confessing the agreement proved in the cause, and some other circumstances (not mentioned) to corroborate the proof of the single witness. If the confession alluded to was proved by another witness, and went to the extent of the agreement alleged, this was a full proof by two witnesses; but the case was not so considered, and an agreement of a different kind was admitted in the answer. The Master of the Rolls offered

ed the defendant an issue, who declined it, unless he was allowed to read the answer, as was done in *Ibbetson v. Rhodes*, and another case of *Cant v. Beauclerck*; but his Honour said, that it did not rest singly upon the oath of the witness, for several circumstances corroborated what he swore, and therefore was not within the rule of those cases, and consequently he could not give any directions that the answer of the defendant should be read at law.

In a book called *Clerk's Instructor*, 9. it is said, that a man and his wife are considered but as one witness; but books of this kind are no authority; and it is very improbable that such an absurdity would be admitted in modern practice.

In the same book, p. 6. it is laid down, that if a defendant in an answer affirm any thing, which he seconds by the testimony of a single witness, and nothing is proved against it; this is sufficient to decree for the defendant or to dismiss the bill. I apprehend that the rule is here correctly stated, for the ground of requiring two witnesses against the answer, is the credit given to the defendant's oath, whereas there is nothing to oppose to the testimony of the witness for the defendant; if there is any objection, or suspicion with respect to the actual testimony given, it is competent to the court in this as in all other cases to direct an issue.

By statutes 1 *Edw. 6. c. 11. f. 12.* 7 *Wm. 3. c. 3. f. 24.* it is provided that no person shall be indicted or convicted of high treason, except by the evidence of two witnesses; the latter act imports, that one witness to one overt act, and another witness to another overt act of the same treason, shall be sufficient. And the same rule was previously adopted in the construction of the former act, but it is expressly provided by the last act, that if two treasons of different kinds are alleged in the same indictment, one witness for each shall not be sufficient. The proof by separate witnesses, of repeated attempts to kill the king, is the proof of different overt acts of the same treason, and not of different treasons; and one witness of each attempt is therefore sufficient: *Vid. Stafford's case, Raym. 408.* It is also held, that if one witness proves an overt act of treason in the county where the indictment is laid, the proof by another witness of another overt act, in a different county, will maintain the charge. See 1 *East, P. C. c. 2. f. 65.* One witness also is sufficient to prove a collateral fact, as where a prisoner called witnesses to prove he was born in *France*, (which, under the circumstances, would have been a sufficient defence,) it was ruled that his being born in *Ireland* might be proved by a single witness: *Foster, 240.* I think Mr. *East* has clearly shewn, *P. C. c. 2. § 66.* that the acts of parliament are sufficiently satisfied by two wit-

nesses proving the confession of the party charged. The stat. 1 and 2. *P. and M. c. 10.* provides, that treasons respecting the coin may be proved as before the stat. of *Edw. 6.* and these treasons are not included in the statute of *William.* The stat. 40. *G. 3. c. 93.* contains also an exception with respect to the assassination of the king, or any direct attempt against his person, whereby his life may be endangered, or his person suffer bodily harm.

In case of perjury, it is required that the falsehood of what has been sworn shall be proved by two witnesses, as the oath of the party accused on the one side in the original swearing is considered as equivalent to the oath of one witness against him. Perhaps upon the principles of correct reasoning, this consideration may be rather calculated to shew that such evidence ought to be received with considerable caution, than that it ought to be absolutely rejected; and the motives for falsehood in the original testimony or deposition, may be much stronger with reference to the event on the one side, than the motives for a false accusation of perjury on the other. It is held that the rule does not apply where the testimony of the single witness is supported by other circumstances. I do not find any authority with respect to the nature of the circumstances, which shall be deemed sufficient for this purpose; the only fact that I recollect having seen acted upon as such in practice, is the writing of the defendant.

Whatever principles are applicable to the sufficiency of the proof given by two witnesses in one case, are equally applicable in others, where there is the same necessity, except where the particular nature of the subject induces a difference. A case occurred (which I quote from memory) before Sir *William Scott*, in the Consistory Court of *London* in *Easter Term, 1792*, upon a proceeding for disturbing a clergyman in the exercise of his functions; and it was held that the proof of one act of interruption by one witness, and of another by another, was not sufficient. The learned judge said (*a*), the case had been compared to high treason at common law, and to proceedings for adultery and defamation in that court; but in case of high treason the guilt consisted in the intention of the mind, of which the facts proved were only indications, and the proof by different witnesses of different acts, was all evidence of one criminal intent; and that in cases of adultery and defamation, there was always a general article charging the fact of adultery or defamation, besides the articles alleging

(*a*) I do not affect to state any of his expressions, but merely attempt to delineate according to my recollection the substance of the argument.

particular instances (a), and the several particular facts constituted parts of the same adulterous or defamatory conduct, whereas in the particular case, not only the proofs, but the charges to which they were applied, were separate and distinct.

The following passage from *D'Aguesseau*, in the case of the prince *de Conty*, in support of the position that an allegation of insanity may be supported by the testimony of different witnesses, to different indications of it, may perhaps be deemed superfluous with respect to the immediate proposition, but my partiality for this illustrious magistrate, and this particular exercise of his judicial talent, presents a temptation for adducing his authority, whenever an opportunity occurs, which I have not the inclination to resist.

The question either relates to a certain single determinate fact, in which case it falls within the common maxim *unus testis nullus; testis*, because that fact being essential, it is absolutely requisite that the depositions of two witnesses should concur to establish the truth of it.

Or, on the contrary, the question is respecting a general fact, a habit, a multiplicity of actions leading to a single consequence; and then it would be both impossible to require two witnesses for each particular act, and unjust to reject the single depositions of separate acts.

We say, in the first place, that it would be often impossible to require from a party, that each act should be proved by two witnesses. For insanity, or sanity, appear in all places, and at all times, and yet the same persons cannot always be present at this multitude of actions. One observes one action, another another. But if it were absolutely requisite that they should all see the same action, it must be supposed that the person whose state is to be contested, is to be always surrounded by a crowd of witnesses, the exact and assiduous observers of his conduct, who may at a future period relate the same circumstances of sanity or derangement.

But this supposition is not only absurd and impossible, we add, that it would be unjust to reject the single depositions of separate acts.

The general fact is the only one, of which the proof is ordained; and you know that in this cause, although it was contended to be necessary to allege particular facts of insanity, you paid no regard to this argument, but confirmed purely and simply the sentence, which admitted a proof to be made of the general fact. Particular

(a) In the Ecclesiastical Court, the allegation is contained in a set of articles particularizing the transactions intended to be proved, and the examination of the witnesses consists in reading the articles, and taking their depositions with respect to the facts alleged. The first article is always general, stating the charge of adultery, &c. without any circumstances or particulars; upon which general article no witnesses can be examined.

facts are infinite. How could they all be included in the articles of the allegation? The witnesses are left at liberty to select and state them as proofs of the general fact; but this general fact is always the subject of the proof, and the principal object of justice. It is sufficient if all the witnesses say, that the person whose state is contested, appeared to them to be sane, or the contrary. It is not necessary that they should all agree in the reasons of their judgment, provided they concur and are unanimous with respect to the principal fact, and only differ in particular circumstances. They come to the same point by different ways, and those who were separated in the means, are united in the end. It is the same, as if two experts concur in declaring a writing to be forged, but found their opinion upon different observations. If they were separately examined, and concurred in their judgment, although their motives might be different, would not the proof be as strong as any which the science of experts can supply? In the same manner, witnesses are examined with respect to a person's situation. One adduces one fact, another dwells upon another, all equally pronounce a concurrent judgment upon the strength or weakness of his mind; can it be contended that the proof is not perfect, because each circumstance is not attested by two witnesses? Do not we know that it occurs every day in questions of state, especially in those which relate to filiation and legitimacy, that it is very rare to see two witnesses who mention the same fact? One establishes one presumption, another furnishes another conjecture, and it is the assemblage of all these presumptions and conjectures which forms the proof. An infinity of atoms compose a body, and although each in particular seems to have no extension, they together form an extended substance. Many rays, which when separate have no perceptible lustre, by their union produce a glowing body of light, many particular facts form one general fact. So likewise let us add, that in these affairs the witnesses in some degree participate in the functions of the judges, whose decision they sometimes anticipate. Now as it is not necessary that the same facts should determine all the judges, and some may be influenced by one fact, and others by another, yet they are all said to be of the same opinion, when they all decide in favour of sanity or of the want of it; in the same manner witnesses are to be considered as unanimous, when from different facts they all draw the same conclusion, upon the same general fact which is the subject in dispute.

The writers on jurisprudence, and especially *Mascardus*, after having stated a part of these reasons, draw from them this general consequence :

consequence : *Non tamen de necessitate requiritur quod sint testes, sed satis erit ut saltem singulares sint, quia et tam recte probabunt furorem.*

## SECTION XI.

### *Of hearsay Evidence.*

Mr. *Fonblanque*, in his notes to the *Treatise of Equity*. B. 6. c. 1. §. 1. speaking of this subject, observes, that in considering the authority of general rules, it is material to distinguish those which are drawn from the depths of reason, and the strict observance of which is essential to the attainment of truth, from those which are founded upon notions purely of convenience, and which may be considered as merely modal and assistant, rather than essential to such object ; such are those general rules which respect the order of proceeding, &c. After taking notice that his author has stated some general rules, with reference to the qualifications of witnesses, he adds, that it may be material to state, in addition to those which respect the qualification of witnesses, those which respect the nature of their evidence, for though they are generally thrown together, he apprehends them to be in their nature extremely distinct. Thus when evidence is rejected as hearsay, it is rejected not on the ground of any want of qualification in the witness, but that the nature of his testimony, though it be true, does not afford the degree of proof which the fact may allow.

It is certain that privately speaking a hearsay of certain facts may in many cases convey to the mind as full a conviction, as the ocular observation of the facts themselves. If a person of indisputable veracity relates a palpable fact, as received from another of equal veracity, the hearer acts upon the supposition of the existence of the fact, with the same assurance as if it had fallen under his own inspection, but the degree and extent to which this conviction can be carried, is comparatively very small, and the admitting it in the administration of justice, would be productive of very considerable error and inconvenience. It would import a full reliance upon the veracity, the accuracy, and the fullness of the information that had been communicated by every person through whom the information had been transmitted, and would want the sanction of an oath which could not be applied to the occurrence itself, but only to the fact of the communication. It would also be subject to the perhaps stronger objection, of not admitting those inquiries

inquiries which conduce to a full and satisfactory explanation of what is related.

Evidence of this description is therefore in general excluded, and most of the cases in which it is apparently admitted, when properly examined, will perhaps be found in principle not to amount to exceptions from the general rule; for it is to be recollected that all considerations of evidence must be pursued with reference to the subject matter to which it is applied, and that to weigh the competence or sufficiency of evidence in any given case, it is requisite to discern with accuracy the nature of the proposition which it is offered to establish. What is called hearsay, may be properly divided under two principal heads: 1st, Those in which it is a mere narrative of an event: 2d, Those in which it is the actual occurrence of a fact, which fact may be materially connected with the general conclusion intended to be drawn upon the subject of the enquiry. Speech is a mode of action; but as it is an action of much more frequent occurrence than any other, and as there are some respects in which it may be distinguishable from other actions, it is often referred to as a separate subject, and the frequency of the separation occasions the affinity to be sometimes overlooked; but I conceive that the distinction between the cases, in which the immediate action of speech furnishes a material indication with respect to the object of inquiry, and those in which it is a mere act of narration, will in most cases furnish the proper principle for ascertaining whether the evidence of its occurrence is or is not properly admissible. Many acts are in themselves of an equivocal nature, and the effect of them depends upon the intention or disposition from which they proceed, which is in general best denoted by the expressions accompanying them. Wherever, therefore, the demeanour of a person at a given time becomes the object of enquiry, his expressions, as constituting a part of that demeanour, and as indicating his present intention and disposition, cannot properly be rejected in evidence as irrelevant. In questions of fraud or *bona fides*, an adequate judgment can in general only be formed by having a perfect view of the whole transaction, which of course includes the conversation which forms a part of it; and, according to the phrase usually applied to this subject, the language which is used on any occasion forms a part of the *res gesta*. In questions respecting acts of bankruptcy, the intention is almost always the very point in issue, and this is commonly to be collected from the conversations importing the existence of those apprehensions which give a character and quality to the concomitant actions. In *Bateman v. Bailey*, 5 T. R. 512.

a person who had been carried from his own house to *Manchester*, under an arrest, upon being liberated went to a retired public house, where he took pains to withdraw himself from observation. Evidence was offered of what he said, upon his return home, as shewing that he had kept out of the highway for fear of another arrest, which being rejected, the Court of King's Bench upon an application for a new trial, ruled it to be admissible; and it was said by the court, that although the bankrupt cannot be called as a witness to prove his own bankruptcy, yet it was never doubted but that what was said by him at the time in explanation of his own act, may be received in evidence. An admission by him before his bankruptcy of a debt due to another, is sufficient to charge his estate. If he has been absent from his home, an admission by him that he has been abroad to avoid his creditors is good evidence. Whatever he says, in short, before his bankruptcy, is evidence explanatory of the act done by him. In this instance, he absented himself from home under suspicious circumstances, for which his reasons were asked, and without doubt it was competent to inquire of the witness to whom he communicated them, what those reasons were.—So far as the observations in the preceding case are referable to the immediate point before the court, I think that they are perfectly correct, and in truth they are directly illustrative of the principle which I am endeavouring to establish; but some of the expressions that have been cited, if construed literally, may be applied with greater latitude than the principle seems fairly to warrant. The conversation of a person, upon his return home, naturally connects itself with the occasion of his absence, and is an indication of the existing state of his mind; and wherever the expressions can be so connected with the actions, as to be regarded as the mere result and consequence of the co-existing motives, they form a proper criterion for directing the judgment which is to be formed upon the whole conduct. But while it is an established rule that the testimony of a bankrupt upon oath shall not be received to establish the existence of his own bankruptcy, it seems inconsistent to admit, as an indiscriminate proposition, that any thing which he may have previously said shall be an admissible medium of evidence; and I think the proper consideration will be best referred to the principles already adverted to, according to which, whatever expressions may fairly be regarded as resulting from the cotemporary motives acting upon his mind, and influencing his conduct, will be properly received; but that a mere narrative at any time before the issuing of the commission of a conduct, and the motives of that conduct at any indefinite antecedent period, ought

not to have an authority which is denied to his solemn examination.

In case a question should arise respecting the state of health of a person at a given period, the application of that person to a medical practitioner, and the representation of his complaint, would be properly evidence of a fact, the representation being the natural effect and consequence of the existing indisposition. According to the representation in the public prints, of a case of *Avison v. Lord Kinnaird* (which will most probably not be included in a regular report before this discussion has passed the press), respecting an insurance by the plaintiff on the life of his wife, evidence has been allowed by the Court of King's Bench, of the wife having represented at a subsequent period the state of her health, at the time of effecting the insurance. This upon principle I should have conceived to be inadmissible, as amounting only to narration; the mere circumstance that it could not be supposed that the party was actuated by any undue motive, would go a great way in favour of the general admissibility of hearsay evidence; the circumstance that this was the confession of the wife of the party affected by the evidence, does not seem to form a sufficient exception, unless it can be contended, which it certainly cannot, that the wife's declarations are in general to be admitted against the husband.

In cases of conspiracy, whether amounting to treason or not, the acts of any of the parties engaged in the confederacy, with reference to the common object, are admissible evidence against the others, whether immediately privy to them or not. See *Rex v. Stone*, 6 T. R. 527. and the cases there cited; and I conceive that verbal acts, if I may be admitted to use that term, as indicating a present purpose and intention, cannot be distinguished from others; but in this case as in others, where the expressions are merely narrative of a past occurrence, I do not think that they are properly admissible to prove such occurrence] having existence.

In this view of the subject, there does not appear any substantial difference between the expressions of a third person, and those of a party adducing them in his own favour; supposing the previous fact, that his conduct in other instances could properly be the subject of inquiry.

If an action was brought against a person, for knowingly giving another a false character of affluence, his fairness in doing so might be rendered apparent by his giving credit himself; his offering to become responsible to a different person, or his recommendation to his own nearest connections, would also be a natural indication of his

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his sincerity, and therefore, I conceive, would be also proper evidence of it; as in any other cases, those expressions which indicate an existing temper and disposition would be a proper medium of proof, whenever the existence of that temper and disposition would be a proper object of inquiry.

It is sometimes said, that the objection to hearsay evidence, does not apply with respect to a declaration accompanied by an act; in the preceding observations I have endeavoured to trace the nature and import, and, therewith, the limits of this proposition, which I think is only correct where the expressions are demonstrative of the nature of the act itself, and that the mere circumstance of being cotemporaneous by no means removes the principle of the objection. Thus where a man delivers a stolen watch to a constable, and says, that he has received it from the prisoner; what is related is a detached and separate fact, and not a mere exposition of the accompanying fact itself; and therefore is, I conceive, not properly admissible, although I have known an argument addressed to a court of Quarter Sessions with confidence and success, in support of the opposite decision. In the same court, I have seen a decision (which, after the numerous citations that I have made of judgments which have appeared to me in opposition to the correct principles of legal reasoning, with a view to illustrate my general observations, I am glad of the opportunity of adducing as an instance of concordance with my opinion), I have known evidence offered on behalf of the prisoner of the declaration which he made at the time of being apprehended, which was objected to, but received: these declarations corresponding with the evidence adduced by him, were a manifest indication that the defence had not been prepared at leisure and by way of afterthought; they constituted a part of his demeanour, at a time when the demeanour is necessarily affected by the consciousness or guilt or innocence; and denoted a consistency in his defence, which was a strong corroboration of its veracity; the mere declaration standing alone as an insulated fact, would have been no proof of the truth of the assertion, but the evidence of it could not have been properly rejected, as the immateriality of it could not be assumed, if by the addition of other evidence it could naturally be rendered material.

If a person is employed as agent to another, the acts of the agent within the apparent limits of his employment are, in point of legal effect, the acts of the principal, and therefore, whatever is represented by the agent in the course of such transaction, is properly evidence against his principal, not properly as a proof of the actual truth of the fact represented, but as constituting in itself a representation by which the principal is bound, as if it had been  
made

made by himself, and which is equally obligatory upon him, whether the relation is true or false. In the case of *Biggs v. Lawrence*, 3 T. R. 454. the defendant directed goods to be delivered to *Wood*, the captain of a smuggling vessel, and Mr. Justice *Buller* decided at *nisi prius*, that as it was established that *Wood* was the defendant's agent for this purpose, any acknowledgment under his hand was evidence against his principal, as much as if it had been the acknowledgment of the defendant himself: the case was decided before the court upon the merits in favour of the defendant, and no discussion took place respecting the admissibility of this evidence. In *Banerman v. Rakenius*, 6 T. R. 665. it was said in argument, that Lord *Kenyon* had frequently ruled against such evidence at the sittings, without its having ever been questioned, and his Lordship's own opinion, as expressed in that case, seems to be against the admissibility of such evidence, which, according to the course of the cause, did not become a material question; but the previous decision of *Senat v. Porter*, in the same volume, 158, also seems to be a decisive authority in opposition to it. There the protest of a captain was ruled not to be evidence against his owners in favour of an insurer, even although it had been communicated to them by the broker, which was contended to amount to a recognition of the facts which it represented. If this act, which results from the ordinary or more correctly speaking, the constant course of nautical transactions, could not be allowed to affect the parties, by whose agent it was made, much less should any distinct collateral representation. When it is alleged that the act of the agent is the act of the principal, the proposition is always to be qualified by the nature and apparent limits of the agency; but an authority to negotiate a contract, to receive goods or money, or do any other transaction in the course of business, by no means indicates an authority to bind the principal, by any naked collateral representation of a fact, which has antecedently taken place; therefore the proper inquiry respecting the expressions as well as the other acts of an agent, is how far they fall within the actual or ostensible purpose of his delegation.

On the trial at *Nisi Prius*, of the case of *Fowler v. Padget*, the principal point of which is reported 7 T. R. 509. I remember that part of the evidence offered to prove, that the plaintiff had left his dwelling-house with intent to defraud or delay his creditors, was, that when creditors called at his house in *Manchester*, they were told that he had gone upon some business to *Yorkshire*, when in truth he had gone to *London*. Upon the discussion of the admissibility of this evidence, of which my memory does not furnish me with the result, and which is not noticed in the report, it occurred

occurred to me as a bye stander, that the evidence was not of the character of hearsay; that the point intended to be ascertained, was not that the fact related was true; but that the answer given was purposely false; and that the intentional falsehood of an answer given to a person calling at his house, may lead to a conclusion of concealment, and consequently of fraudulent intention. A presumption of agency may be easily formed, with respect to the answers given to persons calling at a man's habitation; the nature of such answers, and the authority of giving them, being as much connected with the domestic economy of a house, as the transactions with customers are connected with the arrangements of a shop. It must be remembered that the adequacy of the conclusion, deduced from the fact of such a misrepresentation being given, is a question perfectly distinct from that which applies to the competency of the proof, as founded upon hearsay.

One of the cases, which are mentioned as exceptions to the rule for the exclusion of hearsay evidence, is where it is adduced to shew that the testimony given by a witness upon the trial, is consistent with his declarations on former occasions; but it has been said that this is not evidence in chief, and it is doubtful whether it be so in reply. 1 *Mod.* 283. According to the principles of correct reasoning, the propriety of the evidence in this case as in the others already referred to, must depend upon the nature of the object which it is intended to attain. In an ordinary case the evidence would be at least superfluous, for the assertions of a witness are to be regarded in general as true, until there is some particular reason for impeaching them as false; which reason may be repelled by circumstances, shewing that the motive upon which it is supposed to have been founded, could not have had existence at the time when the previous relation was made, and which therefore repel the supposition of the fact related being an after-thought or fabrication. The suspicion of an opposite conduct may result, either from the inherent nature and complexion of the evidence itself, or it may be indicated by the imputations actually thrown out in cross-examination, or otherwise by the opposite party. If a witness speaks to facts, negating the existence of a contract, and insinuations are thrown out, that he has a near connection with the party on whose behalf he appears, that a change of market or any other alteration of circumstances has excited an inducement to recede from a deliberate engagement; the proof by unsuspecting testimony that a similar account was given, when the contract alleged had every prospect of advantage, removes the imputation resulting from the opposite circumstance, and the testimony is placed upon the same level which it would have had, if the

motives for receding from a previous intention had never had existence. Upon accusations for rape, where the forbearing to mention the circumstance for a considerable time, is in itself a reason for imputing fabrication unless repelled by other considerations, the disclosure made of the fact upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material, and the evidence of them is constantly admitted without objection. See *East, P. C. cb. 10. § 5.*

Cases, where reputation is admitted as evidence, also appear in some degree, although more remotely than the other instances which have been adduced, to fall within the principle of the preceding observations, for in those cases the existence of the fact of reputation is in general so closely and intimately connected with the fact reported, that from the proof of the one, it is a legitimate course of reasoning to infer the existence of the other; in the same manner as in other cases, it is competent to argue from the visible effect to the necessary or probable cause; and this principle accords with the distinction which is made between reputation of the general proposition, which is the natural effect of the existence of the fact proposed, and evidence of what has been said respecting particular circumstances from which that fact may be inferred, for such evidence is mere hearsay; the narration of the particular event is in this case, as in all others to which the objection applies, merely referrible to that particular event, which in itself is only a transitory incidental circumstance. A general reputation that a road was a public highway, could only arise from the actual occurrence of the facts of which it was a natural consequence; the circumstance that *A. B.* had done an individual act, amounting to an indication of its being a highway, is as much insulated and the relation of it as much remote from being an actual consequence that the fact had occurred, as the relation that *A. B.* had murdered *C. D.*, is remote from being an actual consequence of that event having necessarily taken place.

The first case in which reputation is admitted, is pedigree. It is almost impossible in most cases to prove by direct evidence, the actual birth of the person whose filiation is a subject of inquiry, the few persons having an immediate knowledge of the subject, are often dead long before the motive of inquiry arises; but the concurrent and consequent facts are attended with a notoriety, which is so generally and almost so universally the effect of an actual occurrence of the principal fact to which it has relation, that it is acted upon with as much confidence as could be given to the most direct and positive assurances. In the case of the *King v.*

*Erifwell,*

*Erifwell*, which will be mentioned presently, Lord *Kenyon* said, that "the declarations of the members of a family, and perhaps of others living in intimacy with them, may be received in evidence as to pedigrees, but evidence of what a mere stranger says, has ever been rejected in these cases." The terms *intimacy* and *stranger*, as applied to this subject are evidently extremely vague, the circumstances attending consanguinity are, in their own nature, calculated to induce an opinion, and conviction of the existing relation, and do not by any means necessarily depend upon the subsistence of a personal acquaintance. If for a series of years, from infancy to manhood, I have seen a person treated, and heard him called the son of another living in my neighbourhood, it is not requisite that I should have ever spoken either to the one or the other, or to any of their family, in order to be convinced of the reality of the relation subsisting between them. But independently of the reputation of the general fact of relation, there are some particular facts, the declarations respecting which are received in cases of pedigree; and in these cases there is a material difference between the acts of members of the same family, who are interested in the minutiae of its occurrences, and persons who have only a knowledge indicating the general subsistence of the relation; and upon these subjects there does not seem to be any material difference between written entries and verbal declarations. For instance, the time of birth is a matter respecting which the members of the family alone have in general an interest to take notice. In *Goodright v. Moss, Couv.* 591. it was decided that a mother's answer in Chancery, was evidence to shew that her son was born before marriage; and Lord *Mansfield* in allusion to other cases, that had been previously decided, said tradition is sufficient in point of pedigree: circumstances may be proved. An entry in a father's family *Bible*, an inscription on a tomb-stone, a pedigree hung up in the family mansion, (as the Duke of *Buckingham's* was,) are all good evidence. In the preceding case of *Goodright v. Moss*, Mr. *Bar.* (afterwards Lord Chief Justice) *Eyre*, at *Nisi Prius*, refused to admit evidence of reputation, that the party was born before marriage. I think however the propriety of this determination is rather doubtful, for if reputation is evidence that *A.* was the son of *B.*, an opposite reputation at least diminishes the weight of one argument in favour of that proposition, and is in general as naturally (and perhaps more frequently) a consequence of the actual fact on the one side, as the reputation of legitimacy on the other.

There is a disinclination to bastardize issue, which is sometimes perhaps carried too far. When parties are actually married, and

there is no impossibility of the husband being the father of the issue of the wife, every consideration of decency and propriety repels the admission of evidence to the contrary. But when the question is, whether a person was or was not born during wedlock, it should be recollected that the interests of justice are concerned in preventing one, who is really a bastard, from usurping the rights of the legitimate members of the family; and there is no particular reason of public policy, which requires that those who have the real rights in their favour, should meet with peculiar obstacles in substantiating the proof of usurpation.

In all questions of prescription, reputation is universally admitted to be evidence; but I have already adverted to the rule, and the reasons upon which it is founded, which confines such evidence to the general right, and excludes it with respect to particular acts, by which that right may have been exercised, or otherwise manifested to exist.

In *Yates v. Harris*, *Gilb. Ev.* 77, an old map of lands was allowed as evidence, where it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase. I should conceive that the description of lands in old deeds would fall within the same principle, where the object was merely to shew the description, that had been applied to the property at a given time, although the persons against whom such deeds were afterwards adduced were no parties to them; for there can be no other motive in such description, than to mark the object of the instrument; the contents of the deed can give no right against third persons, and therefore there can be very little motive for inserting a fictitious description, of a co-existing subject which at the time will speak for itself. I have known however such evidence to be treated with great contempt, in the case of *Prescott v. Philips*, *Trin.* 1798; adverted to *ante*, No. 15. Lord *Kenyon* applied to it, the epithets of stuff and nonsense. Mr. Justice *Ashturst*, thought the evidence absolutely inadmissible, because it was possible that a man might chuse to be a very great rogue for the sake of posterity. Mr. Justice *Grose*.—It is the clearest case that ever was. Mr. Justice *Lawrence* was silent.—This discussion may at first sight appear rather applicable to a different part of our inquiry; but I think these descriptions are very much to be assimilated to hearsay evidence of matters of reputation. In *Davies v. Pierce*, 2 *T. R.* 53. and *Holloway v. Baker*, cited, *ibid.* it was held that the declarations of former tenants, respecting the persons under whom they held their farms, were properly admissible. This evidence seems to fall within the principle already adverted to, and referable to the written evidence last mentioned; being a matter of cotemporary description,

tion, connected with and arising out of the actual existence of the fact which it purports to indicate.

The admissibility of hearsay evidence in cases of parochial settlement, formed one of the leading points upon which the judges of the King's Bench were equally divided, in the famous case of the *King v. Briswell*, 3. T. R. 707. The question there agitated, has since been placed at rest, as we have seen in a preceding section, (§ 9.) but the discussion respecting it will continue to preserve its utility, in the exposition of this branch of the law of evidence.

Declarations of a person under the apprehension of impending death, are also sometimes admitted as evidence, chiefly in cases of murder, where the declarations of the dying person are admitted to affect the party accused, upon the principle, that the mind is under these circumstances as much impressed with the obligations of adherence to truth, as when speaking under the sanction of an oath; and the reasoning so far as it goes is certainly well founded; but while the veracity of these declarations is admitted, it is highly important to use an anxious caution in deciding upon the effect of them. The sanction of an oath is only one part of the benefit of a judicial examination, and only one of the reasons for the exclusion of hearsay evidence; the opportunity of investigating the accuracy of the evidence, of applying questions, by the answers to which it may be explained or qualified, is an important circumstance, and this is wholly lost. Much consideration also should be given to the state of mind of the party whose declarations are received. Strongly as his situation is calculated to induce the sense of obligation, it must also be recollected, that it has often a tendency to obliterate the distinctness of his memory and perceptions; and therefore, whenever the accounts received from him are introduced, the degrees of his observation and recollection is a circumstance which it is of the highest importance to ascertain. Sometimes the declaration is of a matter of judgment of inference and conclusion, which however sincere may be fatally erroneous; the circumstances of confusion and surprize, connected with the object of the declaration, are to be considered with the most minute and scrupulous attention; the accordance and consistency of the fact related, with the other facts established by evidence, is to be examined with peculiar circumspection, and the awful consequences of mistake must add their weight to all the other motives, for declining to allow an implicit credit to the narrative, on the sole consideration of its being free from the suspicion of wilful misrepresentation.

The existence of an apprehension of death, at the time of mak-

ing the declarations, is to be inferred, either from the cotemporary or previous declarations of the party, or from the nature of his situation being such, as necessarily to induce that impression. It was agreed upon a conference of all the judges in *Easter Term*, 1790, that it ought not to be left to the jury to say, whether the deceased thought he was dying or not, for that must be decided by the judge before he receives the evidence, 1 *East*, P. C. c. 5. § 124. I am aware how much I subject myself to the imputation of presumption, in hazarding a doubt upon the correctness of a position which has been so established; but feeling the doubt, the mode of inquiry which upon deliberation I have adopted as having the most utility, obliges me to express it; and if in doing so I unintentionally incur the charge of disrespect to the particular opinion of the particular judges, I shall have some excuse when it is considered that my motive is a superior respect to the fundamental principle of law, that questions of fact are exclusively the province of the jury. The relevancy of the evidence to the charge, the effect of the conclusions to be deduced from it, (supposing those conclusions to be ascertained,) the propriety of submitting it to the jury, with respect to the conclusion which shall be inferred, are properly within the consideration of the judge. The judge upon the anterior evidence of apprehension, must decide as to the reception of the subsequent evidence of declaration; thus far is mutually agreed—but the evidence from which the apprehension is inferred may be true, or false; the inference deduced from it may be correct, or erroneous; the sum of the inquiry is the question of fact, whether the deceased did or did not act under the apprehension imputed; questions of veracity, questions of inference, and the resulting questions of fact are in all other cases allowed to belong to the decision of the jury; and the propriety of the decision of the judge in favour of receiving the declaration, by reason of evidence indicating the apprehension of approaching dissolution, is no more conclusive upon the jury, in admitting the relation of the circumstances, by which the apprehension is supposed to be manifest, to be true, or the inference deduced from the relation, to be correct, than the declaration itself is conclusive upon them, as to the veracity of the party deceased, or the accuracy of his representation. According to a fair analogy to other proceedings, the direction should be previous to considering the effect of the declaration; to determine, 1<sup>st</sup>, whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question was inferred: 2<sup>d</sup>, Whether the inference deduced from such circumstances or expressions is correct: 3<sup>d</sup>, Whether the deceased did make the declarations alleged against

against the accused: 4th, Whether those declarations are to be admitted as sincere and accurate.

In *Wright v. Clymer*, 3 *Bur.* 1244. it came out by the defendant's re-examination (or as it is called cross-examination), of a witness produced by himself for a different purpose, that one *Medlycott*, who had written and attested the instrument under which the defendant claimed, acknowledged in his last illness that he had forged it; to which evidence no objection was made by the counsel for the defendant at the trial; but upon an application for a new trial they objected against it as hearsay evidence. Lord *Mansfield* with reference to this objection, said, "It came out upon their own cross-examination; they made no objection to it at the trial. The competence of evidence depends upon the circumstances under which it is given. Even though it had been upon an examination by the plaintiff, especially as it was all written and witnessed by *Medlycott*, and gave the premises in question to his wife, as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice, and ease his conscience, I am of opinion, that the evidence was proper to be left to the jury."

The admission of hearsay evidence was one of the points in discussion in the famous *Douglas* cause, and is the principal subject of one of the letters of Mr. *Andrew Stuart* to Lord *Mansfield*. The question in that case was whether *Lady Jane Douglas* had been delivered of twins at *Paris*, on the 10th of *July*, 1748. The truth of this position was impeached on several grounds, which it will not be here necessary to advert to, as the present discussion is only relative to the admissibility of the evidence; neither will it be necessary to examine how far the inference intended to be deduced from the particular evidence, was combated by any other facts in the cause. It was alleged by *Lady Jane* and her husband, that she had been delivered by the assistance of a surgeon of the name *Pier la Mar*; this was treated on the opposite side as a fiction and invention, and it was said that no such person could be found to have had an existence. In support of the filiation, evidence was given that a surgeon of the name of *Delamarre*, at a time coinciding with that in question, spoke of delivering a foreign lady of advanced age, of great family in her own country, and who had come last from *Rheims*, (which description accorded with *Lady Jane*.) of twins; the objections against the probability of this account, and the want of coincidence between this *Delamarre*, and the description given of the surgeon who attended *Lady Jane* are here omitted, as they apply rather

to the effect and consequence of the evidence than to the propriety of attending to it, if free from any such observations.—The following preliminary observations, by Mr. *Stuart*, upon the general nature of the subject, place in a very perspicuous point of view the general nature of the objections against hearsay evidence. “Hearsay evidence is, in general, of very little consequence, and ought never to be regarded, except where, for want of direct and positive proof, the judge is necessitated to give a determination even upon such slight probabilities as are laid before him. For, besides that a testimony of this kind is weakened by its removal from the first source, it is liable, from its very nature, to important objections, which greatly diminish its authority. Very few persons impose on themselves such strict laws of veracity, that every word which drops from them in conversation can be regarded as a judicial testimony.—Vanity, self-interest, love of talkativeness, a variety of motives, even the most frivolous, make people indulge themselves in fictions of this nature; and they think themselves the more secure, both as a detection is not attended with any important consequence, and as their companions never dream of sifting their story, or examining circumstances, so as to render the detection possible.”

“If such narratives have small authority at first hand, what weight is due to them when repeated, after an interval of many years, by persons who were noways interested in the original event? The memory of men is never so tenacious as to retain, with any tolerable exactness, circumstances which entered merely by the ear, which could at first make but a slight impression upon them, and which they never, during a very long interval, had any occasion to recollect. Every one’s experience may convince him, that no conversation was ever repeated by four or five persons, even next day, without some material variations, and sometimes contradictions in the circumstances. But if innocent error be so natural, and even unavoidable in such testimony, what must be the case where the least suspicion of fraud, or corruption, or even partiality, is allowed to enter? A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.”

With respect to the admissibility of the evidence in the case referred to, I conceive that the general principle of the objection will not be found to apply, when the real proposition intended to be established is attentively considered.—If the enquiry had rested merely

merely upon the abstract question—whether Lady *Jane*, at the time referred to, had or had not been delivered—and the parties alleging such birth had, in order to prove it, offered the kind of declaration now under discussion, it would have been a mere naked case of hearsay; but that is not a correct view of the nature of the dispute; the filiation was supported by the usual evidence of nurture, education, and repute, by all those circumstances which are *prima facie* sufficient; the truth of it was impeached by collateral circumstances, and amongst the rest by the imputation that the surgeon, whose name was adduced, was a mere fiction, and the improbability that *Delamarre*, the surgeon, proved to have had an existence, could be the person intended, or could have been so connected with Lady *Jane* and her husband.—But if at the same time *Delamarre* had held conversations importing such a connection, agreeing in the leading particulars with the facts related to have passed, such a concurrence of circumstances, as that Sir *John Stewart* and Lady *Jane* should, at mere random, have taken up the name of *La Marre*, a fiction and non-entity; and that *Delamarre*, at the very time to which that relation was applied, should have, of his own head, invented a fictitious story, coinciding in its leading particulars with the fiction adopted by other persons, with whom he had no connection or intercourse, is marked with the highest degree of improbability; the conversation in question would therefore almost necessarily indicate the existence of a connection with respect to the event in question—whether a connection, in assisting upon a real delivery, or in aiding the false assertion of one, is a different question, to be decided by other circumstances. Supposing such a conversation to have passed, and to have been truly related, it removes the argument which it was intended to oppose, arising out of the fabrication of the name of *La Marre*, and the want of connection between Lady *Jane* and *Delamarre*.

There are some cases respecting the admissibility of the declarations of persons against others with whom they are connected, the principle of which has already been in some degree examined, with respect to a principal being affected by the declarations of his agent—but which will more properly fall under consideration in a following section.

## SECTION XII.

*Of the Competence of Witnesses, and of some particular Exceptions to Testimony.*

It would perhaps have appeared to be a more methodical arrangement of the subjects, if the competence of witnesses had been examined previous to the insertion of the preceding sections, respecting their number and the nature of their testimony, but the preference is not of sufficient importance to induce me to deviate from the course of my author.

In the treatise of *Pothier* we have seen, that the law of France required several qualifications with respect to the attestation of formal instruments, which were not necessary in witnesses adduced to prove a matter of fact; women, foreigners, monks professed, who were all excluded from the former, were sufficient witnesses for the latter. For the parties can choose what witnesses they will for the purpose of a solemn attestation, whereas they must take such witnesses to a fact as the circumstances afford.

The general objection to a witness were the want of discretion, personal infamy, causes which lead to a suspicion of partiality, to which was added the suspicion of subornation.

It is observed by *Gilbert* that idiots and insane persons are obviously incapable of being witnesses, upon which Mr. *Lofft* remarks, that this must be understood of such as manifestly are within the description of this deplorable calamity; otherwise defect, or inconsistency of understanding, not clearly to this extent, will affect their credit but not their competency to be examined. Yet of an insane person it might, for defect of other evidence, merit to be considered, whether in civil cases at least, the testimony of such might not be admissible, upon points where his understanding did not appear to be subject to disturbance; it being well known that in many of their melancholy instances, especially where the result of some violent passion, the party affected is entirely cool, clear, and recollected in his ideas, and as free as other persons from the delusions of a perverted imagination, in every thing not connected with the cause of his insanity: with regard to persons who have only temporary fits of madness, (then usually termed lunacy,) and at other times are in all respects found of reason, these are then consequently as capable of testimony as of any other legal act.

According to the law of England, there is no fixed time at which children are excluded from giving evidence, but the reason and sense of their evidence is to appear from the questions propounded,  
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and their answers to them.—*Gilb.* 144. And Mr. *Lofft* observes, that as children of very tender years are capable of being legally considered as capital offenders, much more are they capable of being witnesses.

There are cases in which infants of the age of six years were held inadmissible as witnesses to prove a rape, or an assault with an intent to commit a rape; but in the case of the *King v. Brayne*, 12 April, 1779, *Bull. N. P.* it was determined by all the judges, that an infant of the age of five years might be sworn and give her evidence upon oath, provided she have discretion, and be acquainted with the nature of an oath.

Sir *Mathew Hale* expresses an opinion, that where the information from the party injured is peculiarly essential, it may be expedient to hear an infant, though the court should think it unfit to swear her; but this sentiment is now universally exploded.

It is customary when children are adduced as witnesses, to make a preliminary examination, in order to decide upon the extent of their understanding, and their sense of moral and religious obligation; but it may deserve consideration, whether such a decision could not be as accurately formed by attending to their examination upon the subject in dispute, as by their answers to the questions which are now commonly used as a touchstone.

The next objection is personal infamy. This objection was of much greater extent in the civil law than it is in the law of England, and in France included persons in a state of mendicity, and those against whom a decret (or warrant of apprehension) had issued for any criminal offence, until they were legally acquitted of the charge.

According to the law of England, a conviction and judgment for a capital felony, is a disqualification from being a witness; but where the conviction is for a felony within benefit of clergy, the allowance of clergy, and the consequent punishment, is a restoration of competency. The ancient punishment upon this occasion was a burning in the hand, which was treated as having an influence to purge the offence.

But the offence of petty larceny being a case of felony in which inferior punishments were inflicted originally, and not by way of commutation, the rules concerning the benefit of clergy did not apply to it, and as there was no purifying process, the stain, once contracted, continued after the punishment was complete.

This absurdity continued until the 31st year of his present Majesty, when it was enacted, that no person shall be an incompetent witness by reason of having been convicted of petty larceny, c. 35. Although nothing can be more general and explicit than the language

guage of the act, I have known it decided in an inferior court that a person under sentence of imprisonment for petty larceny was incompetent, until after the imprisonment had expired. This was adopting, by way of analogy, the rule in cases of grand larceny; but nothing can be more repugnant to reason than resorting to analogy for the purpose of altering the plain interpretation of language, perfectly unambiguous in itself, and leading to no absurdity in its consequences.

Of offences inferior to felony, those which may be stated as certainly disqualifying a witness, are, perjury, forgery at common law, and barratry.

It was formerly held, that the infamy of the punishment of standing in the pillory was a disqualification, but I conceive that modern opinions are uniform, that the disqualification must proceed from the infamy, not of the punishment, but the crime.

In order to support the objection to a person's evidence on the ground of infamy, the record of conviction and judgment, or a copy of it properly authenticated, must be produced; no other evidence of the commission of the crime is admissible; and a verdict upon an indictment for perjury, without a judgment, has been ruled to be insufficient.

It has been a matter of debate, whether the King's pardon restores the competency which is lost by the conviction of an infamous crime; *Gilbert* adopts the opinion that it does; but in case of a conviction for perjury on the statute, the King's prerogative of pardon is expressly excluded.

Under this kind of exclusion may also be ranked persons excommunicated. *Mr. Lofft* enumerates the causes of excommunication, and expresses his surprize that they remain as unrepealed exceptions to the competence of witnesses.

A general infamy of character may defeat the credit of a witness, but does not affect his competency. And it is only allowed in respect of the question of credit to give general evidence, and not to enter into a detail of particular facts, as has been already mentioned in a former section, upon the examination of witnesses.

The causes which lead to a suspicion of partiality, and which exclude the testimony of witnesses in the civil law are, as may be seen by the *Treatise* in the preceding volume, very numerous, and seem to extend to almost every circumstance which can tend to influence the wishes of a person in respect to the event. They exclude relations, servants, professional agents, and (subject to certain distinctions) those who are engaged in any suit with either of the parties. The slightest reflection must evince the impolicy of such

such a rule. The grand foundation of judicial rectitude is, as I have frequently had occasion to take notice in the course of the present number, an accurate and complete information of the facts to which it is applied; and the allowing a mere suspicion of partiality in those, to whom such facts are often most familiarly known, indiscriminately to preclude the admission of that testimony, which may be essentially requisite to the interests of justice, is a very disproportionate sacrifice of a certain advantage to the avoidance of contingent evil.

Any circumstances calculated to induce either partiality or enmity, may be very properly, and, as I conceive, very sufficiently estimated in deciding upon the credit which ought to be given in each particular instance; additional caution will be excited, and the consistency of the evidence, taking one part of it with the other, its coherence with undisputed or well established circumstances, its internal marks of probability, the demeanour of the witnesses, will all be more accurately examined, and this will, upon the general average, induce a more accurate knowledge of the facts in question, than a course of proceeding which, whilst it is occasionally useful in the prevention of falsehood, is continually injurious in the suppression of truth.

Even the benefit arising from the exclusion of those persons as witnesses, who have a direct and immediate interest, is, as a general question, very problematical.

Mr. *Fonblanque*, in one of his excellent notes to the *Treatise of Equity* observes, that no rule can be more reasonable in a general view, than that which requires the testimony by which any fact is established, to be free from that bias which an interest in the event might, even imperceptibly, give to the mind of a witness: but this rule, though so admirable in its principle, is, perhaps, of all the rules of evidence, the most flexible in its application; the variety of influences to which the human mind is subject, may be considered as interests which it more or less anxiously consults. The voice of nature may be supposed to give a bias to the testimony of those who stand in the relation of blood; and, according to even the worldly construction of interest, the child is interested in preserving the character and defending the property of its parent; but it is a species of interest which the law does not apprehend to be likely to supersede the rights of truth and justice, and therefore a child, by our law, may be a witness for or against his father. The habits of friendship may have so blended the claims of character, that the testimony of a friend may, in some instances, be considered as the testimony of a man in his own behalf, but the law does not reject such testimony; it may indeed in  
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such instances be influenced by a more powerful motive than the prospect of acquiring or preserving wealth, but it is a consideration which does not disqualify the witness, however it may weigh in estimating his credit. What then, it may be asked, is intended by the interest which excludes the testimony of a man, whose testimony is in other respects unimpeachable? It is a melancholy reflection, that though the law of England conceives the claims of truth to be sufficiently strong to repress the feelings of nature, and the not less powerful dictates of friendship, it dares not trust the interests of justice to that species of influence which the smallest, present, actual or supposed pecuniary benefit may excite: "I mean not, (he adds) to arraign the wisdom or policy of the law.—I have already stated it to be of all the rules of evidence the most flexible in its application, that liberal spirit which ever accompanies the truly enlightened mind, having modified its rigour by distinguishing that actual interest which goes to the competency of testimony, and that influence which merely affects the credit of it."—Whatever justice there is in the general tendency of the preceding observations, the law of England, so far as it differs from that of other countries, is rather an exception from, than a peculiar object of, the censure which they import.

In discussing the nature of that interest which induces the disqualification of a witness, *Gilbert* observes—that it is where there is a certain benefit, or disadvantage to the witness, attending the consequence of the cause one way.

Few subjects have produced a greater multiplicity of decisions than the extent and application of this rule, and amongst those decisions there is a considerable degree of contrariety. That which is an interest, and that which is merely a cause of influence, have been confused and blended together; but the necessity of comparing and examining a diffuse class of cases, and the difficulty of reconciling and distinguishing them, is in a great degree prevented by the judicious and accurate investigation which took place in the modern determination of *Bent v. Baker*, 3 *T. R.* 27, which is now regarded as furnishing the proper criterion in all disputed cases.

That was an action on a policy of insurance, and the broker who had effected the policy, and who had himself subscribed it, after several other persons, was adduced as a witness to shew that the policy was void.

His testimony having been rejected at *Nisi Prius* by Lord *Loughborough*, the case was brought, by bill of exceptions, before the court of King's Bench, who ruled the evidence to be admissible. There was a writ of error in the House of Lords, and the matter

was finally settled by compromise, but the opinion of the court of King's Bench has been since considered as fixing the general standard upon questions of competence:

It had been formerly decided, that one underwriter could not be a witness for another upon the same policy, and that decision had been generally followed, the ground of it being, that although the witness had not an interest in the particular cause, he was interested in the question which it involved upon the validity of the policy. There were several special circumstances upon which, in *Bent v. Baker*, it was held that the evidence ought to have been received, particularly the necessity arising out of the witness's character as broker. But the grand point which the case established was, that a witness shall not be rejected as incompetent, unless he has an interest in the event of the cause. Upon that point Lord *Kenyon* expressed himself as follows: "I must acknowledge that there have been various opinions upon this subject, and that it is impossible to reconcile all the cases. Then we have only to consider what are the principles and good sense to be extracted from them all; I think the principle is this, if the proceedings in the cause cannot be used for him he is a competent witness, although he may entertain wishes on the subject; for that only goes to his credit, and not to his competency; as where he stands in the same situation with the party for whom he is called to give evidence, there is no doubt but that it may influence his testimony; or where a father is giving evidence for the son; but this does not render him incompetent, and such circumstances are always open to observation. So here the witness might have had his wishes; his situation might have created an influence upon his mind, but the question still is, whether he was a competent witness: on the grounds already stated, I think that he was." And after observing upon some of the particular circumstances, he said, "However, these are only the small points of the cause, and I again recur to that which is the principal ground of my opinion, namely, that the witness was not interested in the cause then depending."

Mr. Justice *Buller's* opinion seems to have been principally founded upon the particular circumstances, but he said that on the general ground he inclined to think that there was no objection to the competency. The true line he took to be this, *is the witness to gain or lose by the event of the cause?* Now the witness could not gain or lose by the event of this cause, because the verdict could not be evidence either for or against him in any other. Mr. Justice *Grove*, with respect to the general question, whether the witness's being interested in the general question put to him shall render him incompetent, as well as his being interested

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in the event of the suit, said—"I think it is better to narrow the objections to those cases where the witness is interested in the event of the cause." And after a considerable interval Lord *Kenyon* said—"The case of *Bent v. Baker*, laid down a clear and certain rule, by which I have ever since endeavoured to regulate my opinion in causes coming before me at *Nisi Prius*, though probably I may not have decided properly in every instance, when called upon to form an opinion on the sudden. The rule there laid down was, that no objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence, on any future occasion, in support of his own interest." *Smith v. Pragu*, 7 T. R. 60.

It will not be necessary to enter into a detail of the numerous cases which have occurred upon this subject, or an examination how far they have been individually conformable to, or variant from the standard which is now established, and according to which a witness is not incompetent, unless he has an interest in the event of the cause. The distinction between an interest in the question proposed and in the event of the cause, cannot be more strikingly illustrated than by the immediate subject to which the case of *Bent v. Baker* relates—the admission of one underwriter in behalf of another upon the same policy.

In the application of the rule which is now established, and of the adjudication respecting it, it will be an important caution to avoid drawing too general conclusions from particular premises, and to attend to the observation of Mr. Justice *Buller*, in the case of *The King v. Proffer*, 4 T. R. 19, "That the question whether evidence be admissible or not, depends upon the subject matter to which it is applied." For instance, it is decided generally, that a tenant cannot be a witness to support his landlord's title, as he is liable to an action for *mesne* profits, if his landlord is defeated: provided the declaration in ejectment is served upon the tenant, it may be assumed for this purpose, that a judgment against the landlord, who is substituted under a rule of court, may be good evidence against such tenant in an action for *mesne* profits, as the tenant had an opportunity of maintaining his own personal interest; but a former tenant, or one who came in pending the proceedings, and quitted the premises before the trial, could not, in any action against himself, be affected by proceedings which he had not an opportunity to contest, and would therefore have no interest, on the ground suggested, in the event of the cause.

Where the interest of a community, as a parish or corporation, is in question, the members of that community are not in general admi-

admissible witnesses. Thus, where a corporation were lords of a manor, and having approved part of a common, demised it, reserving rent to the mayor and bailiffs; it was contended that freemen might be witnesses, to prove that there was a sufficiency left, because they had no interest at all, the rent being reserved to the mayor and bailiffs, and the freemen not having the direction of the corporate funds: and secondly, that the interest was too minute to operate as an objection to their testimony; but it was answered by the Court, that the rent must be reserved for the use of the corporation, and therefore the objection must prevail, however small the interest may be in reality. *Barton v. Hindle*, 5 T. R. 174. The effect of this objection appears to be often prejudicial in shutting out the due investigation of truth, but while the general principle of the objection is allowed, it would be highly improper to subject it to the fluctuation of opinions upon the degree of interest in particular cases; and any corrective of the exceptions upon general grounds, can only be applied by legislative authority.

But still the objections must be understood as subservient to the grand criterion of *Bent v. Baker*—an interest in the event of the cause. On this account it has often been held, and is now a familiar matter of practice, that a liability to be rated to the poor does not disqualify a person not actually rated, from being a witness on a penal statute, giving part of the penalty to the parish. In the case above referred to, of *The King v. Proffer*, 4 T. R. 17, it was ruled, that on an appeal, by several persons, for not being rated to the poor, (which was an election qualification,) a person possessed of rateable property in a parish, was a competent witness to prove that they ought to be rated; upon which occasion Mr. Justice Buller made the observation already cited, that the question whether the evidence be admissible depends on the subject matter to which it is applied. It is also decided, that the owners and occupiers of rateable property within a parish, are good witnesses for a parish, and compellable to give evidence on the other side, unless actually rated. *Rex v. South Lynn*, 5 T. R. 664. *Rex v. Little Lymley*, 6 T. R. 157.

This decision, at least so far as affects the owners, is a departure from the common standard, for although, in case of a penalty, the application of which is a matter of transient nature, the interest may depend upon the circumstance of being actually rated; the decision of a settlement case produces a permanent effect, by either liberating or charging the parish to an indefinite period; a proportion of that permanent charge therefore falls upon the property, in which the owner has only parted with a temporary interest, and

which, beyond the extent of that interest, must be increased or diminished in value to himself, according to the decision of the case.

Since making these observations it has been decided, in the case of *The King v. the Inhabitants of Kirdford*, 2 East, 559, that an occupier, whose name was purposely omitted in the rate, was a competent witness, although it was contended, that he was eventually interested in the consequences, as he might be put on the next rate, while the same burthen subsists—but the Court held that it was perfectly contingent whether the witness would be interested or not, he might die, or part with his property before the making the next rate, and he could not be rejected on the mere ground of an expectant interest.—From the constant tenor of my observations, it is evident that I am no friend to extending the exceptions against the competence of witnesses, but upon frequent consideration of the subject, I cannot think that the mere circumstance of a witness not being included in the existing rate, is, upon the principles of accurate reasoning, an answer to the objection, unless by contract, or otherwise, his security from a legal liability to the rate is as extensive as his interest in the rateable property, or the liability of that property to the charge which is the subject in dispute. The last rate is immaterial to the question of interest—that rate is fixed, and must be paid. The decision of the settlement induces the necessity of an earlier or a greater rate being afterwards made; or it relieves from that necessity, and the persons interested in the question are those upon whom the liability to such new, or additional rate, may fall. And if that rate may, in consequence of the permanent nature of the charge, impose a permanent liability on the property, those who have a permanent interest in the property have an actual interest in the decision. It cannot, I conceive, be correctly said, that the interest is contingent, merely because the ground of it may possibly cease before the operation of it attaches. The continuance of matters in their existing state cannot reasonably be considered a contingency, otherwise a short answer might be given to all objections of incompetence. Corporators, tenants actually rated, or any other persons may die, or cease to bear the character which is the cause of the objection. The pauper may die, or, being a female, may marry. The answer of an interest being contingent, only applies if some future event, which may or may not happen, must necessarily take place before the interest can arise; but where the character already exists, the possibility of its removal does not destroy the consequences of it. It is the removal only of the interest that is contingent, and when the contingency takes place, the consequences of its existence will determine. To try the question of interest with respect to the

the present subject, by a possible and not very improbable case—a township consists of a single farm, (and in the county of Chester there are many townships of that description)—the farm is in the occupation of a tenant from year to year, and no rate is actually made. The question relates to the acquisition of a settlement by an aged person, who has a numerous train of descendants that have not acquired any settlement in their own right. Has the landlord no interest in the event? At the end of the current lease he will have to pay, or be relieved from paying, as the decision may be, for the maintenance of the family, or he will let the estate subject to the charge, or he will sell it; but will there be no difference in the rent or price, according to the opposite contingencies of the existence or non-existence of the burthen?

Whatever is the proper answer to the questions proposed in this great scale, cannot be the improper answer in any other case depending upon the same principles, unless it is asserted that the magnitude of the interest is the true criterion for deciding upon the weight of the objection.

In some instances the legislature has interposed to destroy the objection of incompetence, as applicable to the members of a community. Thus by 3 & 4 *W. c.* 11. parishioners, other than such as receive alms<sup>(a)</sup>, may be witnesses in actions in the courts at Westminster, or at the assizes, for money mis-spent, or taken by churchwardens or overseers of the poor. By 1 *Anne, c.* 18, inhabitants of counties, &c. may be witnesses respecting persons, or corporations, being obliged of right to repair bridges. By 27 *Geo.* 3. *c.* 19, in actions on penal statutes, inhabitants of any place or parish are good witnesses to prove the offence, notwithstanding the penalty being given to the poor, or otherwise, for the benefit of the parish or place, provided the penalty does not exceed 20*l.*

Where a trustee, or executor, has no beneficial interest, it seems clearly settled that he may be examined as a witness. *Vid: Lowe v. Jolliffe, 1 Bl. Rep.* 365. *Goodtitle v. Welford, Doug.* 139.

Even where there is an interest there are several excepted cases to which the objection of incompetence does not extend.

I shall not enumerate the several grounds of exception which have been stated in the books upon the subject, some of which are founded upon the particular course of proceeding in courts of equity, and others (for instance the remoteness and insignificance of the interest) are very disputable; but merely advert to a few of the most important and best established instances.

The first of these is, that an interested witness shall be admitted from necessity. The necessity here referred to is that which arises

(a) This exception is rather curious, for such persons are very seldom rated, and are therefore in general not incompetent.

from the general state and order of society, and not that which is merely founded on the accidental want or failure of evidence in the particular case. Thus servants and agents are allowed to prove the delivery of goods, or the payment of money, although by doing so they remove the responsibility originally incumbent on themselves. But where the action is against the master, on account of the negligence or misconduct of the servant, the latter cannot be a witness for the former, to whom he is answerable over, without a release. *Green v. New River Comp.* 4 T. R. 589.

A person robbed is, by mere construction of law, without any statutable provision, allowed to give evidence in an action against the hundred, except in certain cases provided for by special acts of parliament.

One of the grounds of the decision in the case of *Bent v. Baker*, was the necessity that a broker who had effected a policy, and who from the nature of his situation must be the best witness to many purposes, and was the only witness who, from the nature of the thing, could speak as to any representation made by him to the underwriters, should not be precluded from disclosing what was material in favour of the underwriters, and it was upon this point that Mr. Justice *Asbburft*, who declined giving an opinion on the great question in the cause, principally relied.

Another general exception is, that a person shall not, by his own act, render himself an incompetent witness, when a party has acquired an interest in his testimony, as by laying a wager on the event of the cause. *Bull. N. P.* 290. This also was a point in the case of *Bent v. Baker*, in which Mr. Justice *Grose* observed, that the broker who had effected the policy, and in whose evidence another gained an interest, should not, by his own act, (of afterwards subscribing the policy) deprive that other of the benefit of his testimony.

A third exception is, that where a person who is tendered as a witness, does every thing in his power to get rid of any objection to his testimony, it shall not be competent to the other party, by an obstinate refusal, to prevent his being examined. In *Goodtitle v. Welford*, *Doug.* 139: the devisee of a reversionary interest surrendered to the heir at law, who contested the will, but the heir refused to accept the surrender, and it was held that, as the witness had parted with his interest, so far as depended upon him, third persons had a right to his testimony, and the surrenderee should not deprive them of it, by refusing to accept the surrender.—So in *Bent v. Baker*, the broker had joined with the other underwriters in a bill in equity, for the purpose of avoiding the policy; but the defendant and witness offered to pay the assured the costs of the  
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suit in equity, and to procure the bill in equity to be dismissed, as to them, at their own expence, which offer the plaintiffs would not accept; this was held sufficient to remove any objection to his evidence, founded on the suit in equity. Mr. Justice *Buller*, stating the proposition with which I have introduced this paragraph—In order to warrant the application of this principle, the nature of the refusal must be attended to. If the witness has an interest which he agrees to relinquish in favour of the party, the party cannot, by his own refusal, defeat the testimony; but, on the other hand, he can never be required to concur in relinquishing any claim, or interest of his own, against the witness.

Where a witness has an equal interest in the decision either way, he may be examined. In *Buckland v. Tankard*, 5 T. R. 578, the acceptor of a bill called one *Gregson* to prove that the plaintiff had no property in the bill, but that it belonged to the witness, and had been merely delivered to the plaintiff to obtain payment for him; which evidence was disallowed, on the ground that if the plaintiff should succeed, the witness would be put to greater difficulties to get back the money, than if the plaintiff should be foiled by means of his testimony. But in *Illerton v. Atkinson*, 7 T. R. 480, when the question arose whether *Barber*, who received money from the defendant, was or was not intitled to do so as agent for the plaintiff, it was held that *Barber* was a competent witness, being answerable either to the plaintiff or the defendant, although it was objected that if the defendant recovered, the witness would be liable in addition to the costs of that action. And in the subsequent case of *Birt v. Kershaw*, 2 East, 458, it was held that an indorser of a bill was a competent witness, for the drawer to prove that he had received the money from him, and paid it to the indorsee, although it was admitted that if the plaintiff recovered, the witness would be answerable to the defendant for the costs of the cause; and the authority of *Buckland v. Tankard*, was disallowed.—There can certainly be no dispute with respect to the principle, where the event is to the witness a matter of absolute indifference; and it seems to be going too far to consider the probability of a greater difficulty in making out the case on the one side than on the other, as a circumstance which affects the interest; but I do not see how it is possible to regard a witness as indifferent who has a preponderance of interest on either side, or to conceive that the slightest possible interest on the one side, can either, in point of legal reasoning, or in respect to the probable motives of conduct, be suffered to counterbalance the greatest possible interest on the other; and if not, then the slightest excess is as much a real interest as if that excess

had been the only subject in dispute. It is sometimes said that an interested witness is admissible in criminal prosecutions; but many cases supposed to be founded upon this principle, in fact proceed upon a different ground. The admissibility of evidence in criminal cases is a subject to which I shall presently refer with more particularity.

Though an interest in the event of the cause is in general necessary to the disqualification of a witness, and an interest in the question proposed is not sufficient, it does not follow that a witness is necessarily incompetent who has an interest in the event of the suit, unless he has an interest in establishing the truth of his answer to the question proposed. There are not many cases to which this observation can apply, but the effect of it may be illustrated by an instance which I have heard stated, without opposition, in the court of King's Bench. Upon an indictment against a township, or an individual, for not repairing a highway, an inhabitant of the parish at large is interested in establishing the indictment, as he thereby exonerates himself; therefore he cannot prove the special obligation to repair, but he may prove the place in question to be a common highway, for to that extent his testimony only induces a charge upon himself.

In *Fotheringham v. Greenwood*, *Str.* 129, it was held, that if a witness thinks himself interested in the question, though in strictness of law he is not, yet he ought not to be sworn, and a case was cited where a person who owned himself to be under an honorary, but not a binding engagement, to pay the costs, was held incompetent; which doctrine was admitted in *Trelawny v. Thomas*, 1 *H. Bl.* 303. I cannot, however, avoid entertaining a doubt on the rectitude of this opinion. It is agreed that a party in a cause has a right to the testimony of a witness to whom there is no legal exception. Whether there is an exception, founded upon an actual interest recognized by law, is a plain and palpable object of inquiry, but it is injurious that one man should be prejudiced by the mere imagination of another; that his claim should be repelled by the idea of an obligation in his favour, which obligation he will afterwards be unable to enforce.

A release which destroys all legal interest is, as is perfectly familiar, sufficient to induce the admission of testimony, though the release is executed even after the witness is called. These releases are often given by persons under an expectation that those who have profited by their testimony will not withhold their share of the advantage. An expectation of this kind is always open to observation, as it may influence the wishes or affect the credit, though

though it does not exclude the testimony of the person by whom it is entertained (a).

The interests of the husband and wife are so identified in contemplation of the English law, that whatever exceptions, founded upon interest, can be taken to the evidence of the husband, will be equally applicable to that of the wife.

And it is also a general rule, that the husband and wife cannot, in either civil or criminal cases, be allowed as witnesses either for or against each other, a rule which is founded not merely upon the consideration of interest, but upon a principle of public policy. Upon this principle it was ruled in an action brought by trustees for goods which had been conveyed to them for the separate use of the wife, and were taken in execution for the debt of the husband, that the husband could not be admitted as a witness to prove the identity of the goods. *Davis v. Dinwoody*, 4 T. R. 678.

This rule is subject to some exceptions in criminal cases. In case of high treason, the allegiance to the sovereign is considered as paramount to the obligations of marriage, and the rule does not attach. Where a woman is forcibly married she is a witness to prove the fact, in an indictment against her husband, founded upon *§. 3 Henry 7. c. 2.* Lady *Audley* was allowed as a witness to prove that her husband assisted in committing a rape upon her; but the authority of this case has been frequently disputed. Mr. Justice *Buller* observes, that the wife is always permitted to swear the peace against her husband, and her affidavit has been admitted to be read, on an application to the court of King's Bench, for an information against the husband for an attempt to take her away after articles of separation; and it would be strange to permit her to be a witness to ground a prosecution upon, and not afterwards to be a witness at the trial.

But an application for articles of the peace is founded upon the necessity of immediate protection, it is a measure merely cautionary, and no legitimate inference can be drawn from the practice in such a proceeding, to a common law question of evidence. The circumstance of admitting the oath of the wife as a ground for an information, does not induce a much stronger argument. Upon summary and interlocutory proceedings the representation of parties is continually admitted, whose testimony would be unquestionably rejected upon a trial before a jury. A plaintiff is not only allowed to make an affidavit of a debt, in order to hold the defendant to bail, but the affidavit is in general (with what propriety it is not material for the present purpose to discuss) conclusive, and

(a) The cases which have been decided respecting the competence of witnesses, are very well digested by Mr. Peake.

not subject to contradiction; yet the evidence of the plaintiff cannot be admitted to substantiate that debt upon the trial. The defendant, against whom an information is moved, may, by his own affidavit, contradict the charge imputed to him. It might be thought strange that he should be allowed to repel, by his own affidavit, the granting the information, and yet be precluded from giving his own evidence afterwards to contradict it; but it would produce very considerable surprize if any such evidence was offered. Mr. *Lofft* mentions the case of a criminal charge against a husband, for a personal injury to his wife, at *Bury Assizes, 1784*, upon which the judge recommended, in his charge, that the bill should not be found, if unsupported by any other evidence than that of the wife, since a cause unsuitable for the public ear would come to trial, with a legal necessity of the prisoner being discharged for want of evidence competent to go to the jury. But it must be admitted, that if the point were otherwise disputable, the opinion expressed by a judge in his charge to a grand jury, would not have a very considerable influence in settling it. I believe, however, that the evidence of a wife against her husband, upon a charge for personal ill-treatment, is in practice now admitted.

A case in which a wife was admitted to prove that a debt was due, not from the defendant in her cause, but from her husband, is often cited, accompanied with the proposition, that between other parties the wife may be admitted as a witness to charge her husband. *Str.* 504. Certainly if the husband had no interest in the event of the cause, there could not be any objection to the evidence of the wife.

There are several cases in which persons were not allowed to prove the fact of their being, or not being married. In one of them (*Dale v. Johnson, Str.* 568,) the reporter not inaptly makes a query—for it is begging the question which is to be tried. There certainly does appear an incongruity in holding that a person shall not be allowed to prove a fact, upon the existence, or non-existence of which, the competence, or incompetence to be examined depends; and the case is involved in the dilemma, that if the parties are married the ulterior consequences attach without further question; if they are not married there is no objection to the competence.

Where a man is indicted for polygamy, the first wife is not a lawful witness to support the fact of her marriage, and consequently the prosecution against her husband; but the second wife is a sufficient witness to prove the second marriage, which is merely a criminal act, and induces no relation between the parties.

The doctrine of exclusion has been extended furthest in the case of *The King v. the Inhabitants of Cliviger, 2 T. R. 263*, in which a woman

woman having been removed as the wife of *J. W.* the husband, upon his examination, denied having been previously married to any other person; and it was held that another woman should not be allowed to give evidence of her having been previously married to him. Mr. Justice *Asbburß* said, that the ground of the wife's incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even tend to criminate each other. The objection is not confined merely to cases where the husband or wife are directly accused of any crime, but even in collateral causes, if their evidence tends that way, it shall not be admitted. Now here the wife was sworn to contradict what her husband had before sworn, and to prove him guilty of perjury as well as bigamy, so that the tendency of her evidence was to charge him with two crimes. However, though what she then swore could not be given in evidence on a subsequent trial for bigamy, yet her evidence might lead to a charge for that crime, and cause the husband to be apprehended.—And Mr. Justice *Grose*, the only other judge in court, concurring in that opinion, observed, that the true and best ground of objection was not that of interest, but was founded on the political inconvenience of causing dissensions in families, between husband and wife. Mr. *Christian*, in his notes to *Blackstone*, after mentioning the above determination, proceeds to observe that, “if this be true a plaintiff, or prosecutor, may have the benefit of the testimony of the one, and the defendant, or prisoner, cannot have the benefit of the testimony of the other, because the evidence of the latter would tend to charge the former with perjury. Surely in such cases where the interests of strangers are concerned, the furtherance of public justice is a consideration far superior to the policy of marriage, or the domestic strifes of the parties.”

In the case of *The King v. Frederick and Tracy, Str. 1095*, the defendants were indicted for a joint assault, and it was insisted to examine the wife of the defendant *Tracy* as a witness for the other defendant, but there having been material evidence given against the husband, and it being a joint trespass, and impossible to separate the cases of the two defendants, in the account to be given of the transaction, the Chief Justice refused to let her be examined.

The rule concerning criminal proceedings is stated by *Gilbert* as follows: “in all public prosecutions the party injured may be a witness, where there is only a fine to the King, and no private advantage to himself arising by such a prosecution; but if there be any advantage of private benefit to accrue by the prosecution, the party is equally excluded as in a private action.”

This exception of a private interest does not exclude the testimony of a person from whom goods are stolen, though by statute he is entitled to a restitution in case of conviction; neither are persons entitled to rewards for apprehending highwaymen, burglars, &c. thereby disqualified from giving evidence. An informer entitled to the whole, or any part of a penalty, cannot be examined as a witness to support the information; and many convictions before justices of the peace have been set aside on account of this objection.

The connection of a private interest with a public prosecution has been formerly allowed as an objection in many cases, which have since been over-ruled. For instance, a person from whom a note had been fraudulently obtained, was held by Lord Chief Justice *Holt*, to be an incompetent witness to support an indictment for the fraud, for though the verdict upon the information could not be given in evidence in an action on the note, the Court were sure to hear of it to influence the jury. *Rex. v. Whiting, Salk. 283.* There are also several cases in which it has been held, that perjury could not be proved upon an indictment, by the evidence of the person against whom it was committed.

Also, that in an information upon the statute of usury, the party to the usurious contract could not be a witness, because that would be to avoid his own securities.

But the authority of all those cases is now destroyed, and the subject was, after some other decisions, contradictory to those already stated, very fully investigated by Lord *Mansfield*, in the case of *Abrabams v. Burn, 4 Bur. 2251*, in which a person who had borrowed and repaid money upon an usurious contract, was held a competent witness in a penal action to prove the usury; and it was laid down as an established rule, that the question in a criminal prosecution, being the same with a civil cause in which the witness was interested, went *generally* to the credit, unless the judgment in the prosecution where he was a witness, could be given in evidence in the cause where he was interested. It was also stated as established, that where the matter was doubtful, the objection should go to the credit, and not to the competence.

In that case the borrower had repaid the whole money, and there was no security or pledge outstanding against him, which was partly relied upon in the decision; and some expressions fell from the Court, from which it might be inferred, that it would be a sufficient objection if the cause turned upon points and transactions, which, if proved in another cause, would avoid the debt. A case which happened some time afterwards seems to admit the same principle—an uncertificated bankrupt was not allowed, as a witness,

to support a penal action for receiving usurious interest from himself, not having repaid the money borrowed. *Masters v. Drayton*, 2 T.R. 496. But this was prior to the full investigation which the doctrine of competence received in the case of *Bent v. Baker*; and I have already had occasion to allude to a subsequent decision, in which the contrary was expressly decided, upon the broad and intelligible principle, that the witness had not any interest in the event of the cause. *Smith v. Prager*, 7 T. R. 60 (a).

It may still be questionable whether the party grieved can be a witness to prove perjury, upon the statute 5 Eliz. c. 9, as by that statute the party injured is intitled to 10*l.* and as the statute gives the action to the party upon the offender being convicted, such conviction tends directly to his interest, and must be given in evidence in the action, therefore the testimony seems inadmissible.

In *Howard v. Shipley*, 4 East, 180, it was held, that a person was a competent witness to prove bribery at an election, although a similar action had been brought against himself, and he avowed the intention of availing himself of the indemnity given to a discoverer.

A person whose name is forged is still considered incompetent to prove the forgery, unless he has a release from those who are interested in the validity of the instrument, as is evident from daily practice. An exception is stated in *Bull. N. P.* 289, where he is not directly interested in the question, as in *Wells'* case, who was indicted for forging a receipt from A.—A. having recovered the money in an action against *Wells*, was admitted to prove the forgery.

In a case at the Old Bailey, Sept. 1792, the obligor in a bond being indicted for altering a receipt for interest, so as to make it appear a receipt for principal and interest, Mr. Baron *Hotham* held the obligee to be an incompetent witness, although he had obtained a verdict invalidating the receipt, as judgment had not been entered up. If a similar point were again to arise, it might not be unimportant to consider, how the witness, in such a case, can derive any benefit from the conviction of the offender, as the goods of such offender being forfeited to the crown, the witness is thereby deprived of the fruit of his verdict, and loses all chance of satisfaction for his demand; and it may perhaps be found, that the inadmissibility of such evidence has been taken for granted too generally, without adverting to the difference of consequences which result from its being received between one case and another.

(a) In the *King v. Boston*, 4 East, 573, the defendant, in a suit in equity, put in an answer, upon which an issue was directed, which came on to be tried at the same assizes, with an indictment for perjury in the answer. The indictment came on first for trial, and it was ruled, that the plaintiff in equity was a competent witness to prove the perjury.

I have heard a learned judge assign a reason for not admitting a person, whose name is forged to an instrument, purporting to subject him to an obligation, viz. that though the crown acquires a right, by forfeiture, to the goods of the offender, it may not be allowed to set up such a right in respect of the particular obligation, which, by the same record that is necessary to the title, is found to be a forgery.

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There are some other points respecting the testimony of witnesses, which it may be at present proper to advert to.

A counsel or attorney cannot be allowed to give evidence respecting matters which have been disclosed to them confidentially in those capacities; by their clients: but with respect to matters of fact which are in their own knowledge, they are equally admissible, and are equally compellable to give their evidence, as other persons.

In the case of *The King v. Watkinson*, Str. 1112, it was ruled, that an attorney present at the putting in an answer by his client, was not compellable to prove that fact on an indictment for perjury against the client; but the reporter makes a quære, for this was a fact in his own knowledge, and no matter of secrecy committed to him by his client. An attorney is not compellable, upon a *subpoena duces tecum*, to produce papers with which he is intrusted by his client, as evidence against his client, but ought upon receiving the subpoena, to deliver them up to him. *Ren v. Dixon*, 3 Bur. 1686. But an attorney having attested a deed, and refusing to give evidence thereof, was punished by attachment. *Doe ex dem. Jupp v. Andrews*, Cowp. 845. An interpreter between a party and his attorney, was held, by Lord Kenyon, to stand in the situation of the attorney himself, in *Madam du Barre's* case, cited 4 T. R. 756. A person by profession an attorney, and consulted confidentially, but not employed as an attorney in any suit, is not within the exemption. *Wilson v. Rastall*, 4 T. R. 753. Mr. Justice Buller said, "This doctrine of privilege was fully discussed in a case before Lord Hardwicke. The privilege is confined to the cases of counsel, solicitor, and attorney; but in order to raise the privilege, it must be proved that the information which the adverse party wishes to have, was communicated to the witness in one of those characters; for if he be employed merely as a steward, he may be examined. It is indeed hard, in many cases, to compel a friend to disclose a confidential conversation, and I should be glad if by any law such evidence could be excluded. It is a subject of just indignation when persons are anxious to reveal what has been communicated to them in a confidential manner; and in a case mentioned

mentioned in the argument where *Reynolds*, who had formerly been the attorney of Mr. *Petrie*, but who was dismissed before the trial of the cause, wished to give evidence of what he knew relative to the subject, while he was concerned as the attorney; I strongly animadverted on his conduct, and would not suffer him to be examined; he had acquired his information during the time he acted as attorney, and I thought that the privilege of not being examined to such points was the privilege of the party, and not of the attorney, and that the privilege never ceased at any period of time. In such a case it is not sufficient to say that the cause is at an end, the mouth of such a person is shut for ever. I take the distinction to be now well settled, that the privilege extends to those three enumerated cases at all times, but that it is confined to those three cases only. There are cases to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire in attending in their professional characters. This point was very much considered in the *Duchess of Kingston's* case, where Sir *Cesar Hawkins*, who had attended the *Duchess* as a medical person, made the objection himself, but was over-ruled, and compelled to give evidence against the prisoner." After an interlocutory judgment was signed, and a writ of inquiry executed, in an action at the suit of an indorsee of a promissory note, and the cause compromised, the plaintiff told his attorney he was glad it was settled, as he had only given ten pounds for the note, and knew it was a lottery transaction; the Court held that this case was not within the rule, that the difference was, whether the communication was made by the client to his attorney in confidence, as instructions for conducting his cause, or a mere *gratis dictum*. *Cobden v. Kendrick*, 4 T. R. 431. The case mentioned in *Bull. N. P.* 284, where a defendant pleaded to debt upon bond, the 5 and 6 *Edw.* 6, against buying and selling offices, and upon the trial *A.* was produced as a witness to give an account upon what occasion the bond was given, and Lord Chief Justice *Holt* refused to admit him, because he was privately intrusted to make the bargain by both parties, and to keep it secret—seems not to be law, according to the opinion in *Wilson v. Rastall*.

It also seems to be a necessary consequence of the decision in *Wilson v. Rastall*, that the privilege of secrecy does not extend to any communications made in the business of conveyancing, although the person employed therein may be an attorney; for it is not a case in which an attorney has any special privilege, or recognized character, but he is merely resorted to as a person of skill in the business required.

In *Walton v. Shelly*, 1 T. R. 296, it was decided that a person who had given credit to a negotiable instrument, by putting his name upon it, could not afterwards be admitted as a witness of any facts to invalidate it; but that decision was over-ruled in *Jordaine v. Lasbrooke*, 7 T. R. 601, in which it was decided that the indorsee of a bill dated at *Hamburgh*, for the purpose of evading the stamp duty, might be admitted as a witness to prove that it was drawn in *England*.

Lord *Mansfield*, in *Walton v. Shelly*, and Mr. Justice *Abbott*, who differed from the rest of the court in *Jordaine v. Lasbrooke*, relied in a great degree upon the maxim of the civil law, *nemo allegans suam turpitudinem est audiendus*. I conceive, however, the real principle of the maxim is no more than that a person shall not found any claim, or defence, upon his own iniquity, and that it has no relation to the case of a witness, and, in fact, it must in general be very difficult to conceive that a person would be inclined, as a witness, to state his own misconduct, in opposition to the truth, unless he appeared to have some motive for doing so, connected with the event of the cause.

Mr. Justice *Lawrence*, in *Jordaine v. Lasbrooke*, said, that as no earlier determination than *Walton v. Shelly* was to be found in support of the point which was there decided, it must depend upon its being supported by the general principles and rules of law, applicable to the admissibility of witnesses. "Now" (he said) "I find no rule less comprehensive than this, that all persons are admissible witnesses who have the use of their reason, and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and are not influenced by interest. What credit will be due to them must depend on a great variety of circumstances, and must be decided on by the jury; and I am not aware of any case solemnly decided, excepting that of *Walton v. Shelly*, in which a witness has been rejected as incompetent, but upon the ground of some objection which may be classed under one or other of these heads. Under none of these classes does the witness in this case fall, and the constant practice of examining accomplices shews, that the mere circumstance of a man's representing himself as having done things inconsistent with common honesty, is not sufficient to reject his testimony, however it may weaken and impeach it."

It is said that parents shall not be received as witnesses to bastardize their own issue: the proper application and extent of this rule, are shewn by Lord *Mansfield* in the case of *Goodright v. Moss, Coup*, 591. cited in the preceding section, "As to the time of birth the father and mother are the most proper witnesses to prove it;

it; but it is a rule, founded in decency, morality and policy, that they shall not be permitted to say, after marriage, that they have had no connection, and that the issue is spurious." In the case of *The King v. The Inhabitants of Bromley*, 5 T. R. 330, it was ruled that persons who have cohabited as husband and wife, are competent to prove that they were not married, and that their children are illegitimate; but it was said by the Court, that such testimony is open to great observation.

## SECTION XIII.

## Of Confession.

It certainly is very reasonable that a party who, by his own act, voluntarily dispenses with any proof being made of a fact by which he may be affected, should be subject to the same consequences as if such fact had been actually established by evidence; but the reality of the acknowledgment from which any such conclusion may be drawn, and the extent to which the inference from it ought to be applied, are subjects which may deserve very considerable deliberation.

It has often appeared to me, that a distinction is not sufficiently made between the actually admitting a fact, and the declining to contest it; that the one should be regarded as effective, not only directly and with respect to its immediate object, but also that until it is shewn to have been founded upon some mistaken supposition, the fact which it imports should also be taken as established, with respect to all its collateral and incidental consequences; while the effects of the other should be confined to the immediate subject of it, and that the party who, from a consideration of the immateriality of the interest involved in any question, compared with the expence and risque, declines contesting it, should only be bound by his election so far as it goes, without being prejudiced in respect to any other purpose. The distinction between actually admitting a fact, and declining to contest it, may be partly illustrated by the case of *The Queen v. Templeman*, 1 Salk. 55. in which Holt, Chief Justice, took a difference between a man confessing an indictment, and his being found guilty; that in the first case a man may produce affidavits to prove *son assault* upon the prosecutor, in mitigation of the fine, otherwise where the defendant is found guilty, for the entry upon a confession is only *non vult contendere cum Domino Rege, & ponit se in gratiam curie*. And in every other case I should conceive it reasonable, that a formal act of confession should not be carried beyond its immediate purpose, so as to preclude, in other respects, the application

plication of that justice which would result from the real manifestation of the truth. But it has generally seemed to me, that there is a very strong disposition to hold parties to the consequences of every thing which can, even by implication, be regarded as an acknowledgment; without giving an adequate attention to the nature of the act from which such acknowledgment is inferred, to the difference between consciousness and inadvertence, between acquiescence on the ground of immateriality or insignificance, and assent induced by a certain persuasion of the truth.

There is very great utility and benefit in the practice which allows a person, against whom an action is commenced, to pay a certain sum of money into court, so that the plaintiff, if he proceeds afterwards, may proceed at the same peril, in case he cannot establish any claim beyond the amount of the money which he has so paid, as he would have done, if he had had no claim at all; but I think this benefit would be extended by giving effect to the distinction that has been above alluded to, and where there may be two questions, the one trifling and insignificant, the other material and important, which, upon examination, may eventually be found reducible to the same principle, it would be desirable to allow a party to relieve himself from the hazard of costs with respect to the one, without his being thereby concluded with respect to all the inferences which may be referable to the other; but the contrary doctrine appears to be established. In *Yate v. Willan, 2 East, 128*, an action was brought against a carrier for not delivering goods of a greater value than 5*l.* according to an alledged agreement; the defendant had given notice that he would not be answerable for goods above the value of 5*l.* unless specially entered; and it appeared that by the circumstances of the case, he was not liable to the action, and that the notice excused him from being answerable even to the amount of the 5*l.* but the decision was, that the payment of that sum into court, was an acknowledgment of the contract as stated; and therefore, as he was liable for the whole, if he was liable for any part, his acknowledgment (which, according to the principle above alluded to, might have been only considered as a waiver of his defence *pro tanto*) of any part was not only an acknowledgment, but a conclusive acknowledgment and estoppel for the whole. Without examining how far this decision was absolutely necessary, in consequence of the previous state of practice, I may venture to suggest, that it is in the power of courts to correct the inconvenience alluded to, without overturning the precedent; by granting rules for defendants to pay money into court *without prejudice*; and I think it would certainly be desirable to allow a party,

party, as much as possible, to restrain and limit the ground of dispute, without subjecting him to demands for which he is really not answerable by doing so.

A judgment by default, or upon demurrer, is also considered as amounting to an admission of the facts stated in the declaration; and the effect of such admission seems to be sometimes carried further than the rules of legitimate reasoning will fairly warrant. Upon such a judgment the plaintiff is, without giving any evidence, intitled to damages; but the damages are in general only nominal, unless actual evidence is given of the particular right upon which the claim is founded: but when evidence is given, it should appear to be open to every inquiry, with respect to the facts which it purports to establish, since the acknowledgment is only of a right of action in general, and not of a right in respect to those particular facts so adduced in evidence. The case of *De Gaillon v. J' Aigle, 1 Bos. & Pul. 368*, has always appeared to me, upon this principle, rather incorrect. In that case the defendant pleaded coverture, to which there was a replication alleging circumstances to render her personally liable; which replication, upon demurrer, was allowed to be good, and judgment was given for the plaintiff. Upon the execution of the writ of inquiry, the defendant gave evidence, that in the particular transaction brought forward, she had only acted as agent for her husband; and the jury being of that opinion, gave a verdict for only nominal damages: but a new inquiry was awarded, as the court were of opinion that the evidence ought not to have been admitted, and that the only question to be decided by the jury was the amount of the debt, and that the question whether *the debt* were contracted by the defendant as agent for her husband, or in her separate capacity, must be taken to be determined by the record.—Now I apprehend that a judgment by demurrer cannot fairly be carried further, in effect, than a judgment by default, except as to the establishment of the point of law. By the judgment on the demurrer the court had decided, that such facts as were stated in the replication, were a sufficient answer to the defence alleged by the plea; but whether any such facts did, or did not exist, was no further decided, than as a demurrer is technically a confession of the existence of some cause of action, upon which, as upon a judgment by default, the plaintiff, without any evidence, recovers nominal damages; but when actual evidence is introduced to raise those damages to a greater amount, there would be a terrible perversion of judgment, if the particular facts so adduced, were not open to examination: a person who demurred, or suffered judgment by default, having only in contemplation a debt of 40*s.* might be charged with a claim for 40,000*l.* which

he had never heard of; or with which he had only been incidentally connected. Wherever particular evidence is introduced to support a claim on the one hand, that evidence ought, according to the principles of justice, to be open to examination and contradiction on the other (a).

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(a) At the time of writing some of the preceding observations, I had in contemplation a case of *Chambers v. Marshall*, then depending upon a motion for a new trial in the Court of Common Pleas of Lancaster, and since determined in a manner contrary to my wishes and expectations.

Eight defendants were sued upon a demand for several hundred pounds, and pleaded in abatement, that the promises were made jointly with a great many other persons. The fact was, that they were a committee appointed by the association of several friendly societies, for the purchase of provisions. From the multiplicity of names inserted in the plea, it was impossible to substantiate it by evidence; but the real fact was, that the defendants were themselves not liable, the contract having been made before they were connected with the institution. It was however held, that they were precluded by their plea, from contesting the particular demand set up in evidence by the plaintiff, in any other manner than by shewing the joint liability of the other persons named. Supposing that they could have shewn the existence of some other contract, made in conjunction with those persons with the plaintiff, I suppose that it would not have been held that they could be fixed with any other debt, which in fact they did not owe. But admitting for a moment, that before any evidence was given for the plaintiff, he would be intitled to a verdict unless some evidence was given by the defendant, to shew the existence of some joint contract with the other persons named; the question is, whether any actual evidence given by the plaintiff, to intitle himself to more than nominal damages, is not fully open to examination and contradiction, it being perfectly evident that the supposed admission on the record, if there really is any such, is confined to a general cause of action, and has no reference to any particular facts which witnesses may be adduced to prove. The decisions in that court take place at the chambers in town, of the judges appointed for the northern circuit. I had not an opportunity of attending the argument, but the following unsuccessful observations were, upon submitting the motion for a new trial to the judge, who tried the cause, offered to him in writing with perfect sincerity, and with as much conviction of their accuracy, as the situation and prejudices of an advocate can ever allow to be entertained. "In case it should be held that the plaintiff was intitled to a verdict, without any evidence being given on either side, it is submitted that an inquiry into the reality of the particular debt, attempted to be proved on the part of the plaintiff, was relevant and material with respect to the amount of damages. For otherwise the damages must either be nominal, or they must be for the amount stated in the declaration; or they must be entered according to the suggestion of the plaintiffs. Either of the two last standards cannot be contended for; the damages then must be either nominal, or they must be the subject of investigation; and if they are the subject of investigation, they must be equally so to the plaintiff and the defendants, otherwise it would be competent, (as in fact was done in the particular case,) to fix them to an indefinite extent with respect to transactions which they had never any connection with, or with respect to debts which they had fully satisfied forty years before. The evidence offered by the plaintiff is relevant or irrelevant; if relevant, it is open to inquiry and contradiction; if irrelevant, it must be taken as if no such evidence had been given. If the defendants must in point of form be taken to have admitted a cause of action within the terms of the declaration, as in case of a judgment by default, or upon a plea of *plene administravit*, it does not follow, that they therefore admit every particular cause of action within the scope of the declaration, which, contrary to the actual truth of the case, is asserted or attempted to be proved on the part of the plaintiffs.—If in other parts of the work I may be deemed to have taken too great a liberty, in opposing my own suggestions to the

I do not by any means impeach the cases where the judgment is upon a promissory note, and it is held unnecessary to prove the signature of it, for in those cases the legal confession may be fairly held to extend to the existence of the contract declared upon. My observations apply not to cases in which the nature of the procedure renders evidence unnecessary; but to those in which the question under consideration relates to the effect of evidence actually produced; to cases which cannot be supported without tending to the conclusion, that although some evidence is necessary to support the particular demand contended for, yet if any evidence is given, it must be absolutely decisive whether the facts imported by it are correct or erroneous, unanswerable or capable of explanation, true or false.

With respect to extra-judicial acknowledgments, great caution is requisite in preventing their being carried further than their actual intent. The impression, which the party supposed to have made the acknowledgment intended to convey, ought to be strictly attended to; a critical catching commentary upon accidental expressions ought to be carefully avoided; the evidence by which the acknowledgment is supported is often very suspicious, as I have had occasion more particularly to observe in a former section, and should be very scrupulously examined: the mere circumstance of not denying a charge may make certain circumstances very reasonably give the same impression as the actual admission of it; but this is by no means universal, and the nature and weight of the circumstances, and the motives for silence or denial, ought to be fully attended to. Much care ought especially to be taken in preventing any expressions being regarded as an acknowledgment, which were only used as a proposal for accommodation. When it appears that parties have met for the purpose of compromise, the evidence of any offer of accommodation is very properly excluded; the danger consists in withdrawing from observation the real nature of the conversation, or transaction, in which the supposed acknowledgment is alleged to have taken place.

An actual payment is certainly the most unequivocal mark of

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the dictates of judicial authority, where my only possible motive was an unbiassed opinion upon the truth and justice of the subject, I should be more justly open to a similar accusation when my retaining sentiments advanced in the behalf of a client might lead to the imputation of pertinacity. I was not concerned in advising the mode of defence; but, apart from all immediate connection with the cause, I cannot but regret that, by the laws of England, eight men have the prospect of spending their lives in goal, on account of a debt which they never had any thing to do with, merely because they had alleged, that if they owed any thing at all, they owed it in conjunction with other persons.

acknowledging the justice of a demand; but such a payment is subject to repetition, when it appears to have been made by mistake; and the recovery of money so paid is one of the most ordinary grounds of the common action, for money had and received. In *Malcolm v. Fullarton*, 2 T. R. 645, it was ruled, that arbitrators were warranted in awarding a part of a sum of money, which had been paid by the defendant to the plaintiffs, (the assignees of a bankrupt,) to be repaid. Mr. J. Buller said, he was convinced that the defendant was not bound by the payment, it having been made by mistake; the only payment (he proceeded) by which a party is bound, is that which is made into court, under a rule of court; that is a payment on record, and the party can never recover it back again, (a) though it afterwards appear that he paid it wrongfully; but that does not extend to payments between party and party.—If the actual payment, which is the strongest mode of acknowledgment, can be defeated, by shewing that it originated in mistake, it must follow *a fortiori* that any weaker kind of acknowledgment cannot properly have a more conclusive operation.

But it is observed by *Pothier*, that a confession can only be avoided by shewing that it was made under a mistake of fact, and that it is not sufficient to allege a mistake of law.

In a former publication I have had occasion to advert to the questions, whether a person who had paid money merely under a mistaken notion of legal obligation, was entitled to repetition; and also whether a person who promised to satisfy a claim, knowing the facts by which he was legally exonerated from it, but not knowing their legal consequences, incurred an obligation by doing so. My conclusions upon those two points having been contradicted by subsequent decisions, I was induced very particularly to resume the consideration of them, and having met with the discussion of the general subject of Mistakes of Law, by *D'Aguesseau*, I had proposed to offer the translation of that piece, together with my own observations upon the particular subject, accompanied with some general reflections respecting the grounds of legal reasoning and determination, as a detached publication, to which intention I made some allusion in a note to page 306 of the preceding volume. It has since occurred to me, that I might, without impropriety, include these articles in the present Appendix, and they are accordingly subjoined in a following number.

With respect to the present subject, of a confession made

(a) This observation does not at all affect the question before adverted to, with respect to the payment of money into court operating as a confession, beyond the amount actually paid.

under the mistaken idea of legal obligation, I certainly adhere to the sentiments which I have expressed in the essay alluded to; and I think that the principle which militates against inducing any prejudice, from a mere mistake of law, applies more forcibly to a bare confession, than to any other subject.

A sum total cannot, according to any fair principles of reasoning, be regarded as more than the particular items of which it is composed; and, therefore, when a person acknowledges generally the existence of an obligation, and it manifestly appears that his only intention was to acknowledge the existence of certain particular facts, and a certain legal conclusion as resulting from those facts, the case should be considered precisely in the same manner as if he had made the acknowledgment distributively; stating separately the facts, and the legal opinion with respect to them. If the facts alone would not be sufficient to induce an obligation, and the obligation resulted from the mere expression of an erroneous opinion with respect to the law; it would also be sufficient to prove, by other testimony, the existence of the facts, and to confine the evidence of confession solely to the opinion expressed upon the point of law; and thereby to conclude a person by every erroneous legal opinion which he had ever entertained. I suppose it will not be seriously contended, that in either of these two latter cases the obligation would attach; and the question in discussion assumes and supposes the fact to be sufficiently ascertained, that what was expressed generally and conjunctively in the first case, proceeded from precisely the intention, as what is expressed distributively and particularly in the second. It will not be sufficient to object to this course of reasoning, as bearing the appearance of subtlety, unless it can be also shewn that the analysis is not fairly conducted; and if what is to be regarded as subtlety of reasoning is to be excluded, the right course will not be to do the thing by halves, but to ask, what is the plain decision of common justice and common honesty, leaving all artificial reasonings out of the question; and to consider whether one man's ignorance of the law is a sufficient ground for subjecting him to a prejudice, and entitling another, at his expence, to an adventitious benefit? It certainly is very difficult to reconcile the mind to the idea, that a mistaken notion of the law is alone, and independently of all consideration of particular circumstances, (and it must be remembered that the argument is at present wholly upon the general proposition,) an adequate cause of legal obligation.

There are several cases in which the English law acts upon the principle, that an error of law cannot induce any legal consequences. In the case of Lord Griffin, cited in *Wilkes's case*, 4

*Burr.* 2551, the Attorney General came into court to confess the errors assigned in a judgment of outlawry, and to consent to the reversal. The Court told him his confessing an error in law would not do; they must judge it to be an error, and their judgment would be a precedent. In the cause of *Cox v. Parry*, 1 T. R. 464. an insurance was made intended to cover certain goods of *A.*, and other goods of *B.*; the insurance as to the goods of *A.* was void, his name not being inserted in the policy, as was required by an act then existing; the defendant paid into court sufficient to cover the loss upon the goods of *B.*; and it was considered how far that could amount to an admission with respect to the goods of *A.* The short answer might have been given, that the payment into court admitted the general validity of the contract, but merely confined the application of it to that subject, with respect to which it was really obligatory; but the decision was upon the point, that paying money into court was an admission with respect to the sum paid, but no more. But in *Yate v. Willan*, above alluded to, Mr. Justice *Lawrence*, referring to the case of *Cox v. Parry*, said that it amounted to no more than this: that if the contract declared upon be illegal, the defendant shall not give it effect by his admission, because no admission of the parties can conclude the court, to make them give effect to an illegal contract.—Now the illegality, in the case referred to, was nothing of a criminal nature, with respect to which the court, from a disapprobation of the object, refuses its assistance to either party; all that could be possibly meant to be referred to by the imputation of illegality, was the mere want of circumstances sufficient to induce a valid legal obligation, and if the general sentiment of the learned judge is, as I conceive, correct, it follows that an admission of obligation which does not previously exist, has not the effect of inducing any. Upon judgment by default, a defendant is intitled to the same exceptions as upon general *demurrer*, the defendant being bound by his supposed confession with respect to the fact, but not with respect to the law.

The consideration of the general question, how far a person is bound by his confession arising from a mistake of law, is wholly unaffected by any questions respecting the proof by which any mistake may be established; and which fact, like every other, must be supposed to be ascertained or agreed before the question of law can arise. The confession itself, properly speaking, ought only to be regarded as *prima facie* evidence of the existence of facts, sufficient to induce the obligation which it imports, and as forming a presumption open to explanation and contradiction.

I do not by any means offer to impeach the doctrine, that a person

son shall not disavow a contract which he has entered into, on the pretence of having been ignorant of the legal consequences attached to it. There his intention of entering into the definite contract is complete, and that intention includes the legal consequences, whether known or otherwise; in the case of a confession there is no intention of contracting any new obligation, but merely the expression of an erroneous opinion, with respect to an obligation supposed already to exist; and which, if it does not exist, there is no adequate reason to create. In the first case, the party with whom the contract is made, might be subjected to prejudice if the obligation was not supported; for he had a right to rely upon the consent of the other party, to assume all the legal obligations resulting from the nature of the contract, and his own consent was purchased upon the faith of that reliance. In the second case, the party claiming the benefit of the acknowledgment, is merely contending for a contingent advantage, for which he has not given any consideration whatever.

In the section upon hearsay evidence, I adverted to the question, of the confession of an agent being admitted as evidence against his principal, and stated my reasons for conceiving that it could not be allowed. There is one case in which the declaration of a wife, that she had agreed to pay 5s. a-week for nursing a child, was received against the husband, Lord Chief Justice *Pratt* observing, that matters of this kind were generally under the direction of the wife, *Anon, Str.* 527.; but this seems to be a mere anomalous decision at *Nisi Prius*, which ought not to have any effect in opposition to the general principle, which is clearly established, that a wife's declarations cannot be admitted against her husband; which has been carried so far, as even to exclude the declarations of the wife suing as executrix. *Alban v. Prichett*, 6 T. R. 680 (a). It has been held that the

(b) The case of *Avison v. Lord Kinnaird*,<sup>7</sup> referred to in the section on *Hearsay Evidence*, is now reported. 6 East, 188. The particular evidence objected to was, that the plaintiff's wife, being ill in bed, mentioned that she had been at Manchester the week before to insure her life; that she was very poorly when she went, and not fit to go; and the court seem to have considered it as a cotemporary declaration. The argument partly proceeded upon the ground of breach of confidence between husband and wife, for which there was certainly no foundation. Another point which the court acted upon was, that the plaintiff examined a surgeon as to her appearance in point of health, on the day when the insurance was effected; and he expressed a favourable opinion, principally from the answers she gave to his inquiries; and it was held by the court that this evidence being given on the part of the plaintiff, let in the other evidence (supposing it originally inadmissible) on the part of the defendant. This point may require a great deal of consideration, before the principle which it involves is adopted as a rule of law. 1st, If a witness on the one side states any thing in his answer which is not properly evidence; there being nothing objectionable

the admissions made by an under-sheriff are evidence against his principal in an action for an escape, because he is answerable for the acts of his under-sheriff, and the latter gives bond to him for the due performance of his office. *Yabsley v. Doble*, 1 Lord Raym. 190. These reasons are not very satisfactory; for although a sheriff is answerable for the acts of his under-sheriff, it does not follow that the declaration of the under-sheriff (except where it constitutes a part of the *res gesta*) is the proper evidence of those acts, and the liability over is only an indirect and incidental consequence, the primary object of the action being to charge the sheriff personally, and his security for reimbursement may probably be defective. The argument would go to shew that all principals are bound by the admissions of the agents, against whom they have a remedy over.

tionable or objected to in the question, I cannot conceive that that is sufficient to warrant evidence, which in its nature is illegal, being deliberately given on the other. ad, The conversation spoken to by the surgeon was a cotemporary act, and the point which seems to be decided is, that the giving evidence of a cotemporary, explanatory declaration, constituting a part of the *res gesta* on the one side, would let in explanatory or hearsay evidence, given of the same transaction at a subsequent period by the other side, which certainly is very far from being a necessary conclusion.—Mr. Justice Lawrence said, that if the evidence of what she said was struck out of the question, there would still be abundant evidence to shew that the verdict was right. But I apprehend that if any inadmissible evidence is received, it is not sufficient, to support the verdict, to shew that there was other evidence sufficient to warrant the jury on drawing the same conclusion. It certainly would be no answer if the objection was taken by the good, but almost obsolete, course of a bill of exceptions, a proceeding which is commonly declined partly from an apprehension of apparent disrespect, and partly from considerations of expence. The idea of disrespect is always disfavoured, and I believe upon a calculation of expence a second trial at *Lancaster* would at least be equal to the most chargeable mode of making up the record. This case also inclines me to express a wish, which I have very often entertained, that where a point of evidence is argued at *Nisi Prius*, the question shall be previously put down in writing; and that a distinct note in writing shall also be made, at the time of the points which are submitted to the jury. The slight loss of time which would arise from writing the points, and reading them to the jury from the note, would in many cases be very amply compensated. The new trial in *Awison v. Lord Kinnaird*, was applied for, not only on the question of evidence, but upon a supposed misdirection of the judge, that if the jury thought that at the time of effecting the insurance, the immoral habit of excessive drinking was so rooted as to endanger the life of the plaintiff's wife, by its probable continuance, and this was known to the plaintiff at the time, it would avoid the insurance. But this ground was afterwards disfavoured and removed by the report.—I am sure I shall not be suspected of meaning to convey the slightest imputation of any other intention, than that of communicating the most full and faithful account of the trial; but having been present, and struck with the circumstance at the time, I can declare that if I have full and distinct recollection of any incident which has occurred in the course of my life, it is of a direction to the effect mentioned in the objection. To desire a judge to take a particular note of a particular direction, has often a teasing and irritating effect, and may excite a reply of unintentional harshness, but a general habit which should effectually secure a perfect representation, appearing before the court in bank of the incidents at the trial, would have a more beneficial influence on the administration of the law, than that rapidity of execution which is often regarded as the surest test of excellence.

## SECTION XIV.

*Of Presumption.*

The examination included in a former section, of the principles which regulate the burthen of proof, necessarily produced a reference to different cases of presumption; the proper effect of presumption being to consider the truth of a proposition, whether positive or negative, as sufficiently established until the contrary is shewn.

In some cases the mere want of a presumption on the one side is a sufficient presumption in favour of the other; for wherever the nature of a subject leaves it perfectly indifferent, whether a given fact does or does not exist, the party who founds his claim or his defence upon the existence of it, must remove that indifference, and the opposite party may rely upon the single argument, that nothing appears in opposition to him, and that *de non apparentibus & non existentibus eadem est ratio*.

Where the existence of one fact so necessarily and absolutely induces the supposition of another, that if the one is true, the other cannot be false, as where connection is inferred from pregnancy, the term presumption cannot be legitimately applied: for the nature of presumption is, that it does not require to be substantiated, but that it may be defeated by positive contradiction, according to the maxim that *stabitur presumptioni donec probetur in contrarium*. The distinction between presumption and proof is, that the one may be false, but until shewn to be so, must be regarded as true; that the other (the facts upon which it is founded being admitted) cannot be otherwise than true.

In some cases, the inference of one fact which is deduced from another, is so strong, or so completely established by legal authority, that although it may really not be true, no argument or evidence is admitted to the contrary. This is the subject which in the civil law is distinguished by the appellation of *presumptio juris & de jure*, the nature of which is fully explained in the preceding treatise, and the principal subject to which it is applied is the force of a judicial determination, the facts imported by which are not open to contradiction, although they may be, and frequently are, in opposition to truth. The presumption that, when two married people cohabit together, and there is no personal incapacity, the issue of the wife are the issue of the husband,—the maxim, (when properly applied,) that the king can do no wrong—*also*

also of this description. Some presumptions are allowed and acted upon, which are not really believed to have any foundation in truth, but are merely convenient fictions, introduced for advancing what are supposed to be the purposes of justice; such are the presumptions in favour of a right to lights, which have been enjoyed for twenty years, and other presumptions, the offspring of modern practice, which were particularly adverted to in the preceding number: such is the presumption that a satisfied term has been surrendered, which is admitted to prevent an action of ejectment from being defeated by a formal objection. The mode and form in which these last presumptions are introduced, are, by regarding them as an actual conclusion by the jury from the facts; but it is well known that such facts are not supposed to have any real existence. How far the spirit of invention in this respect will be carried, it is impossible to guess. In *Wilkinson v. Payne*, 4 T. R. 468. the plaintiff brought an action on a promissory note given him, in consideration of a supposed marriage with the defendant's daughter. The note was objected to, on the ground that the marriage was not legal, having been contracted by license when the plaintiff was under age, and there being no person competent to consent; it was also shewn that the marriage could not have been solemnized after he came of age, the wife being confined to her bed from that time until her death. The judge left it to the jury to presume a subsequent legal marriage by banns; which they accordingly did. A new trial was applied for, but refused. Whether the court, in their refusal, proceeded upon recognizing the propriety of the direction, upon the discretionary nature of their authority in the granting of new trials, or upon the sufficiency of the actual marriage, (setting the presumption out of the question,) cannot be exactly ascertained, each of these grounds having been adverted to; the first of them however was not directly and explicitly avowed. Nothing can be more clear, than that a jury, professing to believe the truth of a subsequent regular marriage, professed to believe that which it was impossible, according to the ordinary structure of the understanding, that they could believe in point of fact. If such marriage had taken place, the plaintiff must have known it, being himself a party; and it is beyond all imagination that, knowing it, he should not have been in a condition to prove it. Lord *Kenyon* in that case alluded to another case before him, of *Standen v. Standen*, in which the jury presumed a legal marriage, though there was strong suspicion that there was not time enough for the banns to have been published three times; but the real decision in *Standen v. Standen*

proceeded on the ground of discrediting the witness who swore to impeach his own marriage. The principle adopted in *Wilkinson v. Payne* is certainly very dangerous in its tendency, as it goes to subvert the main foundations of the distinction between truth and falsehood. Many cases must occur in the administration of justice, where the wishes of those who are to decide must, from the nature of the circumstances, be in opposition to the legal right; but if we once begin to shake the rule that the law is to command, and the judge to obey; if we once admit the propriety of professing to believe, as true, what we are actually convinced is not so; nobody can say where the deviation will stop, and legal certainty will be sacrificed at the shrine of judicial discretion.

The *English* law has several instances, established by act of parliament, of the presumptions of law (*juris*) mentioned by *Pothier*, (that is, presumptions which the law positively requires to be made, but which are subject to contradiction by positive evidence,) principally in cases of revenue and penal statutes. If a question arises, whether a duty has or has not been paid? whether a person has or has not a given qualification? it is generally required that the proof of payment or qualification shall be incumbent upon the party, who is subject to any penalty or forfeiture on the opposite supposition.

By an edict of *Henry II. of France*, made in the year 1556, cited *Domat. b. iii. Tit. 6.* it is enacted that, "If a woman has concealed her being with child, and is brought to bed privately, and without any witness, and it be found that the child never was christened, nor had any public burying, she should be reputed to have murdered her child, and be punished with death." Our statute, 21 *James I. c. 27. anno 1623*, which provides that, "If any woman should be delivered of any issue, which, being born alive, should by the laws of this realm be a bastard, and she endeavour privately either by drowning, or secret burying thereof, or any other way, so to conceal the death thereof, that it may not come to light whether it were born alive or not, but be concealed; the mother shall suffer death as in case of murder, except she can prove that the child was born dead," is so very similar to the preceding edict, that it may reasonably be supposed to have been suggested by it. This statute, after resting a long time, almost as a dead letter in the book, has been lately repealed, and a more humane disposition has been substituted for it. The presumption certainly is in its own nature too violent, as the sense of shame, in case of a child being born dead, may be attended to without sacrificing the duties of humanity.

The presumptions of most frequent occurrence are those in which, from certain established facts, an inference is deduced that may or may not be true, but, the truth of which being much more conformable to probability than its falsehood, is regarded as sufficiently proved, until the contrary is shewn. To induce this presumption, the facts from which it is deduced should be either directly established, or themselves deduced from other facts upon the same principle of inference, so that the ultimate presumption may be connected, either mediately or immediately, with facts established by proof; it being always a primary presumption that positive testimony is to be regarded as true; unless there are special reasons for discredit, or at least for doubt.

The general principles upon this subject are very distinctly expressed by *Domat* as follows: "The certainty or uncertainty of presumptions, and the effect which they may have to serve as proofs, depends on the certainty or uncertainty of the facts from which the presumptions are gathered; and on the justness of the consequences which are drawn from those facts, to prove the facts which are in dispute. And this depends upon the connection that there may be between the known facts and those which are to be proved: thus one draws consequences from causes to their effects, or from effects to their causes; thus we conclude the truth of a thing by its connection with another to which it is joined; thus when one thing is signified by another, we presume the truth of that which is signified, by the certainty of that which signifies it; and it is out of these different principles that signs, conjectures, and presumptions are formed, concerning which there can be no certain rule laid down; but in every case it will depend on the prudence of the judge, to discern whether the presumption be well or ill grounded, and what effect it may have as a proof."

He further observes that, "every thing which happens naturally and commonly, is taken as true; and, on the contrary, what is neither natural or common will not pass as truth, unless it be proved; and that from these principles it follows, that there are facts which pass for true, although there be no proof of them, and that there are others which pass for false, unless they are proved."

Among the more general cases of presumption are those, that innocence and sanity are to be presumed, but that guilt, fraud, or insanity, are to be proved; but as it very seldom occurs that these will admit of direct and positive proof, they are usually established by the proof of circumstances, which, being inconsistent in their nature with the general and ordinary presumption, induce the special and particular presumption to the contrary,

Although

Although guilt is in general to be proved, and innocence to be presumed; a matter which, abstractedly taken, is unlawful, must, upon the general statement, be taken to be criminal, and any particulars which distinguish and excuse it ought to be specially shewn. See *Rex v. Bear*, 2 Salk. 418. "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appear; and very right it is that the law should so presume. The defendant, in this instance, standeth upon just the same footing that every other defendant doth, the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them." *Foster's Discourse on Homicide*. So, where insanity is once proved to exist, but a lucid interval is alleged to have prevailed at a particular period, then the burthen of proof attaches on the party alleging such lucid interval, who must shew sanity and competence at the period in question. *Attorney General v. Panther*, 3 Bro. Ch. 25. cited *ante*.

Sometimes a presumption from certain facts is allowed for general purposes, but is subject to particular exceptions. Thus, in respect to marriage, cohabitation and general reputation are usually regarded as sufficient evidence, without any necessity for an actual marriage being proved; but an exception prevails in the cases of actions for adultery, and indictments for polygamy.

Amongst other general grounds of presumption, things are held to be legally and properly in their existing state, until the contrary is shewn. If a person is in possession of property, the presumption is that he is the rightful owner. It is also a presumption that things continue in their existing state, unless there is evidence of an alteration having taken place. Thus where the issue is upon the life or death of a person once shewn to have been living, the proof of the fact lies upon the party who asserts the death; for the presumption is, that the party continues alive until the contrary be shewn. *Throgmorton, v. Walton*, 2 Rol. Rep. 416. *Wilson v. Hodges*, 2 East, 312. But what evidence shall be deemed sufficient to encounter that presumption, is a different question. It certainly need not be direct evidence, and it is sufficient to shew circumstances that rebut the general probability. In the case of a life insurance, the death of the person insured is sufficiently proved, by shewing that he sailed in a ship which has not been heard of for an unusual time. *Patterson v. Black, Park Inf.* 433. The same principle is applied in the case of insurance of a ship. *Green v. Brown*,

*v. Brown*, 2 Str. 1199. *Newby v. Read*, Park 63. Sometimes the weight of the evidence may be affected by the nature of the question in dispute. In *Rowe v. Hasland*, 1 Black. Rep. 404. Lord Mansfield said, that in establishing a title upon a pedigree, where it may be necessary to lay a branch of the family out of the case, it is sufficient to shew that the person has not been heard of for many years, to put the opposite party upon the proof that he still exists. Many persons go to the *East* or *West Indies*, and are never heard of again. What is done in such a trial is no injury to the man or his issue, if he should afterwards appear and claim the estate. In *Harwood v. Goodright*, Cowp. 86. it was found by special verdict, that a testator made his will, and gave the premises in question to the plaintiff in error, and that he afterwards made another will different from the former, but in what particulars did not appear to the jury. The court decided that the devisee under the first will was entitled against the heir at law. Lord Mansfield in delivering their opinion said, "The duty of the court is to draw a conclusion of law, from the facts found by the jury; for the court cannot presume any fact from the evidence stated; presumption indeed is one ground of evidence, but the court cannot presume any fact. The ground the defendant rests upon is this, that it is uncertain whether the will be revoked or not, and where the heir at law claims, his title shall never be taken away by an uncertainty. But this is all a fallacy, for here the devisee does not set up an uncertainty, but a clear title under the first will; and on the contrary, it is the heir at law who sets up an uncertainty against her."

Sometimes an ordinary presumption becomes an absolute one, by excluding all the circumstances which are inconsistent with the possibility of its truth. In case of filiation, the issue of the wife is presumed to be the issue of the husband; this presumption may be repelled by positive evidence of incapacity, or non access; but where neither of those facts appear, and, *à fortiori*, where they are excluded by proof, the presumption of parentage becomes, as before observed, a *presumptio juris* & *de jure*, and no evidence in opposition to it can be received. See the pleading of *D'Aguesseau*, upon this subject, *post*. No. 19.

In cases of contract where no particular evidence appears to the contrary, the parties are presumed to have contracted according to the general nature of the subject, and the local usage, if there is any such, respecting it. In case a person agrees to become tenant to another at an annual rent, without specifying any particular term, the contract is, by operation of law, for a tenancy  
from

from year to year : therefore if there is evidence of the subsistence of a tenancy, but no evidence of the terms of it, such a tenancy from year to year is presumed, until the contrary be shewn ; it is also presumed that the parties contracted, subject to the general obligations resulting from their respective characters. In case the commencement of the tenancy does not appear, and it is usual in the country where it subsists for similar tenancies to commence on a particular day, it will be presumed that the tenancy in question commenced agreeably to the custom. If a person engages as a servant in husbandry, without any particular time being specified, the effect of such general hiring is a hiring for a year ; and in questions of settlement where the particular hiring cannot be shewn, but a service for a longer term than a year appears to have existed, it is a sufficient ground for presuming that it was under a yearly hiring, or at least a general hiring, which has the same effect. See *Rex v. Lyth*, 5 T. R. 327. *Rex v. Long Wharton*, id. 447.

There is a rule that *omnia presumuntur ritè esse acta*. A landlord instituted an ejection against his tenant for non-payment of rent, and recovered judgment by default. After he had been several years in possession, a new ejection was brought on behalf of the tenant, on the footing of the original lease. It clearly appeared that there was a forfeiture for non-payment of rent ; but it was insisted that an affidavit of the rent being in arrear, and of there being no sufficient distress (which was a necessary proceeding in the first ejection, in order to determine the lease,) ought to be produced in the second, in order to repel the title founded on the lease. And it was said, that a court will not presume any thing in support of a judgment obtained by confession, or default, or in any other way than upon a trial of the merits. Lord Mansfield in the course of the argument observed, that it was only stated that there was no affidavit produced, not that there was no affidavit at all ; that all presumptions are dependent upon certain circumstances, and such circumstances are proper for the consideration of a jury. Besides the general presumption, that the proceedings were regular and *omnia solemniter acta*, here is a decisive fact stated, that the defendant entered under *and by virtue* of the act of parliament. And the case does not state affirmatively that the judgment was irregular, or expressly and explicitly that there was no affidavit at all, or indeed any thing whatever to take off the general presumption, which was immensely strong the other way. See *Doe v. Lewis*, 1 Bur. 614.

No verbal evidence is allowed of what has been said by a prisoner when brought before a justice of peace upon an accusation of felony.

felony, unless it appears that his examination was not taken in writing; for as it is the duty of the justice to take such examination, it is presumed that he has done so, until the contrary is shewn; and if the examination is in writing, a parol account is not the best evidence. Where a person proved an original lease made in the time of queen *Elizabeth*, and possession in himself and those under whom he claimed, from 6 *Ann.* to 19 *G.* 3. the court held that it ought to be left to the jury, with a recommendation to presume all mesne assignments. *Earl v. Baxter*, 2 *Bl. Rep.* 1228. Where trustees were required to convey upon *A.* coming of age, the jury may presume a conveyance to him, as it was what they were bound to do, and what a court of equity would have compelled them to have done if they had refused; but it is rather to be presumed that they did their duty. *England v. Slade*, 4 *T. R.* 682. This last case however seems rather to have the complexion of a fiction, than of a real presumption. With respect to the general principle of presuming a regularity of procedure, 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.

It is a rule that *omnia presumuntur contra spoliatorem*. In *Harwood v. Goodright*, above referred to, Lord *Mansfield* said, that the jury might have had evidence to prove an inconsistent disposition, or circumstances to lay a fair foundation for presuming it to be so, as spoliation, or the like; and again—In case the defendant had been proved to have destroyed the last will, it would have been good ground for the jury to find that it was a revocation. In *Cowper v. Earl Cowper*, 2 *P. Wms.* 720. the plaintiff, as heir of his father, *Spencer Cowper*, claimed an equitable estate which had been settled upon the first marriage of Lord *Cowper*, brother of *S. Cowper*, upon the issue of that marriage, *Spencer Cowper* being heir at law of such issue. On behalf of the issue of a second marriage, it was contended that there might have been a release from *Spencer Cowper* to Lord *Cowper*; and as *Spencer Cowper* was the executor of Lord *Cowper*, and had, after his death, turned and destroyed several papers, it was further contended that the existence and destruction of such a release ought to be presumed. The Master of the Rolls (Sir *J. Jekyll*), with respect to the nature of the claim, observed, that were he to consider the matter, not as sitting in judicature, but taking in all manner of considerations, such as honour, gratitude, private conscience,

science, &c. he must think the claim should never have been made. With respect to the destruction of papers, he said the facts proved, certainly did give an unfavourable aspect to the plaintiff's claim, but did not go so far as to bar it. After a very full examination of the facts which were proved, in order to establish the charge of spoliation, he said, "That had there been the least positive proof of a release from Mr. Cowper, he should have dismissed the bill, but when such a release or conveyance is only supposed or inferred from appearances, out of which the supposition does not necessarily or even naturally arise, he could not but think the title, though in his own opinion it should not have been set up, was a clear and subsisting one." The mere non-production of written evidence which is in the power of a party, generally operates as a strong presumption against him. I have adverted to this subject in the section on Deeds: I conceive that it 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, in weighing the effect of evidence in its own nature applicable to the subject in dispute.

If the destruction, or withholding of evidence leads to a presumption against the party, to whom it is imputable, much more is the fabrication (a), or alteration of it, calculated to induce the same effect. It must however be remembered, that whatever impropriety there may be in any such suppression or fabrication, the effect of it ought only to be applied to the decision

(a) One of the greatest and most difficult points in the *Douglas* case, arose from Sir John Stewart having fabricated four letters, as received from *La Marre* the surgeon; a conduct certainly very suspicious, and calculated to induce a strong presumption against the general veracity of his account. I believe the true conclusion, from all the circumstances in that case, to be that which was drawn by the House of Lords in support of the filiation; but it is impossible for great doubt not to hang upon a case affected by such a circumstance. This part of the case is the subject of the first of Mr. A. Stuart's letters to Lord Mansfield, in which he charges him with softening the inference resulting from this fabrication, and contrasts his conduct upon that occasion with that which he had pursued in the *Anglesea* case, where he had laid it down, that if the certificate of a marriage purporting to be a cotemporary act was a fabrication, the other evidence in support of the marriage ought not to be believed. The following passage contains Mr. Stuart's general observations upon this subject.

"I had been accustomed to think, that in judging upon evidence, a matter of such infinite importance, in the constitution and jurisprudence of every well regulated state, there were certain rules established, which in every court, and in every country, were received as most invaluable guides for the discovery of truth. For instance, when it appeared that on the one side there was *forgery and fraud* in some of the material parts of the evidence; and especially when that forgery could be traced up to its source, and discovered to be the contrivance of the very person whose guilt or innocence was the object of inquiry, in such a case, I have always understood it to be an established rule, that the whole of the evidence on that side of the question must be deeply tainted by a *radical taint* of its source."

"The natural and necessary effect of these qualities upon the mind of a judge, possessing of discernment and candour, is to make them extremely suspicious of all the evidence on

of the fact in dispute, and a punishment should not be inflicted under the name of a presumption, when the fact supposed to be presumed is not in truth believed.

It is certain that evidence which is false will sometimes be resorted to for the purpose of establishing a fact that is true. Such conduct is not only in the highest degree reprehensible, but is in general (and very properly) attended with the greatest danger to those who resort to it. A strong circumstance of this kind is mentioned in *Coke's P. C. cap. 104.* There were grounds for charging a man with the murder of his niece, but the body of the child was not found; the prisoner being admonished to find the child, brought another like her, who upon examination was found not to be the true child; upon which, with the other presumptions, he was convicted and executed, and afterwards the child appeared to be alive. This case affords a very proper ground for Sir *M. Hale's* caution, not to convict of murder unless the body be found; but should not produce too much intimidation against convicting upon presumptive evidence (a.)

As a general incident to all presumptive evidence, it is requisite that it shall have a proper foundation, and not rest upon mere suggestion or surmise. This was clearly illustrated in the case of *Goodtitle dem. Brydges v. Duke of Chandos, 2 Bur. 1065.* Under a settlement *G. B.* was tenant in tail in possession of certain lands, and tenant in tail in remainder of others, which had been limited to his mother for her jointure. He suffered a recovery; and the jointress having lived several years, it was contended that a surrender from her for the purpose of making a tenant to the præcipe ought to be presumed, but the court decided to the contrary. Lord *Mansfield* said—There are two sorts of pre-

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sumptions, leading to the same conclusion with the forged evidence; perjury testimony in support of it will be little regarded; the forgery of the written evidence contaminates the testimony of the witnesses, in favour of the party who has made use of that forgery, and nothing will gain credit on that side, but either clear and conclusive written evidence, free from suspicion, or the testimony of such a number of respectable disinterested and consistent witnesses, speaking to decisive and circumstantiated facts, as leaves no room to doubt of the certainty of their knowledge, and the truth of their assertions.

“On the other hand, the proof of a forgery such as has been described, must also have the effect to gain a more ready admission to the evidence of the other party. If that evidence be consistent, if it be established by the concurring testimony of a crowd of witnesses, and supported by various articles of written and unsuspected evidence, the bias of a fair mind will be totally in favour of the party producing such authorities, and against that which had been obliged to have recourse to the forged evidence.”

(a) Lord *Coke* after mentioning the fact says, “which case we have reported for a double caveat, it is, to judges, that they in case of life judge not too hastily upon presumptions; and, as to the true and innocent man, that he never seek to excuse himself by false or untrue means, lest thereby he, offending God (the sinner of sinners), overthrow himself as the angels did.”

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sumptions, one a presumption of law not to be contradicted; the other a species of evidence; which latter must have a ground to stand upon, something from whence it is to arise. Where a person has power to suffer a recovery, and thereby bar the estate tail, *omnia presumuntur rite et solemniter acta*, until the contrary appears, and it is reasonable that it should be so, but if the contrary shall appear, there is an end of the presumption. So where the freeholder is a trustee for the tenant in tail himself, and under his power and direction, it is a reasonable and just cause for presuming, that every thing was regularly transacted. So when the persons interested to object against the validity of a recovery, have had opportunity to make objections to it, but instead of doing so, have acquiesced under it, and not at all disputed its validity, this is a presumption that all was right and regular. But there can be no presumption of the nature of evidence in any case, without something from whence to make it, some ground to found the presumption upon. Whereas, here is absolutely nothing from whence to presume. No sort of ground to build any presumption upon. Mr. Justice *Wilmot* said, that he had no notion of a presumption without some facts or circumstances to found it upon. This would be inferring something seen, from something not seen. Length of time alone is nothing; the presumption must arise from some facts, or circumstances arising within the time.

The facts from which a presumption is deduced, must be such as are not merely consistent with the proposition, which they are intended to establish: for evidence, which leaves it indifferent whether a given supposition is or is not founded upon truth, is in effect no evidence at all; neither is a mere preponderance of probability sufficient to constitute a presumption; although the consistency of the fact confirms the assent, to any actual uncontradicted testimony in support of it, in the first case, and the preponderance indicates the preference which, *ceteris paribus*, ought to be given, in the second. A presumption can only be applied, when the circumstances are such as to render the opposite supposition improbable. The degrees of probability are very extensive, and a considerable latitude must be allowed to the judgment applied to the circumstances of each particular question; which, as it cannot be previously defined, is from its very nature subject to be affected by the variety of individual sentiments. Considerable attention ought to be paid to the consequences of the decision, and to the effect of error as it may be committed on the one side or the other, but this caution should not be suffered to degenerate into excessive timidity. And where the judgment is fully and satisfactorily convinced, the conduct should not be in-

fluenced by the mere apprehension of a remote improbable contingency, or the suggestion of fanciful hypothesis. The effect and weight of presumption cannot be influenced by any consideration more extensively, than by the opportunity which the nature of the case affords, to support or contradict it by direct testimony. A person who rests his case on the argument, that certain circumstances which he adduces, afford a presumption of the existence of a disputed fact, is not entitled to any attention whatever, if he cannot but be in a condition to give direct and positive evidence of the fact itself, supposing it to be true; and on the other hand, presumption may be regarded as equivalent to absolute proof, when the party against whom it militates, cannot but be in a condition to defeat it by positive testimony, if false. Where the inconsistency of the admitted facts with an opposite supposition to that which is inferred, is absolute and complete, so as to amount to a moral or physical impossibility, the term presumption, as I have already observed, is inapplicable, and it is a case of perfect proof. In other cases the existence of a mere possibility to the contrary may be so slight that the grounds of presumption will affect the mind, with the same conviction as absolute demonstration. Thus, to instance the case of the controversy between *Marsh* and *Travis*, if *Robert Stevens*, in collating a given number of manuscripts of the *New Testament*, found one which he denoted by an arbitrary character, wherein there were twenty-four singular readings in the *Catholic Epistles*, and Mr. *Marsh* afterwards found a manuscript having a set of singular readings, exactly coinciding with those indicated by *Stevens*, it might be shewn (as it has been) that the fact of identity is only less than certainty by a degree, which it is almost out of the power of language to express, and to all practical purposes, the conviction resulting from this proposition becomes equivalent to certainty itself. But let the degree of improbability be ever so great, if in any the slightest circumstance a clear absolute unanswerable inconsistency is shewn, the supposition that was assumed is entirely destroyed (a). Supposing, for instance, with reference to the same controversy, that it was absolutely and completely proved, that in the manuscript of *Stevens* where *K* is wanting, *U* was not included in its room, and that in the manuscript of *Marsh*, *U* was included, the incompatibility would destroy the strongest possible inference from the conformity. But then in proportion to the

(a) Several circumstances were adduced in the *Douglas* cause to show cause that the child produced as the son of lady *Jane*, was in fact the child of one *Mignon*, which was taken from its parents by some strangers about the time of the asserted delivery, but the child of *Mignon* had blue eyes, and those of the person whose birth was in dispute were black. This difference fully established would wholly destroy all possible evidence of coincidence, unless the colour of the eyes is subject to change, which I conceive is not the case.

positive inference of identity on the one hand, the opposite evidence of incompatibility ought to be manifest and unimpeachable on the other, and if instead of its being fully ascertained, that the *U* was not included in the manuscript of *Stevens*; the case amounts to no more than that there was no actual notice that it was included, the argument of coincidence is not defeated, unless it can be shewn that it was impossible that the *U* should be included, without having been noticed in making the collation, a supposition which is not only destroyed by its intrinsic weakness, but contradicted by several positive instances. Wherever, therefore, the positive known argument leads to a clear and satisfactory conclusion on the one side, it ought not to be destroyed by the mere existence of a circumstance not absolutely accounted for on the other.

The following passage from *Burlamaqui* on natural law, and the note which he subjoins from the *Bibliothèque Raisonnée*, afford some important considerations upon this subject.—When a truth is sufficiently evinced by solid reasons, whatever can be objected against it ought not to stagger or weaken our conviction, as long as they are such difficulties only as embarrass or puzzle the mind, without invalidating the proofs themselves. *Burl.* There is a wide difference between seeing that a thing is absurd, and not knowing all that regards it; between an unanswerable question in relation to a truth, and an unanswerable objection against it, though a great many confound these two sorts of difficulties; those only of the last order, are able to prove that what was taken for a known truth cannot be true, because otherwise some absurdity must ensue. But the others prove nothing but the ignorance we are under, in relation to several things that regard a known truth. *Bib. Rais.*

Therefore when a series of facts distinctly and unequivocally proved manifestly tends to one conclusion, and another fact is proposed in contradiction to that conclusion, the mere inability to account for such opposite fact, is not sufficient to destroy the inference deduced from the others, but the positive inconsistency should be fully shewn. If the facts in support of the conclusion are fully established, and those in contradiction to it rest upon mere inference and probability, which unopposed might be sufficient to establish their existence, this inference may not be sufficient to destroy the conclusion, unless it accounts for the facts from which that conclusion is drawn; as a conclusion resulting from certain facts on the one side, cannot be sufficiently encountered by a conclusion deduced from uncertain facts on the other. If the evidence in support of the conclusion is free from the suspicion of error and inaccuracy in its leading principles, but the relation of any incident-

tal circumstance of inconsistency which is alleged against it, may be subject to those imputations, it is more reasonable to adhere to the first, than to be influenced by the last, unless, as in the preceding case, the opposite relation is calculated not only to oppose the conclusion, but to account for the undisputed facts (*a*). Sometimes a conclusion from circumstances may be so forcible as to discredit even the positive testimony of a fact in absolute contradiction of it, as for instance, where a crime is fully proved to have been committed, and the circumstances upon which it is imputed to the prisoner, cannot upon any reasonable supposition be reconciled with his innocence, the evidence of an alibi is naturally attended with suspicion and distrust, and requires a stronger ground of reliance, than the ordinary presumption of the veracity of evidence. I suppose all arguments of inaccuracy, from an indistinctness in the observation of a particular time to be out of the question; for when the case may be reducible to that, it admits a less violent solution.

The circumstances from which a presumption is deduced, may be dependent or distinct. In the first case, all the facts constitute one entire chain, and a removal of any one of the links destroys the connection of the whole; in the second, the removal of any one circumstance leaves the effect of the others subsisting; but the concurrence of several distinct and independent circumstances, leading to the same conclusion, greatly increases the strength of the whole, and each affords a mutual support and corroboration to the other. It is judiciously observed in *Butler's Analogy*, that probable proofs, by being added together, not only increase the evidence but multiply it; and that unless the whole series of things, which are alleged in the argument he had before adduced, and every particular thing in it can reasonably be supposed to have happened by accident, then is the truth of it proved in like manner, as if in any common case numerous events acknowledged were to be alleged in proof of any other event disputed; the truth of the event disputed would be proved not only if any one of the acknowledged ones did of itself clearly imply it, but though no one of them singly did so, if the whole of the acknowledged events, taken together, could not in reason be supposed to have happened unless the disputed one were true.

(*a*) The following case which has fallen under my observation, is partly connected with this reasoning: *A.* being in company with *B.*, had his pocket picked of three guineas; *B.* told *C.* rather triumphantly, that he had picked *A.*'s pocket of 4 guineas. This was stated by a court of quarter-sessions to the jury as an inconsistency, which destroyed the presumption of guilt; but supposing there to be a falsehood, or inaccuracy with respect to the number mentioned by *B.*, or an inaccuracy with respect to *C.*'s relation, the variation in that respect did not destroy the presumption, or rather conclusion arising from *B.* saying, that he had picked the pocket of *A.*

In the preceding observations, the facts from which the conclusion is drawn are assumed to be clear and undisputed; if some facts naturally tending to one conclusion are clearly ascertained and others which are in themselves ambiguous would conform to such conclusion, so that a given supposition would render the whole connected and consistent; there may be in general sufficient ground to infer, not only the existence of the conclusion in question, but the true exposition of such ambiguous facts, as are consistent with that conclusion; and sometimes, even, if all the facts taken separately may be equivocal, but their union leads in one point of view to a clear and distinct conclusion, and shows a relation and connection, but no reasonable ground can be suggested for a similar concurrence to that which actually exists upon a different supposition, such facts may mutually and reciprocally receive a proper exposition, by the general concurrence of the whole, especially where the conclusion is unopposed by other facts, which are indicative of a different conclusion. The presumption of a fact which is deduced from several undisputed circumstances, is sometimes more satisfactory than the positive evidence of the fact itself, which may be open to mistake, or misrepresentation, and it is clear, that a well connected chain of circumstances is of all evidence the least suspicious in point of veracity, for it is the evidence which is least capable of being fabricated with effect.

But it often requires great judgment and discretion to trace with propriety the connection between the existing circumstances, and the presumption which is applied to them; and there is no enquiry in which rapidity and precipitation may be more frequently detrimental. I have already observed, that a presumption is not destroyed by the mere difficulty of accounting for any incidental circumstance, provided the other circumstances which are undisputed necessarily tend to the conclusion in dispute. On the other hand a presumption is not to be hastily formed, from the difficulty of explaining the cause and reason of existing circumstances, unless the whole of the subject with which those circumstances are connected is sufficiently seen. This applies more strongly, when the difficulty is to account for the non-existence of facts, which might be reasonably supposed to exist upon a different supposition from that which is assumed. There is no point upon which presumption is more material, than in ascribing to particular conduct, motives and dispositions which cannot be seen, and can only be inferred from the facts that are seen, and the probable motives by which they may be occasioned; but it will often be very fallacious, to reason upon the

the motives or disposition of others, without a most perfect view of all the circumstances with which they are connected.

In the *Douglas* cause, several questions were proposed with respect to the motives of lady *Jane*, in doing or not doing particular acts, supposing the filiation to be real. In answer to one of the questions, Why did she not bring evidence of the children being really hers? It is truly observed, that it is difficult to say what is the properest manner of acting, before the event points out the inconvenience of acting in one manner rather than in another, and even ignorance can reason better after the fact, than wisdom can before. Towards the close of the case are the following observations. "If the defender has not been able to account for every particular in the conduct of his parents, the fault lies in the nature of things. The attack made on the conduct of the defender's parents, has obliged him to explain it upon such motives as naturally infer their innocence, which must be conclusive against an argument which assumes for its basis their guilt. The possibilities which run through the pursuer's reasoning on this head, are answered by probabilities: and although it is absurd to demand, and impossible to answer, why an action in itself indifferent was done in one way rather than another, yet the defender hopes that he hath left no part of his parents' conduct unaccounted for. The presumption for innocence supports the account he hath given: and the pursuers have perverted all principles of common sense, in order to wrest a natural behaviour, to an unnatural presumption of guilt. The fallacy of their argument has forced them to destroy under one head, what they had reared under another; to confound things and terms in their nature most opposite; and to proceed in a perpetual rotation, inferring a crime from circumstances of conduct, and explaining that conduct by the assumed principle of a crime committed. In other words, they were guilty, therefore they acted so:—they acted so, therefore they were guilty. The trifling objections raised to the manner in which the defender's parents acted, down to their arrival in *Paris*, have been stated and refuted in the preceding part of this case. The circumstances of their fortune account for the retirement, not mystery, in which they lived there: and the genuine, unvaried, parental tenderness with which they treated the defender from the hour of his birth, till that solemn consummation which their dying behaviour gave to his state of filiation, is more than a sufficient answer to the criticisms, not arguments of the pursuers. The temporary motives which arise from particular characters; and particular situations are too undetermined, to become the foundation of a legal decision.

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But if the defender's case even stood on this issue, he would be warranted, from the most undoubted evidence, to affirm, that the conduct of his parents was fair, natural, and unaffected, if they are supposed innocent; but forced, unnatural, and affected upon the pursuers' unjust assumption, that they were guilty of an imposture."

One instance adduced in the civil law, of a light and insufficient ground of presumption is, where a guardian who had no estate of his own, is found to have enriched himself during the tutelage of his ward. This circumstance does not warrant any inference, that the accession of fortune has arisen from misapplying the property of the ward. *Nec enim pauperibus industria vel augmentum patrimonii quod laboribus et multis casibus quaeritur interdicendum. L. 10. Cod. Arb. Tutel.* I have in an inferior court known the circumstance of five guineas having been stolen from one man, and the same amount being about the same time spent by another, allowed as a sufficient presumption to warrant a conviction of felony.

By the *Roman* law, if a father and son perished at the same time by shipwreck, or in battle, and there was no distinct evidence to ascertain which of the two died first, the presumption was, that the son died first, if under the age of puberty, but that if he was above that age he was the survivor; upon the principle that persons under the age of puberty, are less robust than adults; but that after passing that period, a younger person had more strength than an elder. But this rule was subject to some exceptions for the benefit of mothers, and in support of the rights of patronage and fiduciary bequests. This point arose upon the death of General *Stanwix* and his daughter, mentioned in the case of the *King v. Dr. Kay. 1 Bl. R. 640*, the property being claimed by the brother of the daughter's mother, upon the presumption that she had survived her father; the decision in the case reported was upon a collateral point, and the question was never judicially determined. In *Mr. Fearn's* posthumous works, there is a very elaborate discussion of the subject, in which his conclusion seems to be, that the presumption of the daughter's survivorship could not be supported. This subject came before *Sir William Wynne*, as judge of the Prerogative Court, in the case of *Wright v. Netherwood, 6 May, 1793*, upon a question respecting the implied revocation of a will by marriage, and the birth of a child, of which I have inserted a note to the case of *Lugg v. Lugg, 2 Salk. 593*. The father and child having perished together by shipwreck, the learned judge said, that with respect to the priority of death, it had always appeared to him more fair and reasonable in these unhappy cases, to consider all the parties as dying at the same instant

stant of time, than to resort to any fanciful supposition of survivorship, on account of the degrees of robustness.

## SECTION XV.

### *Of the Authority of Res Judicata.*

The principles which regard the effect of a judicial determination, are very well explained in the section upon that subject in the preceding treatise of *Pothier*. It is highly requisite for the purposes of security, that a certain authority shall be established for the conclusive determination of litigated questions, but the particular mode of conferring and executing such authority, must be a matter of positive regulation. The judgment which is entertained in particular instances, may be and often must be founded upon erroneous reasoning, but as the subject, wherever it rests, must ultimately be subject to human infirmity, the imputation of such error ought not to be regarded as an impeachment of the authority, unless applied in its direct correction, according to the regular course of an appellate procedure.

The great principle illustrated by *Pothier*, with reference to the civil law, and which is in its nature applicable to every other system, is, that what has been regularly decided by a competent tribunal, with regard to the same subject, and the same cause of dispute, and between the same parties, or those succeeding to their rights, and in respect to the same character shall be conclusively regarded as true.

The recent case of *Outram v. Morewood*, 3 *East*, 346 (in which it was ruled that a defendant who pleaded in bar to an action of trespass, a right to get coals by virtue of an ancient deed, was bound and estopped by a verdict in a former action in which his wife, under whom he claimed, had made the same defence, and in which issue was taken upon the identity of the land), affords a very instructive view of the application of similar principles, according to the law of *England*. The following are some of the passages, in the very learned and elaborate judgment of Lord *Ellenborough* upon that occasion: "A recovery in any one suit upon issue joined on matter of title, is conclusive upon the subject matter of such title; and a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded upon the same injury, but also operates by way of estoppel to any action for an injury on the same supposed right of possession. And  
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it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass, is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been on such issue joined solemnly found against them. The judgment which is the fruit of the action, can only follow the particular right claimed, and the injury complained of, and can conclude no further than the existence of the right, the injury thereto, and the compensation due for the same. A judgment in each species of action, from one in an action of trespass, to one upon a writ of right, is equally conclusive upon its own subject matter, by way of bar to future litigation, for the thing thereby decided. It seems clearly agreed (in a case cited), that the party was estopped as to the very issue found against him, but not as to other matters consistent therewith. The cases are, in our opinion, as well upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive, that the defendants are estopped, by the former verdict, and judgment upon the same point, from averring that the coal mines now in question are parcel of the coal mines to which they claim a title under the deed."

The identity of the subject and cause of the demand, is always a matter of averment and evidence. And therefore, where a person brought an action upon a declaration for goods sold, and delivered, and upon a promissory note, and upon executing the writ of inquiry, gave no evidence as to any goods, it was ruled, that he was not precluded from maintaining another action for goods, although the same demand might have been supported in the former action; but Lord *Kenyon* truly observed, that it was a case of great delicacy, and the court must take care not to tempt persons to try experiments in one action, and when they fail, to suffer them to bring other actions for the same demand, and the plaintiff who brings a second action ought not to leave it to nice investigation, to see whether the two causes of action are the same or different, but he ought to shew beyond all controversy, that the second is a different cause of action from the first, in which he failed. *Seddon v. Tutep*, 6 T. R. 607. So where all matters in difference had been referred to arbitration, it was ruled that a party was not prejudiced by the award with respect to any subject, that had not been submitted to the consideration of the arbitrators. *Ravee v. Farmer*, 4 T. R. 146. *Golightly v. Jellicoe*, cited, *ibid*.

Not only is an actual adjudication binding upon the parties, but even where a person who had paid a debt, but upon being sued for it, could not find the receipt, and paid it over again, it was ruled that he could not afterwards (having recovered the receipt) maintain an action to recover it back. *Marriott v. Hampton*, 7 T. R. 269. A similar case was cited, in which there was an opposite determination, and Mr. Justice *Lawrence* observed, that if that case was law, it went the length of establishing this, that every species of evidence which was omitted by accident to be brought forward at a trial, may still be of avail in a new action, to overhale the former judgment; which was too preposterous to be stated. Lord *Kenyon* has ruled at *Nisi Prius*, that even where a party, upon being sued, paid the money demanded, at the same time protesting that it was not due, he could not sustain an action for the repetition of it. *Brown v. M'Kinally*, 1 *Esp. Cas.* 279. In a former case, an action had been brought by the indorsee, against the maker of a promissory note, who, after interlocutory judgment signed, paid part of the money, and gave a warrant of attorney for the residue, and afterwards brought an action to recover back the money which he had paid, giving evidence that the plaintiff in the former action had notice of the note being given on an illegal consideration, to which it was objected, that the action was in effect to put the same sum in litigation a second time; but Lord *Kenyon* overruled it, on the ground that the money had been paid under a compromise, and not under the judgment of a court. The case came before the court, upon a question respecting the admissibility of evidence, entirely collateral to the nature of the demand; and a rule for a new trial was refused, no notice being taken of the objection to the cause of action. *Cobden v. Kendrick*, 4 T. R. 431. It is very difficult to reconcile this determination with that which afterwards took place in *Marriott v. Hampton*; and indeed it seems a perversion of terms, to call an indulgence in point of time, with respect to the payment of part of the money demanded, a compromise, so as to annul the payment of a part, when the payment of the whole would have been conclusive. The decision of *Marriott v. Hampton* was certainly contrary to the moral justice of the case, as between the parties; but the decision seems fairly to result from the correct principles of law, so far as regards the money paid in consequence of the action. Perhaps the point, that the money paid before the action brought, might have been reclaimed, on the ground, that the party by bringing his action had disavowed it as a payment of the debt, would, if it had been made, have fairly justified a verdict against the defendant retaining the unconscientious advantage which he had acquired.

In *Walker v. Witter*, *Doug.* 1. an action was brought on a judgment in *Jamaica*, in which it was incidentally observed, that courts not of record, or foreign courts, or the courts of *Wales*, have not the privilege of their judgments not being controverted. The case of *Sinclair v. Frazer*, before the House of Lords, was cited, in which it was part of the resolution, that the judgment of a court in *Jamaica* ought to be received as *prima facie* evidence of the debt, and that it lay upon the defendant to impeach the justice thereof; but that resolution as well as the observation in *Walker v. Witter*, was extrajudicial and collateral to the decision. But in *Herbert v. Cook*, *Durnford's* note to *Willes's Reports*, 36. a plea to a declaration in debt on the judgment of an inferior court not of record, that the cause of action arose without the jurisdiction of the inferior court, was upon demurrer adjudged to be good. Lord *Mansfield* said, that the argument how far the party was precluded after judgment, from alleging that the cause of action arose out of the jurisdiction, was not applicable; for the demurrer admitted the fact, so that it appeared on the record, that there was no cause of action within the jurisdiction. But with deference, I should conceive that if the defendant was precluded from alleging, that the cause of action did not arise within the jurisdiction, his actually making such an allegation could not reasonably be supported, and therefore that the fictitious admission of the truth of a plea, which arises from denying its sufficiency, did not warrant getting rid, by a side wind, of the principal question, whether a new perfect and indefeasible cause of action, independent of all question respecting the rectitude of the original judgment, did not arise by virtue of the judgment itself. In *Galbraith v. Neville*, mentioned in a note to the third edition of *Douglas*, Lord *Kenyon* expressed strong doubts respecting the doctrine advanced in *Walker v. Witter*, which was maintained on the other hand by Mr. Justice *Buller*. I conceive that there is no other instance in which it has been judicially decided, that the judgment of a court not of record; or of a foreign court, was not conclusive, with respect to the point decided, so far as the suit contained proper parties and incidents to have given it a conclusive effect, if the court had been of record; and many cases which have been decided respecting prize causes, are directly in support of the opposite proposition. The case of *Moses v. Macfarlane*, 2 *Bur.* 1005. which I am next to mention, did not turn upon the circumstance of the inferior court, not being of record.

In that case the plaintiff had indorsed to the defendant four promissory notes under forty shillings each for a particular purpose, the defendant sued the plaintiff upon them, in the court of conscience and obtained judgment, under which he received the amount; and an action of money had and received, was sustained for

for recovering it back again. The case is a valuable one, so far as it expounds the important principles upon which that right of action depends; but, as a precedent upon the immediate point, that a sum of money paid under the direct authority, of the judgment of a court of competent authority, may be reclaimed as unduly paid, it directly militates against every principle that can be applied to the subject. The decision gave great dissatisfaction when it was pronounced, and I conceive it would clearly now not be regarded as an authority. I have observed in an essay in the action for money had and received, upon the arguments adduced in support of the decision, and have had the satisfaction of finding my view of the subject confirmed, by that of Lord Chief J. *Eyre*, (of which I was not aware at the time of my own examination), in *Philips v. Hunter*, 2 H. B. 402. I have often thought, what I perhaps may be censured for suggesting, that Lord *Mansfield* was, in the case of *Moses v. Macfarlane*, in rather too great haste to promulgate the principles which he had imbibed from the *conditio indebiti* of the *Roman* law, and that he applied them in a case where that law had clearly interposed the exception, that *propter auctoritatem rei judicatae repetitio cessat*. *Ff. Mandat*, 59.

The rule that a judgment can only be conclusive between the parties, or those deriving title under them, is very fully established, and in general it can be admitted even as evidence only between such parties; but to that there are some exceptions, which are referred to below (a). In our law, as in the civil law, the same person is only barred when suing in the same right, therefore a person who has sued as administrator, and is barred, may have an action afterwards upon the same obligation as executor, for although the plaintiff was in truth executor at the time of the prior action, his

(a) A judgment is evidence against other parties, whenever the matter in dispute is a question of public right, and all persons standing in the same situation are affected by it, and it is evidence to support or defeat the right claimed: thus a verdict finding a prescriptive right of tything \*; the right of a city to a toll †; the right of election of a churchwarden ‡; a customary right of common; the liability of a parish to repair a particular road §; a public right of way ||, or the like, is evidence for or against the custom, or right, though neither of the litigating parties are named in, or claim under those who are parties to the record. *Peake's Evidence*, 2d. Ed. 40. As to the right of the reversioner or remainder-man, to give in evidence a verdict in favour of the tennor or tenant for life. *Vi. Pike v. Crouch*, 1 Lord *Royms*. 730. *Rustworth v. Countess of Pembroke*, *Hard*. 472. *Gilb. Ev.* 35. *Peak*, 39. A verdict against one servant of J. S., as to the master's right of fishery is evidence, but not conclusive evidence against another servant, maintaining the same right. *Kinnerley v. Orpe*, *Doug*. 517.

\* *Gilb. Ev.* 36.

† *City of London v. Clarke*, *Cart.* 181.

‡ *Berry v. Banner*, *Peakes*, N. P. 156.

§ *Rex v. St. Pancras*, *ibid.* 219.

|| *Reed v. Jackson*, 1 *East*, 355.

mistaking his remedy does not prevent his maintaining his true action. *Robinson's case*, 5 Co. 33. a.

In *Inclendon v. Burges*, 1 W. and M. 1 Sh. 27. Camb. 166. cited in the before-mentioned case of *Outram v. Morewood*, the question arose, whether after an action by one plaintiff, and plea of prescription with judgment thereupon for the defendant, the judgment was an estoppel against traversing the same prescription, in an action brought by the same plaintiff jointly with another person? but the point was not decided, judgment having been given on a collateral objection. One of the points established in *Outram v. Morewood*, was that the former verdict against the wife was an estoppel against the husband claiming in her right. In *Ingram v. Bray*, 2 Lev. 210. the defendant as bailiff of J. S. made cognizance for taking a herriott, to which it was pleaded that A. and B. as bailiffs of J. S., had formerly made cognizance for the same herriott; and it was ruled that the plea was not good, without alleging that the cognizance was made by the assent of J. S., as it might have been by a stranger without his privity.

It is established by several cases, that a judgment in one action is a bar in another action of a different nature; so that the same cause of action shall not be brought twice to a final determination: and the same cause of action is where the same evidence will support different actions, although the actions may be grounded on different writs. See *Kitchen v. Campbell*, 3 Wilf. 304. S. C. 2 Black. 827. by the name of *Kitchen v. Campbell*, in which it was decided that a verdict for the defendant in trover was a bar in an action for money had and received, for the money arising from the sale of the same goods. See also the several cases there cited. But the proposition, as stated in the preceding case, is properly qualified so as to be consistent with the doctrine contained in several authorities, that where the point has not been brought to a final determination in the first action, but the plaintiff failed from the mode of action not being adapted to the nature of the claim, a judgment for the defendant in the first action was no bar to the plaintiff in the second.

Where an action of debt was brought upon an obligation, in the condition of which there were two points to be performed by the obligor, at the request of the obligee, and the defendant pleaded in bar that the plaintiff had made no request, upon which the issue was found for the defendant, and afterwards the plaintiff brought another action upon the same obligation, and the defendant pleaded the former action in bar and not by way of estoppel; the opinion of the court was, that it was a perpetual bar to the obligation,

tion, the verdict being in force, although the obligation was forfeited for the other point. *Dyer*, 371. b. I conceive however that that determination would not apply to excluding an action upon a subsequent breach; but only to bar any action for a cause existing when the former was brought. The principle, that if the subject matter has been once properly in judgment, the case shall not be again open to discussion, on account of the stating a ground of decision not before adduced, is illustrated by the cases of *Greathead v. Bromley*, 7. T. R. 455. *Schumman v. Weatherheart*, 1 East, 537. in which it was held that after an application to set aside an annuity, for non compliance with the provisions of the annuity act, had been dismissed, the application could not be renewed, by making objections not before entered into. In the first of these cases, Lord *Kenyon* observed, that the act of parliament gives a summary jurisdiction to the court, to be exercised according to a known legal discretion, and that they could not govern their discretion better than by analogy to the proceedings at common law; where if an action be brought, and the merits of the question discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvas the same question again in another action, although perhaps some objection or argument might have been omitted to be (a) urged upon the first trial, which would have warranted a different judgment. But relief was afterwards given in with respect to the same annuity, in the Court of Chancery. See *Bromley v. Holland*, 7 Ves. 3. The question, how far a court of equity is authorized to rescind an instrument, after an ineffectual application for the purpose in a court law, where there are no equitable circumstances, and the court of law has full concurrent authority, was not discussed with that particularity which the importance of it would seem to require.

In case of ejectment, a verdict in one cause is not conclusive in another; but this arises from the fictitious quality of the action, and from the real parties not being recognized so far as to let in this objection. The judgment, however, is conclusive in an action for mesne profits between the real substantial parties to the first cause, so far as regards the possessory right necessary to maintain the action. But (according to the passage already quoted in the section on Records), the judgment, like all others, only concludes the parties as to the subject matter of it. Therefore beyond the time laid in the demise it proves nothing at all, because beyond that time

(a) These words are not in the report, but the subject matter requires them to be supplied, in order to support the sense of the context.

the plaintiff has alleged no title, and need not prove any. As to the length of time the defendant has occupied, the judgment proves nothing, nor as to the value. *Aplin v. Parkin*, 2 Bur. 665.

With respect to decisions which operate *in rem*, the judgment is binding against all persons, upon the ground that all the world are parties to the proceeding.

This doctrine has been principally applied in the case of condemnations in the Exchequer, and in cases of prize. It is perfectly familiar, that a judgment of condemnation in the Exchequer is conclusive as to the property against all the world. There has been a considerable discussion upon the question, whether the same effect was applicable to condemnations by commissioners of excise. In *Henshaw v. Pleasance*, 2 Bl. Rep. 1174: the Court of Common Pleas, upon the ground of a distinction between courts of record and other jurisdictions, were of opinion that it was not; but there were several preceding cases cited in *Gaban v. Maingay*, *infra*, to the contrary; and in the same case is cited a subsequent decision by Lord Mansfield at *Nisi Prius*, in a case of *Dixon v. Cook*, which was removed upon bill of exceptions into the Exchequer Chamber, but never brought to judgment, in support of the conclusive effect of the condemnation. In the case of *Gaban v. Maingay*, *Ridge-way*, &c. The subject received a very elaborate discussion in the courts of *Ireland*. It was decided in the Court of Exchequer, that the condemnation of sub-commissioners was not conclusive, which decision was received in the Exchequer Chamber, by the Lord Chancellor assisted by the two Chief Justices; and all the cases bearing upon the subject, were very fully and distinctly taken into consideration. The distinction with respect to a jurisdiction of competent authority, not being of record was shewn, to be without foundation. The Lord Chancellor observed, that the Ecclesiastical Court is not a court of record; the Admiralty Court is not a court of record; the Prize Court is not a court of record; yet was it ever heard that the justice of a sentence pronounced by the Ecclesiastical Court, or the Admiralty Court, or the Prize Court, upon a matter confessedly within their several jurisdictions, was ever questioned upon the trial of a collateral action for damages in any of the superior courts. It never yet was considered, (except in *Henshaw v. Pleasance*) that the judgment of a court of competent jurisdiction, could be questioned in a collateral action, in which it was pleaded or given in evidence, merely because the court, in which the judgment was pronounced, was not a court of record (a).

In

(a) In the course of his judgment, his Lordship said, "It has been urged at the bar, VOL. II.

In *Scott v. Shearman*, 2 Bl. Rep. 977. It was contended that although a judgment of condemnation in the Exchequer was conclusive with respect to the forfeiture of the goods, it did not protect the officer from his misbehaviour in an action of trespass; that though conclusive *in rem*, so that the right of the crown to the goods should never be contested again, it was not conclusive *in personam*, in case the owner could prove that they were in fact not seizable, and should bring an action for damages; but the contrary was decided, as the only possible ground that the plaintiff could rely upon, in the case before the court, which was unaccompanied by misbehaviour, or any unwarrantable violence, was, that the goods were not in truth liable to be seized. The application of the same doctrine to a condemnation by commissioners, was the principal point in *Gaban, v. Maingay*, Lord Carleton taking notice that the sole ground of the action was the illegal seizing and carrying away the plaintiff's goods, and that the verdict did not find any circumstances of ill conduct accompanying the seizure, which, independent of the supposed illegality of the seizure, could maintain an action of trespass.

In *Cooke v. Sholl*, 5 T. R. 255. it was a matter of discussion, whether a judgment of acquittal in the Exchequer is conclusive on the one side, as a verdict of conviction is on the other, but the case was decided upon a collateral ground. In *Viner's, Abr. Tit. Evidence, Price Baron*, is said to have admitted such evidence as conclusive. Upon principle, I should conceive that the opposite determination would be more correct, as such an acquittal would be warranted upon the mere negative ground, that the crown had not adduced sufficient evidence to support the seizure; and an individual, having a collateral interest in supporting the legality of the seizure, is not a concurrent party with the crown in supporting the condemnation, and asserting the claim of property on the one side, in the same manner as every person having an interest in op-

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that the commissioners, and sub-commissioners of excise are illiterate, and that they are partial and interested men. But if the legislature has thought fit to commit judicial powers to men of that description, we should very much exceed our jurisdiction, and grossly mistake the authority committed to us, if, in giving judgment upon this record, we were to enter into a consideration of the policy of that establishment. Sitting in a court of law, I am not at liberty to enter into an examination of the justice, or injustice of any judgment of a court of competent jurisdiction, unless it comes before me by writ of error. All parties to such a judgment are bound by it, until it is reversed by a tribunal having competent authority to review it, I know of no such dangerous and extravagant excess, into which any court of justice can be betrayed, as entering into a discussion of legislative policy in presiding particular tribunals. If the parliament has thought fit to commit judicial powers to excise officers of a particular description, we can only see that they do not exceed the jurisdiction intrusted to them. If they do not exceed their jurisdiction, we have no authority to pronounce that they are incompetent or corrupt judges."

posing

posing such condemnation, is in contemplation of law a sufficient party in the other.

There is no instance, in which the support given by the *English* courts of justice to the judgment of a competent authority, is more conspicuous than in the effect allowed to foreign condemnations in matters of prize, even where such condemnation has appeared on the face of the proceedings to be an outrageous violation of every principle of right and justice. If the condemnation is pronounced on the ground of a want of neutrality, or a violation of treaties, which are just causes of capture, it is however iniquitous, absolute, and conclusive. *Geyer v. Agridur*, 7. T. R. 681. *Gunetts v. Kensington*, 8 T. R. 230. *Busing v. Royal Exchange Assurance*, 5 *East*, 99. But if the fact concluded is not a legal ground of condemnation, the condemnation has not any legal effect; in other words, a fact established by a foreign sentence of condemnation has no other effect than the same fact established in any other manner. *Calvert v. Bovill*, 7 T. R. 523. *Mayne v. Trotter, Park. Inf.* 363. *Polland v. Bell*, 8. T. R. 434. *Bird v. Appleton*, 8 T. R. 562. No formality of expression is requisite, provided it evidently appears that the condemnation was on a legal ground. *Barzillay v. Lewis, Park*, 359. and if no special ground of condemnation appears, it is equivalent to a positive sentence of condemnation as enemy's property. *Saloucci v. Woodmafs, Park*, 362. If there is any ambiguity in the sentence, so that it does not appear whether the condemnation was on the ground of being enemy's property, or upon a positive regulation as an *arrêt*, for declaring vessels prize if any papers have been thrown into the sea, the truth may be shewn. *Bernardi v. Molbeaux, Doug.* 575. The sentence is only binding as to the conclusion, and not as to the truth of the premises from which that conclusion is formed. *Christie v. Secretan*, 8 T. R. 192. But it is essentially requisite to the validity of a sentence, that it should be pronounced by a court of competent jurisdiction: and, as it is contrary to the law of nations, for a belligerent to erect a tribunal in a neutral country, the sentences of such supposed tribunal are of no effect: *Case of the Fladoyen*, 1 *Robinson*, 135. *Havelock v. Rockwood*, 8 T. R. 268. but a condemnation in the country of the ally of the complaining power is supported. *Case of the Christopher*, 2 *Robinson*, 209. *Oddy v. Bovil*, 2 *East*, 473. In the case of the *Henrick and Maria*, 4 *Robinson*, 43, Sir *William Scott* strongly intimated his opinion, that upon principle, a condemnation is not valid, unless the ship is brought into the country of the capturing power or its ally; but the *British* Court of Admiralty, having in some cases acted upon a different principle, he supported a condemnation in a court of the enemy's country, of a ship lying in a neutral port: the same question is now waiting for determination in the Court of Appeal.

Another subject in respect to which the proceeding is *in rem*, is the jurisdiction of the spiritual court with respect to wills, and intestacy with reference to personal estate; the probate of a will being necessary and conclusive evidence in all civil proceedings. See *Barnesley v. Powell*, 1 *Ves.* 120. 284. and the cases there cited. But where a testator made a codicil to his will, to take effect in a given case, it was properly ruled by the Master of the Rolls, that granting probate of the codicil was no conclusion with respect to the event having taken place, upon which the operation of it was to attach. *Sinclair v. Hone*, 6 *Ves.* 607. The effect of the act of the ecclesiastical court is confined to the direct operation of it; for where the defendant claimed goods as administratrix to a woman, and the plaintiff shewed that he was married to her; which the defendant contended, that he was estopped by the administration from doing, as that would not have been granted if such marriage had taken place. *Holt*, Ch. Justice, decided the contrary, observing, that a matter which has been directly determined by the sentence of the ecclesiastical court, cannot be gainsaid. Their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary; but that is to be understood only in the point directly tried, otherwise it is of a collateral matter, to be collected or inferred from their sentence; as in this case, because the administration is granted to the defendant, therefore they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point there tried had been married or unmarried, and their sentence had been not married. *Blackham's case*, 1 *Salk.* 290. And the same opinion is expressed by Lord *Hardwicke*, in *Baker v. Pritchard*, 2 *Atk.* 387. In the *King v. Vincent*, *Str.* 481. it was ruled that the probate of a will, while unrepealed, was conclusive evidence in support of it, upon an indictment for forgery; but this doctrine was disputed by *De Grey*, Ch. Justice, in the *Duchess of Kingston's case*, and was expressly over-ruled by Lord *Ellenborough*, in the case of the *King v. Gibson*, *Lancaster summer assizes* 1802, where the prisoner was convicted and executed.

A direct sentence in the ecclesiastical court, in affirmance or avoidance of a marriage, is allowed to be conclusive evidence in all civil cases, where the marriage comes incidentally in question (except in case of collusion). See *Bunting's case*, 4 *Co.* 29. *Kenn's case*, 7 *Co.* 41. *Jones v. Bow*, *Carth.* 225. *Da Costa v. Villa Real*, 2 *Str.* 691. *Clowes v. Bathurst*, 2 *Str.* 960. *Meadows v. Duchess of Kingston*, *Ambler*, 756. But in the *Duchess of Kingston's case*, 11 *State Trials*, 201. it was decided, that a sentence against a marriage, in a cause of justification was not conclusive evidence on an indictment for polygamy. The opinion of Lord Ch. Justice *De Grey*, upon that occasion,

occasion, affords the most instructive view that can be given of the effect of judicial sentences (a). The following propositions were deduced by him, from the several cases which had been previously decided. First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence conclusive between the same parties, upon the same matter directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction directly upon the point, is in the like manner conclusive upon the same matter, between the same parties coming incidentally in question in another court. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument by the judgment. It was also the opinion of the judges, that, supposing the sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion. In *Prudham v. Phillips*, cited *Ambler*, 763. *Harg. L. Tracts*, 456, upon the question, whether fraud in obtaining sentence in a matrimonial cause could be shewn in avoidance of the sentence, in a collateral action, Lord Ch. Justice *Willes*, after much debate, took a distinction between the case of a stranger, who cannot come in and reverse the judgment, and therefore must of necessity be permitted to aver that it is fraudulent, and the case of one who is party to the proceedings; that fraud was a matter of fact, and if used in obtaining judgments was a deceit on the court and hurtful to strangers, who, as they could not come in to reverse or set aside the judgment, must of necessity be admitted to aver that it was fraudulent, but that a party cannot give evidence that the judgment was fraudulent, but must apply to the court, which pronounced the judgment to vacate it; and if both parties colluded, he said, it was never known that either of them could vacate it.

In the case of a foreign attachment, according to the custom of the city of *London*, if the regular proceedings have been had against the defendant, the garnishee in whose hands the property has been attached, is protected by the judgment in case of an action brought against him by the original defendant, and is not required to prove the reality of the debt due to the original plaintiff, nor, as I conceive, can any evidence be allowed as to the non-existence of such debt. See *M<sup>c</sup>Daniel v. Hughes*, 3 *East*, 367.

In the case of *Phelps v. Holkar*, before the supreme court of *Pennsylvania*, 1 *Dallas*, 261. an attachment had issued to which

(a) See also Mr. *Hargrave's* observations upon this subject. *Lew Tracts*, 452.

the sheriff returned, that he had attached one blanket, shewn to him as the reputed property of the defendant, upon which judgment was given by default, and an action of debt being brought on that judgment in *Pennsylvania*, the question was reserved, whether the judgment was conclusive evidence of the debt, which it was resolved that it was not: as the attachment was a proceeding *in rem*, and ought not to be carried farther than the property attached.

I have above had occasion to refer to the opinion of Lord *Mansfield*, in *Walker v. Witter*, that the judgment of foreign courts (which are coupled with *English* courts not of record) are only *prima facie* evidence, and not conclusive evidence in an action here; and in mentioning the points that have been determined, in regard to matters of prize, have cited several cases, which shew it to be the established law, that with respect to that subject at least they are entirely conclusive. In *12 Vin. 87. pl. 5 Anon.* the Lord Chancellor took the following distinction; that where a suit is for a debt or other thing, a sentence in another country is not binding, but the court here must examine into the matter in order to form a judgment; *contra*, where the suit here is in order to carry that sentence into execution, for then the proceedings here are founded upon the sentence, and not upon the debt. In *Burrows v. Femino*, or *Temineau*, *2 Str. 733. 12 Vin. 87.* the acceptor of a bill resident at *Leghorn*, who had by a suit there, according to the law of the place, been discharged from his liability, on account of the failure of the drawer, applied for and obtained an injunction in Chancery against a suit here. Lord Chancellor *King* observing, that the court at *Leghorn* had jurisdiction of the thing and of the person, and that he thought he was bound by the sentence; he thought the judgment would be a discharge at law, but as the other judges might be of a different opinion, he would not put the party upon the difficulty and hazard of a trial (a).

In *Sill v. Worfwick*, *1 H. B. 665. Hunter v. Potts*, *4 T. R. 182. S. C.* in error by the name of *Philips v. Hunter*, *2 H. B. 402.* it was ruled that if a creditor in *England*, after a trader here has become bankrupt, attaches his property in a foreign country, he is liable for the amount to the assignees. Lord Ch. Justice *Eyre*, differed in the last case from all the other judges, and thought the

(a) The discharge by bankruptcy, or surrender of property in a foreign country, has some analogy to a foreign sentence. With respect to that subject, it has been held that such a discharge shall be valid here, with respect to a debt contracted in the country where the discharge took place. *Ballantine v. Golding*, *Co. B. L. 347. 1st Ed.* But not with respect to a debt which accrued in *England*. *Smith v. Buchanan*, *1 East, 6.* If a bill of exchange is drawn in *America* payable in *England*, and dishonoured, the debt accrues in *America*, and the drawer is discharged by a bankruptcy and certificate there. *Potter v. Brown*, *5 East, 125.*

decision was an improper interference with the decision of a court of competent authority. He said—"If we had the means of knowing the law of another country, we could not examine a judgment of a court in a foreign state brought before us in this manner. It is in one way only that the sentence or judgment of a court, of a foreign state is examinable in our courts, and that is when the party who claims the benefit, applies to our courts to enforce it; in which case he considered it as examinable." I do not think that the decision of the above cases could be justly regarded as a subversion of the authority due to the courts in which the attachment had taken place, for there is no inconsistency in a person who recovers a judgment which is valid and effective as affecting the immediate parties; being, under given circumstances, answerable as a trustee for the amount received (b).

I have sometimes heard of a contrivance to subject persons resident in *England*, to the process of the courts in *Ireland*, by serving them with a writ here, swearing generally to the service and entering an appearance, and thereupon proceeding to judgment, and bringing an action on the judgment in an *English* court. I cannot however think that the courts of this country would support such a practice upon the mere fiction, that the defendant could not aver against the record: if the Union has had the effect of giving to the records in the courts of *Ireland*, the character of records in *England*, (as to which *Vide Collins v. Matthew*, 5 *East*, 473.) so that the special fact cannot be shewn on a general issue of *nil debet*, I should suppose that a plea setting forth the special circumstances, with proper averments would be sufficient; or that the courts would even oppose a summary remedy, to so violent an invasion of their own prerogatives.

Mr. Peake, in his *Law of Evidence*, discusses with some particularity, the question, how far a verdict in a criminal prosecution should be allowed as evidence of the same facts in a civil procedure. I think it may be fairly stated as the result of the law upon this subject, that there is no authority whatever, upon which any reliance can be placed, in favour of the admissibility of such evidence. The case of *Boyle v. Boyle*, 3 *Mod*, 164. which is upon the face of it completely inconsistent with itself, and which is contained in a book of no reputation, can hardly claim the rank of an authority. It is said, that a woman obtained a prohibition against a cause of

(b) A sentence of expulsion in a college, is conclusive evidence in a question as to the right of the party to be within the garden, &c. *Rex v. Grunden*, *Cowp.* 315. A conviction before a magistrate is, until qualified or reversed, conclusive evidence for him in an action of trespass. *Strickland v. Ward*, *cor. Yates* J. 7 *T. R.* 633. s. Where a surcharge was confirmed by commissioners of houses, &c., on appeal it was ruled to be conclusive in trespass. *Earl of Radnor v. Reeve*, 2 *Bof. & Pul.* 391.

jaſtitation, the man having been convicted of having married her, having a former wife living ;—thus a judgment which implies the invalidity of a marriage, is made an aſſurance of it. All the caſes in which a party having an intereſt in the ſubject of a criminal proſecution has been admitted as a witneſs, are in direct oppoſition to the principle, that the verdict on ſuch a proſecution can be admitted as evidence, in reſpect of the civil right.

### N U M B E R XVII.

*Of the Diſtinctions between Law and Fact, and the Effect of Uſage upon the Law.*

(Referred to, Vol. II. p. 152.)

In the preceding number, on the Law of Evidence, I have referred to the following note, which I had previously inſerted in the view of the deciſions of Lord *Mansfield*, Vol. II. 338. with reſpect to the diſtinctions between law and fact, and the effect of uſage.

“ There are few objects of more importance, conſidering the diſtribution of judicial authority in the *Engliſh* courts of common law, than the eſtabliſhing an accurate criterion for diſtinguiſhing the boundary between queſtions of law, and what are called queſtions of fact. When the diſtinction is eſtabliſhed in a particular inſtance, the conſequence enſues, that if the queſtion falls under the former part of the diviſion, the grounds of determination muſt be judicially recognized by the court, that they are not the object of evidence, and cannot be conſtitutionally referred to the deciſion of jury: the reverſe of this takes place if it belongs to the latter. In many caſes the boundary is defined with ſufficient accuracy; but in ſome there appears to be an almoſt inextricable confuſion and difficulty; and this applies moſt particularly, to diſcuſſions upon the cuſtom of merchants, a term the effect and import of which does not appear to have been accurately defined, when it is conſidered as a queſtion of fact, but which is as precise as any other when conſidered as a queſtion of law, according to the doctrine of Lord Chief Juſtice *Holt*, in the caſe of *Hawkins v. Cardy*, 1 Lord *Raym.* 130, in which the declaration ſtated it to be the cuſtom of merchants, that if a bill of exchange was indorſed over for the whole or any part, the drawer was obliged to pay the ſum ſo indorſed; and upon demurrer, it was urged, that as the plaintiff had alleged this to be part of the cuſtom, it was well enough; but the Chief Juſtice answered, that this is not a particular local cuſtom, but the common cuſtom of merchants, of which the law takes notice; and therefore the court cannot take the cuſtom to be

as stated : and which doctrine is more distinctly announced by Mr. Justice *Egster*, in *Edie v. The East India Company*, 2 Bur. 1216. where he says, the custom of merchants is the general law of the kingdom, part of the common law. This principle has, however, been often departed from, and the custom of merchants submitted as a fact to the jury, and made the object of examination by witnesses. A local custom, the existence of which is confessedly a matter of inquiry for the jury, is a term accurately distinguished ; the extent, nature, and requisites of it are clearly defined, and amongst these are the palpable circumstances of its being immemorial and compulsory. But the term *custom*, in the sense at present under consideration, seems to be in many cases, not carried beyond its popular signification, importing frequent habit, although such habit may have been merely the result of personal convenience, or of mistaken notions of legal obligation, and although it may have been of novel introduction.

“ In the common distribution of law and fact, the law is understood to be a general and universal rule, and the fact to be of a limited and particular nature. Whatever therefore is decided respecting the former, becomes properly an authority for succeeding determinations ; and a want of uniformity in a general rule of property, or conduct is of material detriment ; but the decision on matters of fact in one cause, is not, in its nature, material in the investigation of another, except between the same parties, or those succeeding to their rights. An exception has been so far allowed, that in matters of local custom, a verdict between other parties is admissible in evidence, but then it is only regarded as one amongst other circumstances ; upon the general aggregate of which, a jury may form their determination, the influence of it is not previously defined ; and it is very far from being considered as imperative on the judgment of another jury, or as precluding other sources of examination ; and to be introduced at all, it must be verified as any other record. But an opinion of a jury has been exalted to a much higher rank than this, in the case of the custom of merchants, and almost placed on a level with legislative authority. For in the case of *Lickbarrow v. Mason*, which underwent as much investigation as almost any mercantile cause that ever occurred, the judges of the King’s Bench having given a decision, that the indorsement of a bill of lading defeated the right of stopping *in transitu*, which decision was reversed in the Exchequer Chamber ; and afterwards the judges having very much differed in their opinions before the House of Lords, it being treated all along as question of law, the knot, instead of being unravelled, was cut in two, by referring the case to a jury as a question of fact ; the jury found a verdict, that by the custom of merchants the indorsement

barred the right of the shipper : and in a subsequent case of *Hunter v. Baring*, cited 1 *Bos. & Pul.* 567. evidence was refused respecting the negotiability of a bill of lading, it having been admitted on record in the former case, and contrary to the rule and practice respecting local customs, no evidence was given of the former verdict, but it was judicially recognized by the court, and the rule of law has been since considered as established.

“ That twelve farmers in *Anglesea* or *Merionethshire*, should conclusively settle a general rule of property, is a doctrine which would not be thought to reflect much credit on the *English* law : but although these mercantile questions are most frequently decided by a special jury at *Guildhall*, the law and constitution do not recognize any difference founded upon that distinction. Without entertaining an idea in the slightest degree derogatory to the importance and value of juries, I cannot but think it a manifest inconvenience to refer to that tribunal the decision upon general rules ; their opinion is necessarily instantaneous, and the reasons on which it is founded are not subject to public investigation, and being a fleeting accidental body, the decisions thus formed by them are much more likely to be erroneous, considered as the foundation of general rules, than opinions formed upon accurate and mature deliberation, by persons professionally and habitually conversant with the subjects of their enquiry, and submitting to public notoriety the reasons, and principles, and authorities, upon which those opinions are founded.

“ With respect to questions connected with the construction of written instruments, it must be admitted, that a true construction must be founded upon the words considered with relation to the subject matter. Whatever, therefore, explains and illustrates a subject to which an instrument refers, is properly admissible, to direct the judgment as to the effect and object of the instrument itself. Therefore, where words are used which are appropriate to a particular branch of trade, or which in some trade have a known constant familiar import, though perhaps in some degree differing from their ordinary application, it seems reasonable that the import so established should be shewn, so that a judgment may be exercised from the nature of the subject and context of the instrument whether the words were, or were not, intended to be used, according to such appropriate signification : but where words are, in themselves, free from ambiguity, and no established technical import has been attached to them, nothing is more contrary to the general spirit of the law, than to settle their construction by the opinions of witnesses.

“ In every case where a question turns upon the degree of diligence

gence or neglect, attached to a particular transaction, the usual mode and habits of business are properly admissible, in order to lead the judgment to an accurate conclusion upon the particular case, and the jury are the proper judges of the effect. But all these cases are very different from examining witnesses to prove, or referring to juries to establish, a general rule of property.

“ In regard to many points upon the settlement laws, the decisions upon opposite sides approach so near, or are so contradictory, that it is impossible to reconcile them with any common principle. This difficulty has, in some cases, induced the court to transfer the decision of the point from themselves as a question of law, and to leave it for the sessions as a question of fact, a course of proceeding which is very conducive to the increase of litigation. If a question is, in its nature, a question of law, the difficulties attached to it cannot be legitimate reason for converting it into a question of fact. A regular series of adjudications, embracing a common and consistent principle, may sometimes be properly adhered to, although the introduction of the principle may appear to have been founded upon erroneous reasoning, because, by such course, that certainty which is a primary object of the law, is materially secured. But where clashing and contradictory determinations, leave the subject more indefinite than if there had been no determination at all, the most beneficial course would seem to be a disregard of the effect of such determinations; an examination of the subject in its original principles, commencing with known established data, and an enunciation of the result, that would leave to the inferior court little more than the application of particular evidence, to a definite and unambiguous proposition.”

The case of *The King v. Steventon*, 2 *East*, 362. may call for some observations connected with the preceding discussion.

The question arose as to the legality of a summons, issuing from the office of the Solicitor of Excise, instead of being signed by the commissioners, and it may be taken for granted, so far as relates to the present purpose, that, independent of the authority of usage, such a summons was insufficient, but the usage in fact having been to issue such summonses, Lord *Kenyon* said, “ that the court ought not to suffer the question to be agitated, Whether a summons which has issued from these commissioners in the usual course of practice, and in conformity with the practice of the superior courts is regular? Subpcenas are constantly issued in this manner; they are sent down blank into the country, and there filled up: and in the same manner are jurors summoned by the sheriff to attend the assizes, without his signature to the process. I am afraid of shaking

shaking the practice of all the courts and judicial officers in the kingdom."

Upon this case it may be observed, that the support of one abuse by merely shewing the existence of another, is not a very legitimate course of reasoning; in the case of subpœnas, the principle of convenience will perhaps induce the courts to sustain their own long continued irregularity; but I think Lord *Kenyon* would have rather hesitated at admitting the general proposition, that whatever was allowed in the superior courts, was therefore allowable in every inferior jurisdiction. The sheriff's warrants for summoning jurors issue under the seal of the office, and under the immediate authority of the under sheriff, whom the law recognizes as the legal efficient officer; the immediate summonses are under the signature of the summoning officer; also a known authorized character, and perhaps in these two instances, the practice may have the antiquity which amounts to common law, but in the case of commissioners of excise, his lordship's judgment is certainly not consistent with the principles which he laid down with such distinguished ability in the case of *The King v. Eriswell*. He there said, the proposition stated was, that the sessions having in general received such evidence as that in question, their usage creates a rule by which the courts are to proceed. I confess (said he) there is something of novelty in that argument, which refers those whom the constitution of the jurisprudence of this country hath invested with the power of correcting the errors of justices of peace, to the very practice of those persons to learn the rules of evidence by which they are to proceed. I remember the case of *Baldwin & Ux. v. Blackmore*, reported in 1 *Bur.* 593. and of which I have a MS. note, and a full memory, where justices of the peace had committed a man and his wife, for returning to a parish from which they had been removed by an order. The action was brought by the husband and wife, on the ground that the wife had been improperly committed; the case was twice argued: and the usage of committing femmes covert was insisted upon; and it rather appeared at first, that some part of the bench were inclined to give countenance to such an usage; but I well remember that Mr. Justice *Foster* treated the argument with more indignation, than is expressed by Sir *James Burrow* in his account of the case. I perfectly well recollect that learned judge's saying, "that he had heard *communis error facit jus*, but he hoped he should never hear that rule insisted upon, to set up a misconception of the law, in destruction of the law. I should have disdained to say any thing on this position, unless it had received the appearance of some countenance

countenance in the cases I have mentioned, and in the discussion of this case. It is the whole ground of the opinions hinted at in the other cases. The practice I know varies according to the usage of each county where the sessions are held; and I should as soon resort to the usage of every parish in the kingdom, on a question concerning the rateability of personal estate. But I will not enter more into this point, as I am clear it would be most dangerous to adopt it. The mistakes of judges, provided they became universal, would, according to that doctrine, become rules of law. An usage commencing at soonest, since 13 & 14 *Chas. II. (a)*. contrary to law, and working injustice every day it was persisted in, would supersede the law." These were manly sentiments, and pronounced in the true spirit of judicial wisdom, but how can they be reconciled with the sentiment in the *King v. Steventon*, that the court ought not to suffer the question respecting the legality of a usage, which must have commenced at the earliest, since the 12th of *Chas. II.* to be agitated? Although some stress is laid in the *King v. Erifwell*, upon the nature of the subject to which the observation is referred, it is manifest that the main tendency of the observations was general.

In the great question of general warrants, it was contended that the usage established a right. Lord *Mansfield*, who in some cases, and particularly in the question respecting the rating of personal property, gave very undue influence to particular usage, said,—How do the ordinary magistrates usually act in such cases? It is not contended that they can issue such a warrant: if the secretaries act in that capacity, the law must be the same, unless a different reason can be assigned. It is said, that usage will justify it; and it appears that the same form subsisted at the revolution, and has continued ever since. Usage has great weight: but will not hold against the clear and solid principles of the law; unless the overturning it would be very ill consequence indeed. But where no great inconvenience can arise in respect of what is past, and the consequence with regard to futurity may be very great; there is no reliance to be had upon such an usage. Besides, usage must be general and allowed, *usitata et approbata*. But this has been an usage of only one office and officer, against the practice of all other conservators of the peace.—*Wilmot, J.* I have not the least doubt, nor ever had, that these warrants are illegal and void.—*Yates, J.* So totally bad that an usage, even from the foundation of *Rome* itself would not make them good. *Money v. Leach* 1 *Bl. Rep.* 555. In the case of *Magdalen College*, 11 *Rep.* 68. the

(a) The year after the excise act.

arguments adduced in favour of ecclesiastical leases, that several similar leases had been granted since the disabling statute, by the advice of men learned in the law, was answered by the Justices *Coke, Croke, Dodderidge, and Haughton*; that the number of leases was more *ex consuetudine clericorum*, who imitated precedents of leases made before the statute, than of any sage advice of men learned in the law; and secondly, that *multitudo errantium non parit errori patrocinium*.

I do not stop to inquire whether such summonses as were issued in the case of *Stevenson*, were independent of usage good or bad; the court laid that question aside, and decided wholly upon the usage. Neither is it material to inquire, whether any inconvenience could result from giving to such a practice a positive sanction on the one hand, or from conforming to the general principles of law on the other. The practice, if requisite, might be fully provided for by the legislature. In the particular case, it is probable that the parties who acted certainly with improper intentions, but as certainly were entitled to the benefit of all exceptions founded upon law, were misled by their reliance that a blunder and irregularity, proceeding from the negligence of official practice, and never brought under judicial notice, would not be raised into a legal principle merely from the length of time, for which it had been improperly continued. The objection which I wish to urge, goes to the foundation of the argument itself, that what is wrong to day becomes in its repetition right to morrow, and if one day will not do, how many will? For there is no statute of limitations. It is not uncommon to adduce an argument in favour of the ancient and established law and constitution of the country, by comparing it to a grand and venerable fabric, but surely the effect of the comparison will not be improved, by extending the veneration to the dust and cobwebs.

In the case *ex parte Leicester*, 6 *Ves.* 429, the present Lord Chancellor advanced a position which is in direct opposition to the principles that I am endeavouring to maintain. He said, that where a practice has prevailed for a series of years, contrary to the terms of an order of the court, and sometimes contrary to an act of parliament, it is more consistent to suppose some ground appeared to former judges, upon which it might be rendered consistent with the practice. I can never advert to expressions of this description without protesting my dissent; and I think that even the immense difference of situation, between the highest depositary of public justice, and the most obscure individual can never give a legitimate sanction to the doctrine, that an habitual disobedience or violation of the law, shall be allowed as superior authority, to the positive and unequivocal mandate of the law itself; this ar-

Numb. XVII.] *Difference between Law and Fact, &c.* 367

gument is perfectly collateral to that, which considers usage as the best expositor of a rule attended with ambiguity, for the proposition which is objected to, assumes the fact of the existing practice, being contrary to the legal authority upon the subject, it takes it for granted that the law is one way, and that some good reason has been found for setting up a different authority, as superior to the law on the other.



N U M B E R XVIII. (a)  
OF MISTAKES OF LAW.

PART I. *Preliminary Observations.*

PART II. *A Translation of D'Aguesseau's Dissertation on Mistakes of Law.*

PART III. *Translation of Vinnius on the Question, Whether Money paid under Mistake of Law can be reclaimed?*

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*Of Mistakes of Law.*

(Referred to Vol. I. p. 306. and *ante*, p. 324. of this Volume.)

PART I.

*Preliminary Observations.*

IN the *Essays*, which I lately submitted to the public, on the action for money had and received, and on bills of exchange, I had occasion to advert to the questions, Whether money paid merely under a mistaken idea of legal obligation was subject to repetition? and Whether an indorser of a bill of exchange, knowing the facts by which his obligation was discharged in point of law, but ignorant of the legal consequence of them, was bound by a subsequent promise of payment? Upon the first of these questions, I extracted a very learned and judicious argument of *Vinnius*, in support of the affirmative proposition, and subjoined some cases that had occurred in the *English* courts of justice, which appeared to be a confirmation and adoption of the same doctrine. Upon the second question, it appeared (contrary to some decisions which had occurred) to be a necessary corollary of the solution proposed of the first, that the promise was not obligatory.

Since that period, a determination has taken place in the Court of King's Bench, upon the first question, opposite to the conclusion, which had appeared to me to be best supported by law and reason: and, very lately, the learned Chief Justice of the same court has, at *Nisi Prius*, given a judicial opinion opposite to that which I had adopted on the second.

(a) The present number, which was written in 1803, was intended to have formed a separate publication, and is mentioned with that view in a note to p. 306, of the preceding volume; but as the discussions in Part IV. c. 3. s. 1. and in the Appendix to this section, *ante*, No. 16. s. 14. have some relation to the subject, I have since decided upon inserting it as a part of the Appendix.

Perhaps it may be thought, that I should act more consistently with the propriety of my own situation, by bowing with deference to the authority of these determinations, than by renewing a discussion which has received its conclusion from those whose opinions are not only to be respected for their wisdom and talents, but also to be acted upon and acceded to, as terminating, by their authority, the controversy of a disputable subject.

I have however always thought that a candid and dispassionate examination of judicial opinions was perfectly consistent with a proper deference to the rank and character of those, by whom they were entertained, and that such examination is often attended with public and professional utility: and I trust my unaffected personal respect towards the noble and learned magistrate, whose sentiments I have taken the liberty of bringing into discussion, will be a security against my justly incurring the imputation of presumption, or of improper tenacity of opinion, in renewing the consideration of these questions.

It must certainly be admitted, that the first of these subjects was not, when presented to the Court of King's Bench, considered as possessing the same importance which has been ascribed to it by the followers of the *Roman* law, or discussed with that attention which it had before received from the celebrated commentator already mentioned, and the still more celebrated magistrate whose dissertation is about to be subjoined; that the determination, as reported, was founded on the want of an adequate precedent in support of the right of repetition, and on the authority of an observation which I conceive will appear in the sequel to have certainly not been necessary to the judgment which it accompanied, and probably not to have been correctly and considerately applied; and that so far was the question from leading to an exposition of the great and general principles which are connected with it, that it was disposed of in a summary manner, without any argument or deliberation.

My acquaintance with the writings of *D'Aguesseau* has only commenced since the appearance of the before mentioned Essays, although I had for many years been anxious for the acquisition of them. His admirable pieces of judicial eloquence have since that time occupied a considerable portion of my time and attention, and the translation of several of them has greatly contributed to my gratification. His pleadings appear to comprise a most striking union of profound learning, logical accuracy, and felicity of diction. They are not, as may be supposed from the title, the arguments of a counsel for his party, but the advice of an assessor to the court. The decisions of the parliament of *Paris* were given in writing, without any public declaration of their grounds and reasons,

reasons, but were preceded by a very full exposition, publicly made by the Advocate General, of the facts, the arguments of the parties, and the legal principles of decision; and it is the execution of this important duty, which constitutes the subject of the pleadings above referred to.

It would afford me great satisfaction to communicate to my countrymen, so much of the excellence of these pleadings, as I am enabled to preserve in the translation: and my intentions and wishes upon that subject are only suspended by the intimation of those best qualified to form an accurate judgment upon the subject, that the usual reception of publications, tending to illustrate the general principles of jurisprudence, or to exhibit the particular application of those principles in the practice of foreign countries, is not sufficiently favourable to afford an adequate expectation of security from loss, or to reconcile incurring the necessary expence, with the dictates of common prudence (a).

The father of *M. D'Aguesseau*, (of whose character a delineation of particular interest is preserved from the masterly hand of the son,) having filled with distinguished virtue and reputation, several of the most important public situations in *France*; upon the institution of the office of a third Advocate General, in the parliament of *Paris*, recommended his son, then only of the age of 21, to the appointment, and *Louis XIV.*, in acceding to the request, declared, that he was so well acquainted with the father, as to be sure that he would not deceive him even in the testimony which he gave in favour of his son. How far this confidence was merited, and justified, is evident to all who have the slightest acquaintance with the writings and history of *D'Aguesseau*. It is observed in the summary of his life prefixed to his works, that he appeared at first with so much eclat, that the celebrated *Denis Talen*, then *president à mortier*, declared he should wish to finish as that young man had begun. It is added, that "he was equal to a multitude of affairs, that he treated them all fundamentally, and frequently discovered laws, pieces, and decisive reasonings, which had escaped the advocates of the parties. He united to erudition, order, and clearness of ideas, the force of reason and the most brilliant eloquence." The truth of this testimony does not rest upon the partiality of a kindred biographer, but upon the existence of the productions to which it is applied. He continued in this situation until the age of thirty-two, when upon the recommendation of the president *Harlay*, himself one of the most eminent

(a) In the sequel of the present volume, I shall embrace the opportunity of inserting some specimens of these pleadings; but I do not think it material to alter the preceding sentence.

jurists of the country, he was promoted to the office of Procureur General, to which that of Advocate General is in some degree a deputation, but an office the functions of which were of a more reclusive nature than those of Advocate General; more intimately connected with the details of administration, requiring the exercise of learning, and talent, in the composition of written arguments, but not calling forth the application of oral eloquence, except upon the opening of the sessions of justice; upon which occasion the Procureur General, in rotation with the senior Advocate General, delivered an address to the judges of the parliament, respecting the duties most entitled to their attention, and the failings against which it was most important to awaken their caution. From this office he passed to that of Chancellor, the grand depositary of justice and legislation, in the year 1717, upon the appointment of the regent Duke of Orleans, being then of the age of 39. In the earlier years of his filling this situation, he was twice banished to his estate; the first time, in consequence of his steady opposition to the financial projects of Law; the second, for resisting an undue precedence being allowed to cardinal *Dubois*, contrary to the usage of the kingdom; but being restored to his dignity, he continued in possession of it until the day on which he completed his 80th year, when he prevailed on the king to accept his resignation, which in less than a year was followed by his death.

His varied excellencies, not only in the science of jurisprudence, but in every department of polite literature, and more especially in his public and private conduct, will best appear from the collection consisting of 13 large volumes, 4to. which has been made since his death, of his productions in the course of his official duty, and his domestic and familiar intercourse.

The dissertation which these remarks are intended to introduce, is perhaps less calculated than any other article in the collection, to afford a specimen of his general style and manner. It appears to have been composed for his own satisfaction, in forming a conclusion upon the important subject which it involves, and the circumstance of its not being designed for publication manifestly appears from its being in two different languages. It begins in *French*, afterwards *French* and *Latin* are intermixed, and lastly, above half the dissertation is in *Latin*. The writer appears to have studiously confined himself to a strict and logical discussion, a quality which is equally conspicuous in his other numerous productions, but is in general accompanied by the finer beauties of composition, which, in the present instance, seem to have been studiously avoided.

Although it is evident, that the dissertation is not clothed in a language.

language intended to meet the public eye, it is no less manifest that the course of argument is perfect and complete, and that the conclusions are the result of a full and comprehensive examination of the subject.

The grand principle upon which the dissertation depends, is the distinction between the effect of ignorance of the law, as it regards the violation of a public duty, and as it only concerns the mistake of a private right; and the consequence deduced from that principle is, that although such ignorance can afford no excuse in the first case, it does not in the last operate as a sufficient cause for divesting the property of one man, and conferring it on another.

It must be acknowledged that some of the reasonings by which this distinction is illustrated, have very much the air of metaphysical subtilty, and, taken abstractedly, would be insufficient to establish the distinction contended for; but the inadequacy of particular reasons cannot affect the propriety of the general conclusion, if that conclusion is supported by other reasons, which are in themselves adequate and sufficient.

The dispute upon this subject, which has more than most others agitated the great leaders of the science of jurisprudence, arose not so much from the nature of the question considered, as depending upon the mere rules of reason and justice, as from the difficulty of reconciling different texts in the *Roman law*, which appear to lead to opposite conclusions. The text which places the greatest difficulty in the way of those who maintain with *D'Aguesseau*, the doctrine of a right of repetition in cases of money paid, upon no other consideration than a mistaken notion of legal obligation (the supposition excluding any moral obligation), is a positive law of the Emperors *Dioclesian*, and *Maximilian*, which appears indefinitely to negative the right. But the laws upon which the opposite opinion is founded, are those which most immediately result from, and are declaratory of the grand principles of justice, and even if the argument should be unsatisfactory in reconciling the apparent contradiction, even if it were admitted that the positive decision of the Emperors was, to the extent of its authority, an unequivocal and universal declaration upon the subject in question; if it is also established on the other hand, that the opposite proposition is the fair and natural result of those other principles which have been just referred to, there will be no difficulty in deciding which is entitled to the preference, from those who would deduce their juridical opinions from the laws of ancient *Rome*, not as they are the authoritative mandates of Princes and Emperors, but as they are to be regarded amongst the master pieces of human wisdom, as they are the deliberate opinions of

men, possessing the highest and best cultivated talents, applied with assiduity to the systematic cultivation of juridical science, and attentively regarding the relation of every individual question to the great whole, of which it constitutes a part. It is this quality that has recommended the adoption of the general system to posterity, and drawn from the illustrious chancellor, to whose memory I have offered an imperfect tribute of respect, the following panegyric, in one of his addresses to the parliament of *Paris*, inculcating the necessity of an extensive cultivation of legal science. "One book which science offers at once to the magistrate, develops without difficulty the first principles, and last consequences of natural law;—the work of a people whom heaven seems to have formed for the purpose of command,—every thing there breathes that height of wisdom, that depth of good sense, and, to say all in one word, that spirit of legislation which was the proper and singular character of the masters of the world. As if the grand destinies of *Rome* were not yet accomplished, she reigns throughout the earth by her reason, after ceasing to reign by her authority. It may be truly said, that justice never fully unveiled her mysteries except to the *Roman* jurists. Legislators rather than jurists, private individuals in the obscurity of retirement, have by the superiority of their intellect, merited to give laws to all posterity;—laws equally extensive and durable. All nations yet appeal to them, and all receive from them the answers of an eternal truth. It is little for them to have interpreted the law of the twelve tables, and the edict of the pretor; they are the surest interpreters of our own peculiar laws; they lend as it were their spirit to our usages, their reason to our customs; and, by the principles which they give us, they serve as our guides even when we walk in a road, which was unknown to themselves."

If therefore it is manifest, that a particular conclusion upon a general and most extensive question, is plainly deduced from the maxims which such men as these have laid down, as the first principles of justice; if those maxims are, in themselves, the result of that common reason which is given to all men, and, to be assented to, require only to be proposed; if the immediate question is one which every man, speaking from the ordinary dictates of natural justice, (independently of the influence of technical science,) must answer in the affirmative; if such is the necessary consequence from the opinions of *Papinian*, justly styled in the treatise before us, *Romane jurisprudentia viva vox et oraculum*, it will be of small importance to those who consult the decisions of that jurisprudence, with a view to be assisted by their wisdom, and not to offer a blind obedience to their authority, whether a contrary

trary doctrine may have had the preference, as resulting from the legislative authority of individuals, who, without regard to their power to convince, were entitled to command.

If it is said, that the discussion, however interesting to a foreigner, to the inhabitant of a country, acknowledging the *Roman* law as the basis of its own particular jurisprudence, however satisfactory in its result, as applicable to the particular doctrines, or even the general principles of that law, is immaterial to the *English* lawyer; that the question for *his* discussion, is only Whether there is any precedent in support of the asserted right of action? I might answer in the language of Lord *Mansfield*, in the passage which I have selected as my first citation in a former publication, wherein I endeavoured to introduce the student to a knowledge of his judicial character: "The law of *England* would be a strange science, indeed, if it were decided by precedents only. Precedents only serve to illustrate principles, and to give them a fixed authority. But the law of *England*, which is exclusive of positive law, enacted by statute, depends upon principles;" and to a similar observation, in another case, that "the law does not consist in particular cases, but in general principles which run through the cases and govern the decision of them." I might refer to the great discussion upon the subject of literary property; to the decisions upon the legality of wages, and of contracts not expressly prohibited, to the doctrine established in the recent case of *Pasley v. Truman*, and its qualification in *Haycraft v. Creasy*, both discussed with much elaborate reasoning, as founded upon the principles of natural justice, but both included in the short sentence of the *Roman* law: *Consilii non fraudulenti nulla obligatio est, caterum si dolus et calliditas intercessit, de dolo actio competit.* But the most cursory reading of the decisions of the *English* law, must lead to the conviction of how great an influence the principles of natural reason and natural justice (destitute as they are of the advantage of being regularly embodied into a connected system) have in its administration; and though the precedents of resorting to foreign assistance, for the exposition and elucidation of these principles are not very numerous, they are abundantly sufficient to manifest its utility.

Though the truth of this general proposition seems almost too obvious to require confirmation, I do not think it unapposite to refer particularly to the cases of *Coggs v. Barnard*, of *Ryal v. Rowles*, and of *Ricord v. Bettenham*. 3 *Bur.* 1734. 1 *Bl.* 563. upon the question, Whether the right acquired by a captor, under a ransom bill, was lost by the death of the hostage? in which the whole discussion turned upon the authorities of foreign jurists, and was

finally decided upon the result of inquiries made from living lawyers in *France* and *Holland*; to *Cornu*, and *Blackburne*, (*Doug.* 641.) in which the present Chief Justice, at a very early period of his eminent professional career, relied upon the same course of reasoning, and supported his arguments not only by the writings of *Valin* and *Grotius*, but upon the principles involved in an ancient controversy between the *Thebans* and *Theffalians*, as stated by *Quintilian*, and in the decision of which the sentiment of *Grotius* was regarded by the court as a strong authority in support of their judicial opinion; to *Robinson* and *Bland*, 3 *Bur.* 1077. 1 *Blackstone*, 234. 256; to *Holman* and *Johnson*, *Cowp.* 341. in which the effect of a contract entered into in a foreign country, was principally referred to the sentiments of *Huber*, and more especially to the case of *Luke v. Lyde*, in which Lord *Mansfield*, in order to form his judgment upon a question respecting the apportionment of freight, intimated that he had been desirous of reserving a case, in order to settle the point more deliberately, solemnly, and notoriously, and especially as the maritime law is not the law of a particular country, but the general law of nations: *non erit alia lex Romæ alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes et omni tempore una eademque lex obtinebit.*

It is indeed observable, that the cases in which recourse has been had to this foreign assistance, have generally been looked up to as cases of distinguished excellence and pre-eminent authority; but from the rarity of their occurrence it might almost be supposed, that the propriety of resorting to such assistance was temporary and occasional; that the works in which it is to be found were only to be opened at distinct intervals and by privileged persons, that the doctrines delivered upon them were to be received and cherished as oracular communications, and that the books were immediately to be closed, until the recurrence of the hallowed period, when the same solemnity might be justly warranted.

It is however certain, that the rational jurisprudence of this country received its greatest and most valuable accessions, during the presidency of Lord *Mansfield*; that the mercantile law, previous to his appointment, had nothing of systematic regularity, nothing of scientific excellence; and that under his auspices it has been elevated to a degree of perfection, which is the admiration of *Europe*. If it is inquired how that elevation was attained? several of the cases which have been just referred to, will assist in forming the answer. He resorted for information to all the sources in which he conceived it was to be found; he availed himself of the assistance of writers in other countries, who had discussed the subjects of his examination with that order and regularity, which

is attended with the peculiar advantage of regarding particular questions, not as they are insulated and detached, but as they form, with their connections and dependences, the coherent and united parts of a general whole. While the advantage which has resulted to the community, from this mode of conducting judicial inquiries, is generally acknowledged, there can be no reason why a pursuit of the same course of investigation should be discouraged; while the particular precedent resulting from these inquiries are followed with admiration and respect, the general precedent which sanctions the same line of proceeding, which evinces the propriety of seeking for useful assistance wherever it may be met with, is too important to be treated with neglect or disregard. The original sources of information are not exhausted, the power of resorting to these sources is not annihilated; and if a court should admit its willingness to assent to a given proposition, provided the same, or another court had given it their sanction, the day, the year, or the century before, why should they deprive themselves of the liberty which they allow to their predecessors, of deducing their opinions from the principles of juridical reason, and assisting themselves in that deduction by the previous inquiries of others, whose ability and industry entitle them to respect, without requiring an implicit deference to their conclusions? Every thing which now is precedent originally was reasoning: although the benefits of legal certainty, frequently warrant and require an acquiescence in the authority of the precedent, whilst the mind withholds its assent to the reasoning upon which it is founded. I shall hazard a few observations in the sequel, upon the extent to which this principle may be justly and usefully applied; my present object is chiefly to obviate the rejection of any doctrine which may, upon an investigation of principles, be found to be useful and correct, upon the mere ground of there being no sufficient precedent to warrant it. The precedents of establishing such doctrines are so numerous, that I may appear to have been undertaking a work of supererogation in defending its propriety; but though a mere assent to the rectitude of this principle is sufficiently general to supersede the necessity of proving it, the practical adoption of it is sufficiently rare to justify the propriety of enforcing it. Whatever course of reasoning may form a legitimate ground for the determinations of the bench, must also be a legitimate foundation for the arguments of the bar, as the nature and essence of these consist in submitting to the attention of the bench, the topics which appear to warrant a determination in favour of the client: and truth, justice, and reason, must necessarily retain their inherent characteristics, by whomsoever they may be accidentally pro-

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pounded and enforced; but though this proposition, like the former, scarcely requires the assistance of argument to establish its propriety, it, like the former, is rather supported by theoretical assent than by practical reception. Numerous as the exceptions to this observation unquestionably are, it cannot be denied that it is too fashionable to sneer at a deviation from the beaten track of practical authority, as the result of pedantry and ostentation; but although, limiting the range of professional arguments to *Impey's Practice*, and the *Index* to the *Term Reports*, might possibly be found to diminish the trouble, without detracting from the profits of individuals, the majority of the profession would assuredly be unwilling to confine themselves within such narrow trammels.

But if there is any subject to which the doctrine of an universality of principle peculiarly applies, it is that of reclaiming money unduly paid; not only upon the ground that there is no subject in its nature, more wholly referrible to the general rules of natural justice, as distinct from the laws founded upon local habit or municipal institution, but also upon the more favourite ground of precedent itself. It will be generally agreed that the system of law upon this subject, as administered in *England*, is chiefly to be deduced from the determinations of Lord *Mansfield*, and that the few cases respecting it of an earlier date are not of sufficient importance to form any regular system. But Lord *Mansfield's* own views upon the subject are peculiarly referrible to the principles of universal jurisprudence, as illustrated and embodied in the *Roman law*, and the whole series of his conduct respecting it is a continued precedent of his recurrence to those principles. In the leading case of *Moses v. Macfarlane*, in which he embraced the earliest opportunity that occurred to him, of giving an exposition of the grounds and nature of the action for money had and received, he enters diffusely into the general doctrine respecting it, and states several principles which have ever since been looked up to as the standard of authority (even by those who think that in the particular application of these principles, he did not allow sufficient consequence to others by which they ought properly to have been restricted and controuled). But it will scarcely be contended that he found the materials of his exposition in any preceding volume of *Reports*; whereas a very slight comparison will evince the source of it to have been the juridical wisdom of ancient *Rome*,

This kind of equitable action to recover money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It is only for money which, ex æquo et bono, the defendant ought to refund.

It does not lie for money paid by the plaintiff, which is demanded of him as payable in point of honour and honesty, though it could not have been recovered from him by any course of law,

As in payment of a debt, barred by the statute of limitations.

Or contracted during his insanity.

It lies for money paid by mistake,

Hæc conditio ex bono et æquo introducta, quod alterius apud alterium sine causa deprehenditur, revocari consuevit. l. 66. ff. Lib. 12. Tit. 6. de Cond. Indeb.

Naturales obligationes non eo solo æstimantur, si actio aliqua earum nomine competit: verum etiam eo si soluta pecunia repeti non possit. ff. Lib. 44. Tit. 7. de Oblig. et Actio. l. 10. Lib. 46. Tit. 1. de fide iussoribus, l. 16. § 3.

Naturaliter etiam servus obligatur, et ideo si quis ejus nomine solvat, vel ipse manumissus ex peculio, repeti non poterit. l. 13. de Conditione Indebiti. ff. 12. Tit. 6.

Naturale autem debitum in hac causa pro vero debito habetur, eoque ceteri exigi non potest; solum tamen non repetitur. Vinnius. Ad. Inst. Lib. 3. Tit. 28. 4. 6.

Julianus verum debitorem post litem contestatam, manente adhuc iudicio, negabat solventem repetere posse: quia nec absolutus, nec condemnatus repetere posset, licet enim absolutus sit, natura tamen debitor *permanet*. l. 60. de Cond. Indeb.

Huc item plerique referunt exceptionem Senatus Consultum Macedoniani; nam et filius familias si mutuam pecuniam acceperit, et pater familias perperam solverit, non repetit. Vinnius. Quoniam, naturalis obligatio manet. ff. Lib. 14. Tit. 6. de Sct. Maced. l. 9. 10.

Quod indebitum per errorem solvitur, aut ipsum aut tantundem repetitur, l. 7. de Cond. Indeb.

Is cui quis per errorem non debitum solvit, quasi ex contractu debere videtur. Inst. Lib. 3. Tit. 28.

Or upon a consideration which happens to fail.

Or for money got by imposition, express or implied, or extortion, or oppression.

Or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons, under these circumstances.

In one word the gist of this action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money.

The damages recovered in the case of *Dutch v. Warren*, shew the liberality of this kind of action; for though the defendant received considerably more, yet the difference only was retained against conscience, and therefore the plaintiff *ex æquo et bono* could recover no more,

The case of *Smith v. Branley*, *Doug.* 696. also affords a very clear instance of a similar parallel:

The whole title in the digest, de *Conditionibus Causa data, Causa, non secuta*, is an amplified view of this proposition.

Si quis dolo malo aliquem induxerit, aut metu illato coegerit, ut promitteret non possum adduci ut credam, solum ex his causis retineri posse. Vinnius.

Ex ea stipulatione, quæ per vim extorta esset, si exacta esset pecunia, repetitionem esse constat. ff. Lib. 12. Tit. 5. de Cond. ob Turp. vel Injust. Caus. l. 7.

Si naturalis obligatio jure civili improbata sit, aut destituta juris civilis auxilio, qualis est mulieris intercedentis. l. 16. § 1. ad Sc. Maced. prodigi promittentes, l. 6. de Verb. Oblig. pupilli sine tutoris contractu, licet hæc admittunt accessiones, ea non attendetur et perinde repetitio datur, ac si quod ex causa solutum est nullo jure debitum esset, Vinnius, 22.

Hoc natura æquum est neminem cum alterius detrimento, fieri locupletior. l. 14. de Cond. Indeb.

agreeably to the rule of the Roman law: *Quod conditio indebiti non datur ultra quam locupletior est factus qui accepit.*

If an act is itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action, for where both parties are equally criminal against such general laws, potior est conditio defendentis.

But there are other laws which are calculated for the protection of the subject, against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover.

But it may be said, that however apposite all the reasonings deduced from *D'Aguesseau* and *Vinnius* might be to have shewn, *a priori*, what the decision ought to have been, whatever influence the discussion now submitted to the public might have had, if it had been presented as an argument to the court, the subject is now at rest and concluded by authority, and that any reasoning of a private individual respecting the grounds of that conclusion, must be not only unavailing but impertinent.

But however little encouragement the discussions of a private individual, respecting legal subjects, have received, or are likely to receive, the reasons which militate against the offering such discussions to the public, seem to be much more numerous on the score of prudence than on the principles of propriety. The law, like every other subject, may be regarded as a matter either of practical information, or of scientific inquiry; if a doctrine which is merely the speculative opinion of an individual, should be conveyed to the public in such a manner as to be susceptible of producing an erroneous impression, that it was admitted in judicial practice, much inconvenience might arise, and much censure would be reasonably incurred. Or if an individual should pronounce a peremptory decision, in opposition to principles established by judicial authority, he would be fairly liable to the imputation of presumption. But in suggesting grounds, and reasons, in support of a difference of opinion fairly stated, every reader is left to the exercise of his own judgment, upon the correctness of the premises and their accordance with the conclusion. To support a general and indiscriminate objection to this course of proceeding, it must be assumed that the reasoning which is offered is satisfactory and correct; for if either the premises are erroneous in themselves,

Ubi dantis et accipientis turpitude versatur, non posse repeti dicimus: veluti si pecunia detur ut male judicetur. l. 3. de Cond. ob Turp. vel Injust. Caus.

Quotiens autem solius accipientis turpitu. versatur, Celsus ait repeti posse: veluti si tibi dedero ne mihi injuriam facias. l. 4. ibid.

elves, or inadequate to the conclusion which is deduced from them, an objection arises of a very different nature from that of a presumptuous arraignment of established authority. Perhaps, in some cases, an examination, of any subject may escape reprehension even whilst the result of it is not assented to, as, by exciting an attention to the arguments suggested, the error of those arguments may be candidly pointed out, and an opportunity may be afforded of giving a correct elucidation of the principles by which they are opposed: to promote inquiry is often a matter of not less utility, than to bring such inquiry to its proper termination; and if the possibility of error was regarded as an invincible objection to the exposition of what, upon an attentive examination, is conceived to be truth, there would be an impediment to inquiry, which would only prevent the diffusion of error, at the expence of sacrificing truth.

If then a fair and liberal investigation may, notwithstanding the possibility or even probability of an error, be attended with advantage, as it excites inquiry, it cannot be reasonable to object to an inquiry as presumptuous, when the result of it, for anything that the objection necessarily supposes to be contrary, may be judicious and correct, however opposite to the conclusions of authority. If the reasonings of the most humble mechanic should, upon examination, be admitted to be accurate, they would not be rejected by the philosopher, though placed in opposition to the opinions of a *Newton*. The opposition would be a strong presumptive evidence of their error, but when that presumption yielded to the force of superior evidence, no veneration of an illustrious name would justify rejecting the conclusions established upon the admitted basis of reason and truth. According to the sentiment of *Boyle*, while authority is a long bow, the effect of which depends upon the strength of the arm which draws it, reason like the cross-bow, has equal efficacy in the hands of the dwarf, and of the giant.

With respect to the effect which prior adjudications ought to be allowed in practice, the best standard to appeal to is the rule of public utility, which is the source and ought to be the measure of assent to their authority. If the precedent upon any given subject, coincides with what is admitted as the principle, there is no room for disputation, because the conclusion, to which ever ground it is referred, is manifestly the same. If the opposite analogies, in support of conflicting opinions, are, as it often happens, so nearly equal, that the judgment, upon an adequate view of the grounds upon which the decision is to be framed, may fairly hesitate between the two, and the decision is, in its general consequences,

*a priori*, immaterial, the advantage of certainty in adhering to a judicial determination, once pronounced and acted upon, is much too obvious to require proof or illustration. Even when the subject, upon a retrospective view, appears to have been such as would not only have admitted of a reasonable difference of opinion, but have called for a different conclusion upon a full examination of its principles, so that what is presented as authority is admitted to have been founded upon error; it may be frequently beneficial to adhere to such conclusion, and nothing is of more ordinary occurrence: but how far the propriety of such adherence extends, is the main question under consideration; the proposition assumes the decision to be erroneous; the ground of adhering to it is the beneficial consequence of doing so; the question then how far the adherence is proper and requisite, becomes identified with that of its being beneficial or otherwise, considered with relation to all its consequences and effects.

This distinction is adverted to by Lord *Mansfield*, in a passage in the case of *Robinson and Bland*, which I have upon other occasions appealed to, and which I consider as marked with peculiar excellence and utility. His observation, is, that, "Where an error has been established and taken root, upon which any rule of property depends, it ought to be adhered to by the judges till the legislature think proper to alter it, lest the new determination should have a retrospect, and shake many questions already settled: but the reforming erroneous points of practice can have no such bad consequences, and therefore they may be altered at pleasure, when found to be absurd or inconvenient."

May not the latter part of this observation, which is in its expressions confined to the particular case of erroneous practice, with propriety be generalized and applied to every other subject which falls within the scope of the same reasoning, viz. that to rectify the error will not be attended with any bad consequences? The abstract preference of truth is a point which does not require to be established by argument; the particular conflict is between error supported by precedent, and truth in opposition to it; and surely it appears to be carrying the sanction to error sufficiently far, when it is allowed to be co-extensive with the utility resulting from it. Perhaps in some cases it may be difficult to fix the criterion to which I am proposing to refer; and when it becomes doubtful whether the adherence to, or the deviation from, an erroneous authority will, in its general consequences, be attended with greater benefit and utility, the grand question may arise on which side the preference ought to be given. I do not conceive that the occasions for applying the rule which may be  
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adopted, in answer to that question, would be very numerous ; and, without enlarging my observation, which probably will be already regarded as too diffuse, I am willing, for the purpose of the discussion, to admit, that where an erroneous proposition is established by authority, and it is doubtful whether the prejudice, from subverting the authority, may not exceed the advantage of correcting the error, the precedent should be allowed to have the turn of the scale in its favour. But, limiting my admission to the terms in which it is expressed, I conceive that the possibility or probability, that in some cases, not particularly adverted to or defined, it may be difficult to form an adequate opinion as to the superior advantage of retaining the error or of correcting it, is not, according to any principles of fair reasoning, to influence the decision of other cases, in which no such circumstance exists, and in which the beneficial consequences of deciding according to the original reason of the subject, would confessedly preponderate.

And if there are any cases to which the propriety of a return from precedent to principle most distinctly and emphatically applies, it is those in which the point in contest has reference to the grand and fundamental principles of justice and integrity, and which are not included in any established and connected system of positive law ; in which no extensive range of property, or order of judicial or commercial proceedings is affected or involved, in which the only mischievous consequence of correcting an erroneous precedent will be the subjecting to the costs of an action, a person who may have the inclination to acquire to himself an adventitious benefit arising from the detriment of another, where the one was without merit to entitle him to the advantage, the other without offence to subject him to the injury. I here use the term *erroneous precedent*, not as assuming to decide that the particular precedent under examination is of that quality, but as supporting the argument that, if, upon consideration, it appears to be so, there is no predominant reason of public utility to militate against the correction of it.

It was long a prevailing opinion, (than which certainly none could be more absurd,) that the act directing sheriffs to take bail bonds was a private statute, and many cases proceeded upon that opinion ; but the case of *Mills v. Bond*, 1 *Str.* 399. was decided upon the correct and opposite principle. The question afterwards coming before the Court of King's Bench, in *Samuel v. Evans*, 2 *T. R.* 569. Mr. Justice *Ashburst* said, that " If all the cases on this subject were on one side, however apparently contrary to reason they might be, the Court would be bound by them ; but if there  
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are several cases which are not reconcileable to reason on one side, and one sensible case to the contrary, we ought to decide according to the latter. Now, there can be no doubt on the reason of the thing, but that this is a general law; and, the case in *Strange* corroborating the opinion that it is so, we might determine it to be such, independent of the authority of another act, which unquestionably makes it a general law."—I have always regarded this sentiment as stopping short of the true principle, by which the exertion of judicial authority ought to be regulated: and if a court possesses the authority of correcting an established doctrine, supported by several cases which are not reconcileable to reason, because there is one sensible precedent to the contrary, I cannot see any material obstacle to their setting the example of that sensible precedent themselves. The authority of the court is the same to-day as yesterday; in the 44th of *Geo. 3.* as in the 6th of *Geo. 1.*; and it is very difficult to understand the logic, by which it would be wrong for a court to correct an erroneous opinion to-day; but if themselves, or any other court of concurrent authority, had been guilty of that wrong to-day, it would become right to follow the example to-morrow. Would it not place the administration of justice upon a more respectable basis, if it were to be held that reason and justice should be regarded as its first, and precedent as only its secondary, principle, than to reverse the disposition and to sacrifice the former at the shrine of the latter? Admitting most willingly the beneficial effects of precedents, in fixing and ascertaining principles, assenting to the impropriety of lightly renewing discussions upon topics, with respect to which reason may fairly hesitate in its decision and certainty of determination is more beneficial than a particular conclusion on either side; objecting to the subversion of confessedly erroneous opinions, when they have so incorporated themselves with the juridical system, as not to admit of separation without inducing injurious consequences; the only proposition which I endeavour to establish, or rather to enforce is, that the acknowledged conclusions of reason and justice shall be admitted to prevail over the accidental sanction of error by precedent, when no important reason of public utility requires an opposite determination.

I am fully aware that in this, as in other instances already adverted to, I may appear to have been unnecessarily occupied, in supporting by a length of argument a self-evident proposition, which nobody would offer to dispute. I must again advert to my former apology, that the objection, however speculatively true, is often practically false; and that the commodious attribute of precedents in saving the trouble of an analytical investigation of

principles has given them pre-eminence far beyond any title, to which they can aspire upon reasons of general utility.

I may perhaps have also incurred the imputation of extending this general dissertation far beyond the limits which the subject that has given rise to it could have required; without entering into the discussion of that charge, I am willing to admit, that the dissertation, although immediately occasioned by a particular topic, was intended to embrace a general subject, a subject which I consider in itself as of high importance; the proper source of legal argument, the freedom of discussion allowable to advocates and professional writers, the utility of recurring to the great principles of natural justice, and the influence which ought to be allowed to the existence, or to the want of particular precedents with regard to questions in their nature referrible to and dependent on those principles. I have also designed to avail myself of the opportunity of defending, with some particularity, the course of examination which I have adopted in different inquiries already before the public, and in others which a present want of encouragement and attention, however mortifying, may perhaps not intimidate me from submitting to their judgment, provided I may indulge the idea, that my endeavours hitherto have not been justly marked by a sentiment of disapprobation.

Craving indulgence for this egotism, I proceed to a short defence of the observations first alluded to, as included in a former publication, and since that period contradicted by judicial authority.

In respect to the question, whether money paid merely from a mistaken idea of legal obligation, unconnected with the existence of any moral duty, is subject to repetition, I in the first place inserted the observations of *Vinnius* in support of the affirmative proposition, (which will be subjoined in the present number,) concluding with the principle deduced from the purest sources of natural justice, that *melius est favere repetitioni quam adventitio lucro*, and coinciding in their general effect with the argument of *D'Aguesseau*, of which in the following sheets I have attempted a translation. Having then mentioned the opinion of *Pothier*, which is expressed in very few and general terms to the contrary, and is wholly founded upon the authority of two laws, the effect of which is fully examined by *Vinnius* and *d'Aguesseau* (a): I proceeded to observe, that it was singular that a question open to so much

(a) 10. Cod. de Jur. et Fact. Ignor. Cum quis, jus Ignorans, indebitam pecuniam solverit, cessat repetitio; per ignorantiam enim facti tantum, indebiti soluti repetitionem competere tibi notum est. L. 9. ff. d. t. Ignorantiam facti non juris prodesse, nec sultis solent succurri, sed errantibus.

discussion, had passed with very little attention in the cases affected by it in the *English* courts, that the opinion of *Vinnius*, appeared to be best founded, as it arose from the application of the rules of natural justice, upon which this right of action rather depends, than upon any positive rules or artificial reasoning; to which I added that I conceived (as it may now be thought erroneously) that it might be positively stated, that the opinion was adopted in the *English* law, and in support of this opinion referred to the cases of *Ancher v. The Bank of England*, *Doug.* 638. *Bize v. Dixon*, 1 *T. R.* 285, and to the opinion given by Lord *Kenyon* at *Nisi Prius*, and which has been contradicted in the case that has since occurred. The two former authorities were not adverted to in the case last mentioned, and upon a very frequent and (as far as lies in my power) an unprejudiced consideration of those cases, it still appears to me impossible to reconcile the determinations which they import, and the principle which, though not expressed, they necessarily involve, with a negative answer to the question at present under consideration. In the first case, the payee of a bill of exchange restrained its negotiability by an indorsement, directing the drawees to place it to a particular account. Afterwards it was negotiated with a forged indorsement, of the name of the person to whose credit it was to be placed, and a third person having paid the money for the honour of the payee, to the *Bank of England*, the payee was allowed to recover the amount. As to the observations arising from that case, I think, 1st, That it is impossible for any distinction to be made between a payment by the drawer himself, and by another person for his honour, and in fact no such distinction was taken or adverted to in the case. If the drawer was not himself liable to the payment of the bill, he was not liable to indemnify any other person who, knowing the circumstances, had paid it on his account; but if he did think proper to adopt the act as his own, he was certainly at liberty so to do; but then, if he adopted it at all, he must adopt it throughout, and the retrospective approbation, which is equivalent to an agency, must have the same effect as a proper agency arising from a preceding authority; and, with respect to that, it is an undisputed proposition that the act of an agent, within the limits of his authority, must be in all respects considered as the act of the principal. 2d, It is impossible to suppose that in this case there was any ignorance of fact; the only fact upon which the question of liability depended, was the indorsement actually appearing on the bill: it is not stated, nor is it to be supposed that that indorsement was not read by the person who made the payment, and even if it had not, the neglect would have been too gross to have been the foundation of any right

of action. 3d, No circumstances of fraud, oppression, undue influence, or any other of the grounds upon which the action for money had and received is founded, are alluded to as having existed, or, from the nature of the thing, were likely to have existed, so as to have formed an ingredient in the decision of the case. 4th, There was a difference of opinion in the court as to the effect of the indorsement, it being held by Mr. Justice *Buller*, contrary to the opinion of Lord *Mansfield*, and *Willes*, and *Aspburst*, J. that it was not restrictive; and upon the legal question, whether it was so or not? the whole discussion turned. After the judges had given their opinions, Lord *Mansfield* said, "The whole turns on the question whether the bill continued negotiable? as the case stands at present let the nonsuit be set aside, and we will consider of it further, and if we alter our opinion we will mention it." The case was not mentioned again, but the cause was tried at the following sittings, when the plaintiff, by Lord *Mansfield's* directions, obtained a verdict. 5th, In this case then the plaintiff recovered back money which he had paid, not being liable to do so in point of law, there being no ignorance of fact, nor any other cause to induce the right of repetition, beyond the mere decision of his not being under any legal obligation, to make the payment: for, as I have already observed, the act of payment being made by another person for his honour, did not form, and, according to the principles of correct reasoning, could not, as a matter of distinction, form any ingredient in the case. 6th, Then the proposition that a person who has paid a sum of money for which he was not legally obliged, and under circumstances indicating that such payment was made under a mistake of law, is, without any adventitious circumstance, entitled to reclaim it, must be true, or the case must have been improperly decided.

The analysis of the case of *Bize v. Dickson*, 1 T. R. 285. appears manifestly to lead to the same conclusions. The plaintiff was indebted to the defendants as assignees of a bankrupt in the sum of 1356*l.*; at the same time the bankrupt was indebted in a smaller amount unto divers persons, on whose behalf the plaintiff had effected policies of insurance upon a commission *del credere*; the plaintiff paid to the defendants the amount of the money owing to them, without deducting the money owing from the bankrupt. Several years afterwards it was decided between other parties, that a person in the situation of the plaintiff was entitled to a set-off, and upon that determination being made, the plaintiff brought his action to recover the money before paid, it appearing that the assignees had sufficient money in their hands to refund what had been paid; and the counsel for the defendant declined arguing the case,

case, the court being of opinion that it came within the principle of the determination, which established the right of set-off at the time of making the payment, and Lord *Mansfield* said, that the rule had always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it in an action for money had and received; so when a man has paid a debt which would otherwise have been barred by the statute of limitations, or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet, the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it in this kind of action.

Here the judgment was professedly and avowedly founded upon the principle of the money having been paid under a mistake, and it was, in the nature of things, absolutely impossible that it could be referred to any other principle; that there was any mistake in fact, is not in the slightest degree hinted at, and any such supposition would be absolutely inconsistent with the circumstances of the case; the mistake then was a mistake of law and nothing more, and although the distinction between a mistake in fact and a mistake in law was not expressly adverted to, either in this case or in the preceding, the proposition that money which has been paid merely under a mistake in law is subject to repetition, is so necessarily involved in both the determinations, that it is a contradiction in terms to affirm at the same time that that proposition is false, and that those determinations can be supported.

In the case of *Farmer v. Arundel*, 2 *Blackstone's Reports*, 824. to which I slightly adverted in the *Essay* on the action for money had and received: a certificate of a pauper was given by the overseers of *Grimly*, to the parish of *St. Peter's* in *Worcester*, or any other parish in the said city; the pauper residing in *St. Martin's* in *Worcester*, was removed to *Grimly*, and the defendant, the overseer of *St. Martin's*, demanded from the plaintiff, the overseer of *Grimly*, a sum of money for the maintenance of the pauper, for the last four years, which was accordingly paid, and the action was brought to recover it back, on the ground that the defendant, having no right to demand, had no right to retain the money, (the case not falling within the statute, which provides the reimbursing the expences of certificate persons,) and the court held the action not maintainable. Lord Chief Justice *De Grey* said, *Where money is paid by one man to another on a mistake, either of fact OR OF LAW, or by deceit, this action will CERTAINLY lie; but the proposition is not univer-*

sal, that whenever a man pays money which he is not bound to pay, he may by this action recover it. Money due in point of honour, and conscience, though a man is not compellable to pay it, yet if paid shall not be recovered back. Put the *form* of the certificate out of the case: it is however evidence at all events, that the parish of *Grimly* have acknowledged the pauper to be their parishioner, and it is allowed that he has been maintained four years by the parish of *St. Martin's*. Admitting therefore, that this money could not have been demanded, (which it is not necessary now to decide,) yet I am of opinion that it is an honest debt, and that the plaintiff having once paid it, shall not by this action, which is considered as an equitable action, recover it back again."

It must be remembered, that there is no dispute as to the right of reclaiming money paid under a mistake of law, not being universal and without exception; that it is agreed on all hands that money, which ought in point of honour and honesty to be paid, cannot be reclaimed; the decision in the case just cited turned wholly upon that excepted principle, but the general proposition stated by the Chief Justice, though collateral to the decision of the cause, is pronounced in terms which indicate a fixed opinion upon the subject, and this opinion, however extrajudicial, confirmed and supported by two cases in which a similar opinion, though not expressed, was evidently involved, may be thought deserving of at least as much attention as the casual expression of Mr. Justice *Buller*, in the case of *Lowry* and *Bourdieu*, which will be presently examined.

In the case of *Chatfield* and *Paxton*, as stated in *Chitty* on *Bills*, 102. the defendants being holders of a bill gave time to the acceptors, and they afterwards became insolvent, of both which circumstances the defendants gave the plaintiff notice, and he at their request, in a letter, accepted another bill, which he afterwards paid, and this action was brought to recover the money back. Lord *Kenyon* said, "My opinion is against the defendants; it was not only necessary that the plaintiff should know all the facts, but he should know the legal consequence of them; it seems to me that the plaintiff did not know the legal consequence of them, and that he paid this money under an idea that he might be compelled to pay it; when the defendants granted this indulgence, they gave it at their own risk. Where a man knowing all the facts explicitly, and being under no apprehension with regard to any of them, nor of the law acting upon them, chooses to pay a sum of money, *volenti non fit injuria*, he shall not recover it back again." This case afterwards came before the court upon a

motion for a new trial, when the verdict for the plaintiff was confirmed, but the case was not at the time reported.

Upon a review of these authorities I was induced to form the conclusion, that the opinion, that money paid under a mistake of law might be reclaimed, was adopted in the *English* law. But in the case of *Bilbie v. Lumley*, 2 *East*, 469. which is the principal cause of the present dissertation, the general proposition being brought before the court, Lord *Ellenborough* asked the plaintiff's counsel whether he could state any case, where, if a party paid money to another voluntarily, with a full knowledge of all the facts of the case, he could recover it back again, on account of his ignorance of the law? No answer being given, his Lordship said, the case of *Chatfield v. Paxton*, was the only one he ever heard of, where Lord *Kenyon*, at *Nisi Prius*, intimated something of that sort, but when it was afterwards brought before the court on a motion for a new trial, there was some other circumstance of fact relied on, and it was so doubtful at last on what precise ground the case turned, that it was not reported. Every man must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case. In *Lowry v. Bourdieu*, money paid under a mistake of the law was endeavoured to be recovered back, and there *Buller*, J. observed that *ignorantia juris non excusat*.

I have endeavoured, in the preceding observations, to examine the effect of an argument founded upon the mere want of precedent, and to shew that the proposition in question was not destitute of the succour of precedent, if any such were requisite; and, whether the argument which I have entered into upon the latter of these grounds be correct or otherwise, it is always certain that the sources of it were not adverted to in the case of *Bilbie v. Lumley*, and that there is nothing in that case which contradicts the position, that the truth of the before mentioned proposition is a conclusion necessarily connected with the authority of the cases which have been cited. Mr. *East* subjoins a note to *Bilbie* and *Lumley*, mentioning that the circumstances of the case of *Chatfield* and *Paxton* were so special, and there was so much of doubt in it, that it was not thought material to report it, to which he subjoins a statement of the case, and of the opinions of the judges, from which it appears that the facts were not known at the time of accepting the second bill, though before the payment of it the plaintiff received some information of the laches, but not such particular proof as would have enabled him to defend himself against the demand upon his acceptance in a court; the opinions of

the judges appear to turn principally upon the particular facts. I have a personal recollection of the case, the discussion of which turned rather more upon general principles than appears by the report; but I am ready to admit, that it was conducted in a manner very desultory, and very different from that which might reasonably be expected in the establishment of a legal principle of such extensive consequences as that before us. If Lord *Kenyon* had then rested the case upon the proposition, which he is said to have so distinctly and explicitly stated at the trial, this point would have had all the weight which it could have received from a direct and immediate precedent; as the case stands, the judgment of the court cannot be fairly adduced as a confirmation, though it is equally certain, that it contains nothing to import a contradiction of the general doctrine stated at the trial.

The doctrine that, "Every man must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance might not be carried, and that it would be urged in almost every case," is certainly entitled to much attention; but I conceive that the effect of the doctrine is carried sufficiently far for the purposes of public utility, by holding that no man shall exempt himself from a duty, or shelter himself from the consequences of infringing a prohibition imposed by the law, or acquire an advantage in opposition to the legal rights and interests of another, by pretending error or ignorance of the law, without its following as a consequence, that the ignorance of one man under no moral obligation, and intending no gratuitous donation, shall be to another a title of adventitious acquisition. It may be stated as a general principle, that money paid without adequate cause is subject to repetition, and when the only cause of payment is a mistake of law, the adequacy or inadequacy of such cause is the important point to which this whole discussion is to be referred; and if no other cause of payment appears, and it is established that money paid under a mistake, whether of law or of fact, may (except under special circumstances) be reclaimed, and it is doubtful whether such mistake did or did not exist, there can be no injustice in adopting the proposition of *Pothier*, that when it is uncertain whether a man has paid what was not due from him knowingly or erroneously, it ought to be presumed that the payment was made erroneously, and that he should be allowed to reclaim it according to the general principle that in *re obscura melius est favere repetitioni, quasi adventitio lucro*, and also according to the other general principle already adverted to, as founded upon the principles of natural reasoning, that *nemo presumitur donare*.

The case of *Lowry v. Bourdieu* was minutely observed upon,  
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in the *Essay* on the action for money had and received, it appearing to the writer that the decision was correctly right, but that the discussion of it by the different judges did not entirely proceed upon similar principles. The facts of the case are, that the plaintiff made an insurance upon an *East India* voyage, not having a direct interest in the ship, but being a creditor of the captain by bond, and the bond being stated as the subject of the insurance. After the voyage had been performed, and all risque (supposing the policy valid) was at an end, he brought his action for return of the premium, insisting, that as he would not have been entitled to recover in case of a loss, it had been paid without consideration; and it was held by a majority of the judges, contrary to the opinion of Mr. Justice *Willes*, that the action could not be maintained; the position which I endeavoured to establish was, that where money had been paid upon a void contingent contract, not attended with criminality, and the one party availed himself of the illegality of the contract, to avoid the performance of his own part of it, the other was entitled to a return of the money which was paid; and that this case did not furnish any exception to that principle. The more particular examination of that point would be here irrelevant. Upon the question how far the case affects the rule now under discussion? I would in the first place examine how far the point involved in the determination, without adverting to any of the observations which accompanied it, is or is not applicable. The present question is, whether a sum of money paid merely in consequence of a mistaken idea, that it could have been legally exacted, is or is not subject to repetition? The question in *Lowry v. Bourdieu* related to a sum of money paid as the consideration of a prospective contingent engagement, and reclaimed on account of the insufficiency of the original engagement, at a time when it was clear that the advantage stipulated for could not have been obtained, however legal or obligatory the engagement might have been; the contingency upon which the advantage was to arise, having become impossible. It is obvious that the two questions are perfectly distinct, and I conceive it may be justly asserted that a decision against the right of repetition in the latter, concludes nothing as to the former. Nothing could be more clear, than that after the risque had been run, there was no ground for a repetition of the money in point of honour and conscience, and if not, the principle is admitted on all hands that there could be no such right in point of law. If then the case of *Lowry v. Bourdieu* concludes nothing upon the subject by its mere determination, as the decision of law upon the particular facts, it remains to see whether the observations relied upon in support of it

can have any greater effect? The opinion of Lord *Mansfield* was, that as the contract was upon a gaming policy, and against an act of parliament, the court would not interfere to assist either party, according to the rule that *in pari delicto potior est conditio defendentis*. It is plain that this ground has nothing to do with the payment of money, under the mistaken idea of a *previous* legal obligation. The opinion of Mr. Justice *Willes* was, that the plaintiff should recover, for that it would be very hard that a party should lose, when he had paid under a mere mistake.—I conceive that this opinion, as applied to the particular case, and inasmuch as it did not embrace the consideration of the point how far the plaintiff in honour and justice was entitled to a return, did not fully meet the case, but it certainly contains nothing to militate against a general right of repetition. Mr. Justice *Ashurst* was against the right of return, but his only observation was, that the contract was a gaming policy, not adverting to the fact, that that very circumstance was the whole foundation of the plaintiff's claim. The opinion of Mr. Justice *Buller*, which must be stated at length, is as follows: "It is very clear to me that the plaintiff ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the law was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy without interest. There is a sound distinction between contracts executed and executory; and if an action be brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation. There was a case of *Walker v. Chapman*, some years ago in this court, where a sum of money had been paid, in order to procure a place in the customs; the place had not been procured, and the party who had paid the money having brought his action to recover it back, it was held, that he should recover, because the contract remained executory; so if the plaintiffs in the present case had brought their action before the risk was over, and the voyage finished, they might have had a ground for their demand; but they waited till the risk (such as it was, not indeed founded in law, but resting on the honour of the defendant) had been completely run. It makes no difference whether the premium was paid before the voyage or after it." The question is, Whether the observation, "that if the law was mistaken, the rule applies, that *ignorantia juris non excusat*," thus casually and incidentally applied, is to decide the important and extensive point at present under consideration? The rule in its terms is sufficiently satisfied, by holding that no man shall, under the pretence of an ignorance of the law, excuse himself from the performance

performance of his own obligations, or acquire an advantage, or avoid a detriment, when he has omitted using the means ordained by law for those purposes. Applied to the immediate subject matter, it has no reference to the point, of money paid under a mistaken idea of a preceding obligation. Applied generally and indiscriminately, it is inconsistent with the idea expressed in very unequivocal terms in the same opinion, that the money can be recovered back whilst the contract remains executory and contingent; for even in that case, the claim can only be money paid on a consideration, which could not have any legal effect; the opinion which admits the party to reclaim the money, whilst by the terms of the contract he may have a chance of benefit, but not afterwards, is totally opposite to the general ground, that he cannot in any case reclaim money paid under a mistake of law, and the several instances in which it has been held that money paid upon such considerations may be reclaimed, whilst the event is contingent, or when the event has been unfavourable to the receiver, and he has taken advantage of the invalidity of his promise, are inconsistent with the position supposed to be involved in the case of *Lowry v. Bourdieu*, that money paid under a mistake of law can in no case be reclaimed. If then the proposition is not universally true, I conceive it may be fairly argued that there is nothing in the case adverted to sufficient to counterbalance what may appear, upon due consideration, to be the true conclusion with respect to the subject of the present inquiry; and if the question previous to the last decision was open to argument, it will remain to consider how far, since that decision, the discussion of it is precluded by absolute authority.

Upon this subject I shall not add any further observations of my own. It will be recollected that the argument only refers to the general proposition, and not to its application, or to the exceptions which may be admitted in particular cases. Unless the subject is so concluded by authority as to be no longer open to argument, I conceive that no stronger argument can be necessary in indicating the true conclusion, than the opinion of *D'Aguesseau*, that one man cannot profit by the error of another, whether of law or fact, without absolutely contradicting a series of propositions, every one of which is a first principle of natural justice.

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If, upon the result of a fair inquiry, it should appear that money paid under a mere mistaken idea of legal obligation, without any purpose

purpose of gratuitous donation or liberality, and for the payment of which there was no moral duty, is subject to repetition, it seems to follow, as a necessary consequence, that a promise of payment founded merely upon such mistake cannot be obligatory : for there certainly are many cases in which an act, voluntarily done, will continue valid, notwithstanding a naked promise to do such act could not have been enforced, as is the case with regard to all acts of mere liberality ; but it would be absolutely contradictory, that a promise to do an act should be legally enforced, while the act itself, if done without such promise, would be liable to be rescinded. But admitting it to be established, that the act, if done, must be suffered to remain ; admitting that a man who has contrived to get a casual advantage by the loss and ruin of another, is not to be disturbed in the enjoyment of it, it does not follow as a consequence that a promise to confer such advantage without any adequate cause can be enforced consistently with the correct principles of legal reasoning ; the particular question, whether an indorser of a bill of exchange, making a promise to pay with a knowledge of circumstances by which he is legally discharged, but without knowing the legal consequences, is bound by such promise, is an instance of this description ; and the true decision of the particular question, depends upon the true exposition of the general principle. I shall not here enter into discussion, how this ignorance of the legal consequences is to be proved ; but will take it as an ascertained fact, observing by the way, that if the evidence upon that subject is indifferent, it is rather to be presumed that a man did not without any motive intend to renew an obligation, from which he was legally discharged, than that he did ; and that even supposing his knowledge of the law to be admitted, and supposing that he intended to enter into a new obligation, (the case being unaccompanied by any circumstances amounting to a new consideration,) it would be very difficult to reconcile a liability founded on such a promise, with the ordinary principles of the law, upon the topics to which I shall advert in the discussion of the question to which I confine myself, and which assumes the ignorance of the law to be an undisputed fact, and the supposition of an existing legal obligation to be the only cause and foundation of the promise.

I will also remove out of the discussion all considerations, founded upon the mode or circumstances of the promise. I will not rely upon the kind of evidence by which acknowledgments or promises are frequently obtained or proved, by the tricks of an artful person knowing the defect intended to be remedied, and  
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contriving to surprize from the ignorance of another a correction of it, by taking advantage of indefinite expressions extorted by terror or surprize, or not unfrequently fabricated by perjury. All these are accidental circumstances, but circumstances of very frequent occurrence, against which the legislature has in particular instances placed a guard by the statute of frauds; they are circumstances to which the subject is peculiarly liable from its very nature, but they may be all corrected by a similar legislative provision; and the general question would in its essential quality remain unaffected.

I shall just advert to the stress which is sometimes placed upon the acknowledgment of a supposed existing obligation. Such acknowledgment, according to the principles of accurate reasoning, cannot be regarded as any thing more than evidence of actual existing facts, by which the obligation referred to is supported; and considering it merely as a medium of evidence, it is, like every other evidence, subject to be contradicted and explained. I am not speaking of any fraudulent acknowledgment of non-existing facts, by which a person to whom it is made may be wilfully misled, or even of an innocent misrepresentation of facts operating to the prejudice of another, and for the consequences of which the person making it may be answerable; these are collateral and particular cases, depending upon particular reasoning, unconnected with the general subject. I suppose a man innocently to acknowledge a fact by which he is chargeable as true, but which appears eventually to be false: I suppose him to acknowledge that he owes 100*l.* to *A. B.* for the price of a horse; and it appears that the horse was sold by *C. D.*, or that the money has been paid, every body will admit that such acknowledgment is merely nugatory. I also suppose a man to state a given series of facts, upon which, in point of law, no obligation arises; and at the foot of that statement to subjoin, "I admit that in consequence of these facts, I am under such an obligation in point of law." I believe it will not be argued that his subjoining this erroneous legal opinion, will induce an obligation, which the facts are incompetent to support. These are extreme cases, but they are cases which exhibit the naked principle, divested of all adventitious colouring, which can only be calculated to mislead, and whatever is the true conclusion as to cases thus nakedly stated, must be equally true as to the other cases reducible to same principles, and unsupported by peculiar circumstances containing in themselves a substantive and efficient cause of obligation, and which cannot be drawn into consequence, where the same cause of obligation does not exist; in fine, an acknowledgment,

ment, in its nature and character, does not induce but only evidences an obligation; if the acknowledgment, however strongly expressed, appears upon examination to be no more than a false impression of facts, or a false opinion of law; it must be held, that, however complex the facts, or however difficult the law, the effect of the acknowledgment is destroyed, or else the true conclusion, in the cases above supposed, is the reverse of what has been assumed, or 3dly, there is to be an infinity of judicial discretion, according to the infinite variety of particular circumstances.

From a mere acknowledgment I proceed to the case of an actual promise, fully substantiated by proof, and perfectly unequivocal in its terms, but on the other hand admitted to be founded upon no other motive or consideration than the mistaken idea of a previous legal obligation. I conceive it will not be disputed, but that 1st, In general, a promise to pay a sum of money, or do any other given act, induces no legal obligation, unless founded on an adequate consideration; 2d, That no action can be maintained on a promise, unless such consideration is alleged, nor, 3d, Unless the allegation is specifically supported by the proof, or in other words, 4th, That although a valid promise is proved, and which is supported by a valid consideration, if there is a material variance between the consideration alleged, and that which is proved, the action cannot be sustained. As I cannot imagine that these propositions call for either proof or illustration to any person, however superficially conversant with legal inquiries, I shall not dwell upon them more particularly at present.

The effect of any promise in precluding the defence of the statute of limitations, or of infancy, or bankruptcy, is not to be regarded as an exception to the propositions just adverted to; because, in all these cases, the promise is not the foundation of the action, but merely the rebutter of a special ground of defence, the waiver of a privilege, and not the acquisition of a right.

It would be irrelevant to enlarge upon the very extravagant length to which what is called a promise has, in the first of these cases, been carried, to the almost total subversion of the authority of the legislature, but the subject is so far connected with the present as to render some mention of it not wholly inadmissible. The statute requires the action to be brought within six years after the cause of action accrued. Various determinations established and rightly established, that a promise to pay the debt destroyed the effect of the previous lapse of time. We are now accustomed to consider the promise stated in an action of assumpsit as merely a fiction, but

but an actual promise was formerly regarded as the essential cause of action; and it was only in *Slade's case* that it was fully established, that no other promise was necessary than the act of contracting the debt; but a subsisting debt was an adequate consideration for an actual promise, which promise being a substantive cause of action, was fully sufficient to support the demand. It then came to be said that the smallest acknowledgment was sufficient to constitute a promise, and there is no objection to its being so considered, if the jury should consider it as made with that view, and as intended to assent to the existence of a subsisting obligation, but when a casual conversation with a third person, intimating an intention to take advantage of the statute, when an absolute refusal to pay, assigning the protection of the statute as the ground of defence, when asserting the debt to have been actually paid, but under circumstances contradicted by the evidence; when the mere exclamation, what an extravagant bill you have sent me! are held to constitute an actual promise, the protection of the legislature is subverted, and an inlet given to perjury and misrepresentation, the general mischiefs of which are perhaps not compensated for by the particular advantage of sometimes enforcing the payment of a real debt, from which a true construction of the act of the legislature would furnish a protection. The object of the legislature is admitted to be the prevention of asserting claims formerly satisfied, and of which the satisfaction cannot be proved; for the effectuating that object a provision is made, the effects of which may eventually extend beyond the purpose intended; but if the law commands, the duty of the judge is only to obey: and it is impossible to suppose that immediately after the statute, such decisions as I have alluded to, some of which are reported and the others I have known to exist, could have taken place; they have only arisen in consequence of the gradual progression, from an actual promise to an acknowledgment implying a promise, and from an acknowledgment implying a promise to one containing an absolute refusal.

In the other two cases, it is allowed, that there must be an actual promise, and that a mere acknowledgment will not be sufficient, the only plausible ground for the opposite determination, in the case of the statute of limitations, viz. that the statute is only to be regarded as inducing a presumption of satisfaction from length of time, has not any application to either of these; in both cases the right of defence is founded upon a different ground, in both there is an adequate ground for an actual promise, but in neither is a mere acknowledgment of the fact of any importance; for

for the existence of the fact acknowledged is consistent with the admitted ground of defence.

But it has been held that the existence of a previous moral obligation is sufficient to maintain an actual promise. The cases in which this has been decided, seem, as far as I am aware of them, almost wholly referrible to the principle of a subsequent assent, being equivalent, under these circumstances, to a previous request, and operating retrospectively and with some degree of fiction, as amounting to such request. I am not acquainted with any case which has been under the cognizance of judicial authority; where the mere discharge of a moral obligation was stated, upon the declaration, as the consideration of the promise.

The term *moral obligation* is very difficult to be defined for the purpose of legal reasoning, although it may perhaps be sufficiently definite for the purposes of the science to which it belongs, wherein the source of obligation, and sanction for its performance, are referred wholly to the internal sense of rectitude in the person supposed to be affected by it. A term so familiar in its application, does not at first view appear to present any peculiar difficulty, but when examined with a view to legal precision the apparent facility ceases; and whilst certain attributes are applied to the indefinite term, the criterion, by which the propriety of the term, and the extent of the consequences applied to it, are to be determined in particular instances, is itself by no means clearly settled. It will hardly be contended that every duty of imperfect obligation, the existence of which can be demonstrated by the science of ethics, can be the consideration of a valid promise to be enforced by the coercion of the law; the duties of gratitude and beneficence are allowed to be real and very extensive sources of moral obligation, but are never held an adequate foundation for legal responsibility. A declaration, that in consideration that *John* had formerly lent a sum of money to *Richard*, which had been attended with very beneficial consequences, and that *John* was now in indigent circumstances; *Richard* promised to pay him 100*l.* a-year, would scarcely be expected to stand the test of a demurrer; but the morality of the obligation would be supported by every principle of ethical reasoning. But though I advert to the difficulty of fixing the standard of that moral obligation, which shall be sufficiently particular and distinct, to be legally recognized as the foundation of a valid promise, I do not feel myself engaged to attempt a solution of it; for taking the term in its most vague and indefinite character, and allowing it in that character every thing that can be claimed for it, I consider it as inapplicable to the

point under consideration; and, to be more precise, I consider that the mere mistaken opinion of legal responsibility, whether generally or in the particular case which has occasioned these observations, is not to be regarded as a moral obligation, according to the most extensive sense, in which that term can with reference to the present purpose be applied.

When the effect of the supposed obligation is all gain on the one side, and all loss on the other, it is obvious that there is no morality to appeal to in support of it, and that the conclusions of morality are wholly on the opposite side, for there cannot be much difference amongst casuists upon the question, Whether a man ought to take advantage of an engagement in his own favour, which has no other foundation than the ignorance of another, who supposed himself to be merely satisfying a legal claim? But in most disputed cases, there is an actual loss, and the question is on whom the consequences of it are to fall; where both are equally free from all imputation of impropriety or neglect, to use the language of the law, where both are equally innocent, there is no principle of moral duty to vary the decision of the law. The positive rule, that where equity is equal, the law is to prevail, is founded upon principles not only of that equity, which is a particular system of established jurisprudence, but also of the more extended equity, which consists in moral obligation. In short there is no equity, no moral obligation, the pressure of the accident is to be directed by other considerations, and equity and morality are wholly unoperative, and whatever may be affirmed upon that subject, when no culpability is imputable to either, is to be applied, if possible, with greater force in favour of the one side, when any neglect is imputable to the other. If then the law decides that the loss shall fall upon the one, and there is no reason of moral equity to throw it upon the other, and, *a fortiori*, if the decision of the law is accompanied by any negligence in the party, what foundation can there be for asserting that the ignorance and inadvertence of the party who is exempt from the loss, can be the source of moral obligation in favour of him who is subject to it? Or if there is no such obligation previous to the making of the promise, is the act of promising so occasioned, both cause and effect? And does it render those circumstances morally obligatory which previously were not so? And if not, what is the moral obligation which amounts to a valid consideration for the promise? When the law has settled the loss between the two, to the one party it is as much his own, to the other it is as much extrinsic as between two strangers absolutely unconnected. Whatever throws the burthen from the one who is to bear it, and casts it upon the

other who is not, becomes to all intents and purposes an adventitious gain to the first, arising from the detriment of the last. Can the one consistently with moral sentiments found his title to such gain merely upon the advantage which is taken by the ignorance of the other? Is the other, merely in consequence of his ignorance, so far committed in point of moral duty to undertake an adventitious loss, as to render it meet that the authority of justice should interpose to compel the execution of his engagement?

To be more particular: A person engages to do a given act upon a certain condition, the condition is not performed, the obligation then is (collateral circumstances out of the case) at an end; and it cannot be imputed to him as a violation of good faith, that he does not perform the act intended, he is under no moral obligation to do it; and if he promises to do it, there is no consideration upon which the promise is to be maintained. If he makes the promise under no misapprehension, he is subject to the imputation which belongs to every man who violates a promise of mere liberality, and to nothing more. If he makes it under the misapprehension of a legal duty, he is not even subject to that; if the error is in the fact, every one is agreed both as to the morality and the law; if it is in the law, it is for those who contend for a different conclusion, to shew the ground and reason of the difference.

But the condition attached to a promise may be either expressed, or it may be included in the very nature of the promise itself; and the intention may be general to enter into the engagement, subject to the legal consequences of it, without an accurate information of what those consequences may be. From the failure of the condition the obligation is at an end, as if it never had existed, no blame can be assigned to the refusal of doing the act that was promised: for, under the existing circumstances no such promise was made; previous to an actual promise there is no duty whatever; the promise supposes a duty, and does not create one, the supposition is destroyed, and the promise is at an end.

And from particular to pass to technical reasoning; in case a declaration should allege the indorsement of a bill, and those circumstances by which the indorsee was legally discharged, but that the indorser believed and imagined himself to be liable in point of law to the payment of it, and in consideration of such belief and imagination promised to do so. Or if it was declared, that the defendant subscribed a policy on a ship, which was lost by the carelessness and neglect of the master without any fraud, but that the defendant believing the same to be barratry, promised to pay his subscription; it would not be difficult in either of these cases

to anticipate the result. But if the full allegation of the facts, upon which the obligation is supposed to arise, should evince that no such obligation existed, can the proof of the same facts upon a different allegation have a greater effect? and if the facts above stated, instead of being stated in the declaration, appeared in a special verdict given upon a declaration in the accustomed form, it would be very difficult to find a reason for a more favourable decision, the consideration, which in the one case would be held insufficient, would vary from the allegation in the other. In an action on the insurance, a letter is produced; stating, I understand the vessel was lost not by fraud but by other accident, which, though not fraudulent, was highly improper, but as that has lately been decided to be barratry, I will pay it in due course. A new decision shews that that was a mistake; the question is, if a letter so framed is conclusive, and if not, why should a letter from an indorsee stating—the bill was not presented in time, but as I find the drawer had no effects in the hands of the drawee, and my attorney's clerk tells me I am answerable—I will therefore pay it in a month? And if such a letter would be *felo de se*, is there any substantial reason for giving a higher effect to a mere general promise, the cause of which, from the nature of the transaction, appears to be no more than a similar piece of ignorance?—And again.—The declaration states that the defendant indorsed, and was thereby liable, and being so liable in consideration, therefore promised to pay. If he is chargeable under this obligation, it is either by reason of his original liability or of his promise, but the former is negatived by the supposition; the latter is not true, for the consideration was not that he was liable, but that he thought himself liable, which is a variance. And let not this reasoning be objected to as founded upon cavil. The course of special pleading, and the necessary conformity between the pleadings and the proofs are, after making due allowances for acknowledged legal fictions, among the surest touchstones of legal responsibility. In the action of *indebitatus assumpsit*, the consideration is usually every thing, and the actual promise nothing. In the case of bills and notes, the promise is only inserted in the declaration, for the convenience of adding the ordinary money counts; the basis of the action is the liability upon the original contract; but here the hypothesis supposes that liability not to exist; and it is impossible to deny that an apprehension of liability, and an actual liability are perfectly distinct not only in form but in principle; if then the promise and not the liability is the ground of action, it must either be admitted that the consideration stated of an actual liability is false, and that the ground is therefore insufficient, or,

2dly, the proposition above assumed as true, and which it will be difficult to contest, viz. that no action can be maintained on a promise, unless it is founded on an adequate consideration, nor unless such consideration is alleged, and the allegation supported by proof, must be rejected as false; or else 3dly, a similar falsehood must be imputed to the proposition last mentioned, viz. that an apprehension of liability, and an actual liability are perfectly distinct. And if this part of the argument is objected to, as founded upon reasoning which is technical and artificial, let it be remembered, that I do not rest the opinion which I am endeavouring to support merely upon that mode of reasoning, but that I have previously deduced my observations from sources of a different nature; that my present object is to manifest the same conclusion, as equally resulting from the most extensive principles of general justice, and from the strictest rules of technical practice.

To the preceding arguments, I would add a short reference to some cases in which the invalidity of a promise has been judicially held, to result from the inadequacy of the consideration. In *Rann v. Hughes*, before the House of Lords, cited 7 T. R. 350., the substance of the declaration was, that the plaintiff being indebted as administrator promised to pay personally, and it was holden that there was no sufficient consideration to support this demand, against the administrator in his personal capacity, for he derived no advantage or convenience from the promise. In the case of *Mitchison v. Hawson*, (to which the preceding is a note,) it was stated that the husband was indebted for work done for his wife before her marriage, and in consideration thereof, promised to pay. The husband was only liable jointly with his wife; and by her death would be discharged; and such joint liability was held no consideration for his separate promise. In *Pearson v. Henry*, 5 T. R. 6. an administrator submitted to arbitration; the arbitrators found a sum due from the intestate's estate, but did not award payment; the plaintiff offered to prove, that when the defendant entered into the arbitration bond, he had expressly undertaken to pay what might be found due; the evidence was rejected; and when the case was brought before the court, Mr. J. Buller said, that such evidence would not avail the plaintiff in that action, for the action was brought against the defendant as administrator; and if there were no assets, the personal promise of the administrator would be *nudum pactum*. Now in the two former of these cases, there was an actual though special liability to do the act promised; but such special liability was not held to be any consideration for a general promise; the last one is only mentioned as confirmatory of the same doctrine; but if a special sub-

sisting

isting liability is no consideration for a general promise, much less should a mere supposed liability, when all actual liability had ceased, be allowed to have a more extensive operation. A valid consideration must in general consist in some thing which is to the advantage to the defendant, or detriment of the plaintiff, but the defendant has no advantage of induce him to undertake the payment of a debt, from which he is legally discharged, the detriment to the plaintiff which is requisite to form a valid consideration, is a detriment which he is induced by the promise to undertake, and not one to which he himself is already subject, and which he has no legal right to shift upon another. And with respect to the question of moral obligation, I have already proposed the consideration of the question, how far, when the law pronounces upon which of two innocent parties a loss is to fall, and there is no special reason to throw it on the other, and a promise is made merely under a mistaken idea of legal obligation, any principle of moral duty preceded, accompanied or resulted from such promise, so as to give it a legal validity and effect, I have already disclaimed, relying upon the argument deduced from the beggarly evidence by which these promises are supported, and the artful contrivances by which they are obtained by cunning from ignorance; I have argued the case as free from these objections; but the tendency of a different conclusion on the legal question to produce such evidence, and suggest such contrivances, may, in closing this part of the subject, be referred to as an additional reason, for supporting what I have endeavoured to establish as the general principle, and for evincing its justice and propriety. It may be said that *vigilantibus non dormientibus jura subveniunt*; but this rule rather operates to evince the propriety of deciding where the loss shall originally fall, than to encourage the experiments of art upon ignorance, in transferring it from one person to another, and, however rightly the law may encourage vigilance, the general rules of justice must be ever at variance, with the seizing at adventitious advantages by one man, in opposition to the legal right of another, with the triumph of artifice and cunning over ignorance and weakness.

I have thus far endeavoured to forget, that any foreign system of jurisprudence may, with respect to the question in discussion, have a tendency to assist in the illustration of our own, but there appears to me to be such an analogy between the action of *indebitatus assumpsit*, and the *pactum pecunie constituta* of the Roman law, that I think there would be more affectation in omitting to notice the accordance which occurs to the mind, than there can be of real pedantry in the introduction of it. It must be recollected,

that the very term *nudum pactum*, as importing a promise invalid for want of consideration, is borrowed from the *Roman* law; and a very slight acquaintance with the two systems upon the subject, must be sufficient to evince their general conformity. By the *Roman* law a *pactum constituta pecunie* was a promise to pay a subsisting debt, whether natural or civil, made in such a manner as not to extinguish the preceding debt, and introduced by the *Prætor* to obviate some formal difficulties. I do not know that any more correct idea can be given of the origin and nature of the action of an *indebitatus assumpsit* (a): it was an action that might be brought upon the promise for the payment of a debt, it was not subject to the wager of law, and other technical difficulties of the regular action of debt, but by such promise the right to the action of debt was not extinguished or varied. In *Stade's case*, 4 *Rep.* 4. the declaration stated, that in consideration that the plaintiff sold the defendant certain corn, the defendant promised to pay. The jury, by a special verdict, found that there was no other promise except the bargain for the sale. From the discussion which the case received, it is evident that it could not have been before that time usual to proceed in assumpsit without a distinct express promise, but the sufficiency of the declaration was established, and the case is in a great degree the foundation of the most ordinary action in modern practice. It will be recollected, that notwithstanding the jealousy which, on account of one arbitrary principle, was heretofore entertained of the civil law, did not extend to the Chancellors by whom the writs were framed, and the conformity in this case between the two remedies, and the entire system, seems to be too great to be merely accidental; and it was a first principle of the obligation of the *pactum pecunie constituta*, that it could not subsist unless there was a actually a pre-existing debt.

*Henneccius ad Pand. de jur. et fact. ign.* has the opposite opinion to that of *D'Aguesseau* and *Vinnius*, with respect to the right of repetition, but with respect to an engagement entered into under a mistake of law, he holds, that no obligation is contracted. His expression is as follows: *Distinguendum, utrum ex ignorantia juris rem tradiderim eamque velim actione repetere: an eam promissam ex hujus modo ignorantia adhuc possideam, et de ea retinenda sim sollicitus. Priori casu, inquitur leges, ignorantia nocet, L. 10. c. h. t. posteriore non nocet, sed promittens exceptione tutus, L. 7. 8. D. h. t.*

I have carried this preliminary dissertation much beyond the limits which I originally expected, but I trust that the topics which I have introduced will not be found wholly uninteresting,

(a) See Treatise on Obligations, P. 2. c. 6. f. 9.

to those who are disposed to attend to the investigation of legal principles. I am aware that such discussions are by no means a favourite branch of study, and I do not indulge the idea that the present attempt will be admitted as an exception. To the charge of presumption in questioning the conclusions of judicial authority, may be added that of ascribing a disproportionate importance to the questions examined. I certainly feel a different impression upon that subject, and hope that the importance of the questions themselves, considered with relation to their consequences and effects, has at least had some co-operation with the wish to support former opinions, not hazarded upon the impression of the moment, but founded upon deliberate though perhaps erroneous consideration. In thus endeavouring to promote a familiarity with other laws, I am sure that I shall not, deservedly at least, incur the imputation of indifference to our own, but in this discussion as in all others, I am desirous of witnessing such a uniformity between different systems of jurisprudence, as results from correct and proper application of the general principles of natural reason, and universal justice.

# DISSERTATION

ON

## MISTAKES OF LAW.

By M. D'AGUESSEAU.

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I. EVERY man may be contemplated with relation either to the public order of society, or to the particular engagements which he contracts with other men ; from this twofold idea, results the distinction which the *Roman* jurists seem to have established between the public state and the private.

II. In the first of these aspects, a man is committed with the law itself ; it is with the law alone that he contracts, that he engages, that he binds himself, with respect to every thing which regards the general police, and the exterior order of society ; it is to the law alone that he is accountable for his infractions of it.

III. In the second aspect, on the contrary, a man has only to regard the person with whom he contracts ; the law does not punish an ignorance which relates only to a matter of private right ; although it establishes this right in the same manner as the public law ; it only regulates it with reference to the interest of individuals, and the loss of the rights which might have belonged to them is the only penalty which the law attaches to those who, by their imprudence, have merely infringed (*bleffé*) the maxims of private order.

IV. As the public order regards the public utility directly, while the order of private right only regards it indirectly, the first ought always to be considered as more important and inviolable than the last.

V. As public law only regulates the most exterior actions of men, it is more easily to be conceived and observed than private.

Of

Of the fifty books of which the digest is composed, there are more than forty entirely devoted to the explication of the rules of private right; and there is almost the same proportion in the code of *Justinian*.

VI. From all these differences we may deduce this general consequence, that although ignorance of legal obligation is always reprehensible, it is however much more criminal, when it violates the maxims of public order, than when it merely affects some rule of private right.

1st, Because the law is always in the right, and as in matters of public order, a man only treats with the law, there can never be that compensation of mutual faults, which often serves as an excuse to those who treat with other men upon any thing which relates to private order (a).

2d, Because the person who by mistake contravenes a private law, does no injury to any one but himself; while he who through ignorance violates a public law, or rather a law of public order, attacks as much as in him lies the whole state of civil society, and directly offends against the general utility of the community.

3d, Because the public law (by which I mean that which ought to be practised by all the citizens) being much more simple, the person who is ignorant of it is much more inexcusable.

VII. Then by a necessary consequence of this principle, ignorance of public order ought always to be punished, although the quality of the persons, the nature of the laws, and the variety of circumstances may very much increase, or diminish the degree of punishment.

VIII. Then, that which is lost by an ignorance of the public law, is lost without resource, since this ignorance, so far from serving as an excuse, stands in need of one itself.

IX. Much less then can an ignorance of public order be a sufficient reason for recovering an advantage, which a party has failed to acquire; for how can that ever be the object of recompence which may be deemed fortunate in escaping punishment?

But as these rigid maxims cannot always be observed with regard to private right, it is necessary to premise some general notions, which may serve to discover the real principles that are applicable to this subject.

(a) This reason must be acknowledged to be rather fanciful than solid.

I. It is naturally just that one man shall not be enriched by the detriment and injury of another (*a*).

II. That which is ours cannot, without our own act, be transferred to another (*b*).

But consent or even neglect is here understood by the name of an act. *Vi. Jac. Gothof. ad hancce regulam.*

III. There is no obligation without a cause;—a consequence of the preceding principle.

The principles of equity and justice give a right to reclaim what belong to one person and is without any cause, in the possession of another (*c*).

IV. That which is null in itself produces no effect; then, if there is no obligation in the beginning, because the promise is made without a cause, the obligation before payment may be rescinded, after payment the thing paid may be reclaimed (*d*).

Hence arise the actions *condictio indebiti*, *condictio sine causa*, *condictio causa data, causa non secuta*—and *condictio ob turpem vel injustam causam*. *Tot. Tit. ff. & Cod.*

V. It is the same whether there is no cause, or an unjust cause (*e*) at first, or whether the cause for which the obligation was contracted has failed.

Whether the promise was from the beginning without any cause; or whether there was a cause which ceased, or failed, there is a right of repetition. (*f*) *L. 1. § 2. ff. de Cond. sine Causa.*

It is evident that whatever has been received by any person without a just cause, or for a cause which is no longer just (*g*), may be reclaimed.

If a payment be made by error on account of any of those

(*a*) *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiores.* *L. 206. ff. de R. J. L. 14. ff. de Cond. Indeb.*

(*b*) *Id quod nostrum est, sine nostro factō ad alterum transferri non potest.* *L. 11. ff. de R. J.*

(*c*) *Hæc condictio ex bono et æquo introducta, quod alterius apud alterum sine causâ deprehenditur, revocare consuevit.* *L. 66. ff. de Cond. Indeb.*

(*d*) *Si ab initio non consistit obligatio quia sine causâ promissum est, antè solutionem ipsa obligatio, post solutionem quantitas soluta condictetur.* *L. 2. ff. de Condic. sine causâ.*

(*e*) This does not mean an illegal contract, for in respect to that it is an established principle that both parties being in equal turpitude there is no repetition.

(*f*) *Sive ab initio sine causâ promissum est, sive fuit causâ promittendi, quæ finita est, vel secuta non est, dicendum est condictio locum esse.*

(*g*) *Constat id demum condici posse alicui, quod vel non ex justâ causâ ad eum pervenit, vel redit ad non justam causam.* *Dict. Leg. § 3. ibid.*

causes, which are of no avail or effect in law, there is a right of repetition (a).

VI. It is of little importance whether the obligation be entirely without any cause at all, or whether there be only a cause as to part: what is useful is not vitiated by what is useless, neither can what is useless be confirmed by what is useful; but the obligation is destroyed (b). Such are the very words of *Julian*, in *L. 3. ff. de Cond. sine Causa*.

Neither does it signify, whether a person undertakes an obligation entirely without cause, or whether he undertakes a greater obligation than he should have done, except that he must proceed in a different manner, to be liberated from the whole or from the excess.

VII. The same obligation may arise from several causes, one of which may fail while the others remain, but as long as any one cause remains the obligation is sustained; for such an interpretation ought always to be made, that the act may rather stand than fall.

VIII. A thing may be said to be not due, in several different ways.

1. If it is not due by any law, that is, neither by the law of nature, nor by the civil law.

2. If it is due by the law of nature, or as it is called by jurists the law of nations. *L. 47. (c). ff. de Cond. Indeb.* but is not due by the civil law. *V. C. 64. ff. de Cond. Indeb. (d)*

3. If it is due by the civil law, but not by the law of nature.

4. If it is due both by natural and civil law, but the debtor may protect himself by a perpetual exception.

Exceptions may be distinguished into two kinds; for they differ with respect to their duration, and their effect.

With respect to duration, they are either temporary, or perpetual, or ambiguous, that is, it is doubtful whether they are temporary or perpetual, which commonly depends upon an uncertain

(a) *Ex his omnibus causis, quæ jure non valuerunt, vel non habuerunt effectum, secuta per errorem solutione, conditioni locus erit. L. 54. ff. de Cond. Indeb.*

(b) *Utile ab inutili non vitatur, nec inutile ab utili confirmari potest: Sed scinditur obligatio.*

(c) *Indebitam pecuniam per errorem promissisti; eam qui pro te fidejusserat, solvit: Ego existimo si nomine tuo solverit fidejussor, te fidejussori, stipulatorem tibi obligatum fore, nec expectandum est ut ratum habeam; quoniam potes videri id ipsum mandasse, ut tuo nomine solveretur; sin autem fidejussor suo nomine solverit quod non debebat, ipsum a stipulatore repetere posse: quoniam indebitam jure gentium pecuniam solvit, quo minus autem consequi poterit ab eo, cui solvit, a te mandati judicio consecuturum; si modo per ignorantiam, petentem exceptione non summovertit.*

(d) *Vi. infra, in the text.*

event. For instance, I owe you a sum of money, and you agree not to demand it, unless *Titus* is consul; if *Titus* dies, the exception becomes perpetual, if he is made consul, it appears *ex post facto* to have been temporary. *Vi. Cuj. ad Leg. 66. § L. 49. ff. de Cond. Indeb.*

With respect to the effect, there are some exceptions which altogether destroy the natural obligation, others which do not destroy the natural but prevent the civil obligation.

An agreement never to sue, the exception of fraud, of the *Senatus consultum Velleianum* (a), the decisory oath, are instances of the first kind.

The exception of the *Senatus consultum Macedonianum* (b), of a judgment. The exception or retention arising from the *Falcidian* law, are referable to the second.

Another distinction may be deduced from the laws themselves. *L. 40. ff. de Cond. Indeb. (c)*

An exception is given either for the sake of the person who is obliged, as the *Senatus consultum de intercessionibus* (d); exceptions of this kind in the gloss, and other writings are called favourable.

Or it is given in odium of the person to whom the engagement is made: an example of which is the *Senatus consultum Macedonianum*, and these are by the same interpreters called odious.

IX. Error of law ought not to give any person a title of acquisition: the reason is evident, and *Cujas* comprizes it in a word in his *Commentary on Law. 8. ff. de Juris et facti Ignorantia*, "Otherwise, an ignorance of the law would be an advantage to the person making the mistake (e)." Error would have more

(a) The object of the *Senatus consultum Velleianum*, was to invalidate engagements entered into by women, on account or behalf of other persons. I cannot adopt the opinion that an exception founded upon this regulation, which was made on account of a facility ascribed to the female sex, of entering into engagements for the benefit of others, dispenses with the natural obligation of performing their engagements. But the opposite principle certainly seems to pervade the *Roman* law upon the subject. The decisory oath is applied when a person making a demand offers peremptorily to abide by the oath of the person from whom it is made as to the truth of it. See the last Section of the *Treatise on Obligations*.

(b) The *Senatus consultum Macedonianum* (so called from *Macedo*, a famous usurer) provided that no action should be allowed for money lent to sons under the power of their fathers. By the *Roman* law, a son of whatever age continued under the power of his father unless emancipated.

(c) *Vi. infra.*

(d) *Viz. the Senatus consultum Velleianum.*

(e) *Alioqui erranti lucro esset ignorantia juris.*

privileges than knowledge, and ignorance would be recompensed, whilst science would not.

Hence those solemn definitions of the law; ignorance of the law does not profit those who are desirous of acquiring an advantage (a). *L. 7. ff. de jur. & fact. ignor.*

An error of the law cannot be taken advantage of even by women (b). *L. 8. ff. Cod.* Ignorance of the law is of no advantage in case of usucaption. *L. 4. ff. Cod. (c). L. 31. in pr. ff. de usurp. & usucap. (d) L. 2. § 15. ff. Pro. Emp. (e) & alibi passim.*

But this maxim seems only to have been contemplated in one point of view. Most of those who have treated of it, have only considered it in regard to the person who falls into an error of law, to whom it is certain that his ignorance can never be of any advantage, but the rule does not appear less certain, with respect to those with whom another by mere error of law may contract an engagement. I mean it is scarcely less evident, that an error of law in one party, is not a sufficient cause to afford title and means of acquisition to another. I suppose the error in law to be the only cause, and the single foundation of the contract or obligation, in a word of the act which is passed, and proceeding upon this supposition, I say, that an error cannot profit the person who obliges himself, neither can it give an advantage to the person to whom he is obliged.

OTHERWISE ALL THE PRINCIPLES WHICH WE HAVE JUST PREMISED AS TRUE WOULD BE ABSOLUTELY FALSE; AND YET IT MAY BE OBSERVED, THAT THERE IS NOT ANY ONE OF THEM WHICH IS NOT A FIRST PRINCIPLE OF NATURAL JUSTICE.

It would be false, that *equity does not allow one man to enrich himself at the expence of another*; that *what belongs to me cannot be acquired by another, without my consent or fault*; unless it can be said, that one who is under an error gives a real consent, or that the (*loi*) law regards a legal mistake (*erreur de droit*), as a fault which it

(a) *Juris ignorantia non prodest acquirere volentibus.*

(b) *Juris error nec fœminis in compendiis prodest.*

(c) *Juris ignorantiam in usucaptione negatur prodesse.*

Usucaption is a right acquired by a length of possession for a certain time by a person *bona fide* believing himself to be the owner, and not knowing the right of the person really entitled. But if he has a knowledge of the facts upon which that title is founded, it is decided by this text that an ignorance of the legal right resulting from them is of no avail.

(d) *Nunquam in usucaptionibus juris error possessori prodest, et ideo Proculus ait, si per errorem initio venditionis tutor pupillo auctor factus sit; vel post longum tempus venditionis peractum, usucapi non posse: quia juris error est.*

(e) *Si a pupillo emero sine tutoris auctoritate, quem puberem esse putem; dicimus usucaptionem sequi, ut hic plus sit in re quam in existimatione. Quod si scias pupillum esse, putes tamen pupillis licere res suas sine tutoris auctoritate administrare, non capies usque quis juris error nulli prodest.*

punishes by the loss of the property, that was the subject and occasion of it. But the first cannot be maintained, and how is it possible to prove the second? Even supposing that a person who mistook the law deserved to lose his property, how could that prove that the other deserved to gain it? And that for this single reason, that the person who erred was not acquainted with his right. In a word, who will maintain that for this error, the one deserved to be stripped of the property which belonged to him, the other to be invested with that which did not?

This is not all; it must be further maintained, that an obligation without any cause, or founded upon a cause which was false, unjust, and illegitimate, could be valid; that that which is null could produce effects, that the law could not establish that favourable remedy, to which it gives the name of *condictio sine causa*, or *condictio indebiti*, and that thus converting all obligations without cause into forced donations, it regarded all those who contracted from error in point of law as real donors.

To avoid all these inconveniences, nothing is more simple than to give the rule of law all the extent of which it is capable. *Error juris in compendiis non prodest*; then it is of no advantage to either party, *neque reo neque stipulatori prodest*, to the one, because it is not just that his fault should be of any service to him, and that he should derive an advantage from his own error; to the other, because there is not a single law in the whole system of jurisprudence, which establishes that an error of another shall of itself, and without any other cause, be a legitimate title and a just means of acquisition.

All these principles being allowed, it appears easy to decide what are the consequences which ought to result from an error of law.

For 1st, The question relates either to acquiring, or to losing.

If it relates to acquiring, an error of law is neither an excuse, nor a title, except to minors and others, who are assisted even in respect to gain, *nisi minoribus aliisque quibus etiam in lucro succurritur*. L. 7. § 6. *et seq. de Minor.*

And in this principally consists the difference, between error of law and error of fact. In error of fact, (says Cujas *ad L. 8. ff. de jur. et fact. ignor.*) there is not any distinction between gain and loss, in error of law there is (*a*). See L. 1. 4. 8. *ff. de jur. et fact. ignor.*

When the question relates to keeping, or to avoiding the loss of

(\*) In errore facti non distinguuntur damna a compendiis: in errore juris distinguuntur.

what we already have, the discordant opinions of the interpreters can scarcely or not even scarcely be reconciled (a); and least you should accuse the modern interpreters alone, you may consult the *Basilican* interpreters, among whom there is a very great dissension upon this subject.

For they expound the words in *L. 7. ff. de jur. & facti ignorantia*, that an ignorance of law does not injure those who are seeking their own (b), as follows :

For instance, a person stipulates for a slave to be given to him of the value of twenty guineas; the slave being dead before any delay, the promiser supposing himself to be still bound by the stipulation, pays the twenty guineas. The law assists him, because his claim is founded upon the loss of the money, and he is entitled to repetition.

The error is manifestly an error of law. The promiser is ignorant of that trite and common rule; that the debtor of a specific thing is liberated by its happening to perish if he is not guilty of any delay in the delivery.

But because the question relates to avoiding a loss, the error of law does not prejudice him; nay even though the money was actually paid, it may be reclaimed, which is particularly worthy of observation, as we shall observe in the sequel.

But in the following article, the *Basilican* interpreters seem to have taken up quite the opposite opinion; for they subjoin these words, *except those who pay what is not due from an ignorance of the law*, as in *L. 1. Cod. p. 18. Anatolius* says, a person who pays money which is not due through ignorance of the law, has not a right of repetition, but if he pays it through an ignorance of fact he has (c).

*Quo teneam vultus mutantem Protea nodo.* But who shall wonder at so great a discord amongst the interpreters of the laws? For the laws themselves appear to be discordant with each other.

For *Dioclesian* and *Maximian* state in the law, *Cum quis. 10. Cod. de jur. & facti. ign.*

That where a person ignorant of the law, pays money which is not due, the right of repetition ceases, for repetition is only allowed in cases where what is not due is paid in consequence of an error

(a) *Vix ac ne vix pugnantes interpretum sententiae in concordiam reduci possunt videntur.*

(b) *Juris ignorantia suam petentibus non nocet.*

(c) *Excipe eos qui jus ignorantes indebitum solverint. Ut L. 1. &c. Anatolius ait, Qui per errorem juris indebitam pecuniam solvit, non repetit; sed autem per ignorantiam facti, repetit.*

in fact (a). Here the various ways in which a thing is not due are not distinguished; but it appears clear that whatever is paid, through an error of law, without being due, cannot be reclaimed, and that there is no right of repetition, except for what is paid in consequence of an error in fact.

But the very title of the *ff. & Cod. de conditione sine causa* shews the contrary; for it is an undoubted principle of law, that what is promised either without a cause, or for an unjust cause, may be recovered back. See *supra*, No. VI. (p. 411.)

Add. law 40. *ff. de Cond. Indeb.*

“ He who has a perpetual exception may reclaim what is paid by error. But this is not perpetual: for if the exception is given for the sake of him with whom the contest is, as in the case of the *Senatus consultum Velleianum*, the payment may be reclaimed; but where the exception is given in odium of him to whom the money is due, there is no repetition; as if a son under the power of his father, takes money by way of loan contrary to the *Senatus consultum Macedonianum*, and after he is his own master pays it, he has no right of repetition (b).”

In this law every body will easily perceive the question to relate to error of law, who observes,

1. That it is evidently to be collected from the very tenor of the words, that the person who paid was ignorant that he might protect himself by a perpetual exception. *Qui exceptionem perpetuam habet, solum per errorem repetere potest.* Therefore what is paid by error or ignorance of the exception may be reclaimed. This is the sense which the words taken in themselves seem to bear; but if a person is ignorant that he has a perpetual exception, of what is he ignorant but the law?

2. That this manifestly follows, not only from the words but also from the very reason of the law; for what distinction does the jurist use to explain the distinction between those exceptions of which an ignorance does prejudice, and those of which it does not? Does he separate an error of fact, from an error of law? On the contrary, he plainly joins them together when he shews, that the stress of the question is placed in the very nature of the exceptions themselves; that some are favourable, which, ac-

(a) Cum quis jus ignorans indebitam pecuniam solverit, cessat repetitio: per ignorantiam enim facti repetitionem tantum indebiti soluti competere tibi notum est.

(b) Qui exceptionem perpetuam habet, solum per errorem repetere potest. Sed hoc non est perpetuum; nam si quidem ejus causa exceptio datur cum quo agitur, solum repetere potest, ut accidit in Senatus Consulto (nempe Velleiano) de intercessionibus, ubi vero in casum ejus, cui deberetur, exceptio datur, perperam solum non repetitur, veluti si filius familias contra Macedonianum, mutuum pecuniam acceperit, et interfamilias factus solverit, non repetit.

ording to *Cujas*, destroy even the natural obligation; others odious, which are rather detrimental to the creditors, than profitable to the debtors, introduced not in favour of the later, but in odium of the former, and which therefore only destroy the civil action, and not the natural obligation.

From this rule, almost all the distinction between law and fact is a departure (*exulat*), it fully appears, that this famous distinction has no place in the rule itself, which is entirely founded upon different principles.

Therefore, this disposition may be extended to error in law. This may also be collected from *Cujas ad leg. 66. ff. de Cond. Indeb.*

In addition to this, the right of reclaiming what is paid without being due, is not founded upon any positive law or edict, but was introduced into practice by adopting the principles of natural equity; for nothing is more repugnant to equity, than that what is paid without being due in any manner, shall not be subject to be reclaimed. And as this action (as *Papinian* says) reclaims what belongs to one person, and is without cause in the possession of another, why shall it not revoke what is given by error of law? For an error of law can never be allowed as any cause.

Lastly, *Papinian*, the life (*viva vox*) and oracle of *Roman* jurisprudence, considers himself as having embraced the whole subject by a single distinction, in *L. 7. & 8. de jur. & fact. ignor.*

An ignorance of law does not those avail, who are desirous of acquiring, but does not injure those who merely seek their own. *L. 7. (a).*

An error in law does not subject any person to the injury of losing his property (*b*). *L. 8.*

Therefore wherever the question relates to avoiding or repairing a loss, an ignorance of the law does not induce any prejudice.

This being the case, who will support on the one side, *Dioclesian* and *Maximilian*, plainly maintaining that money paid by an error of law cannot be reclaimed; and on the other side, the jurists and the spirit of equity itself, exclaiming that an error in the law shall not injure those who are seeking their own, or, which is the same thing, shall not injure any person in regard to the incurring a loss.

(a) *Juris ignorantia non prodest acquirere volentibus, suum vero petentibus non nocet.*

(b) *Error facti ne moribus quidem in damnis vel compendiis obest, juris autem error nec famulis in compendiis prodest. Ceterum omnibus juris error in damnis accitendis sui suæ non nocet.*

The gloss, and the doctors of that stamp, (*assecta*), which was the case with almost all before the time of *Cujas*, would avoid this antinomy, by holding that the term *indebiti* in the law, is to be taken not generally, but strictly. *Cum quis C. de Cond. Indeb.*

A distinction is therefore to be taken according to the gloss, and the common opinion of interpreters.

The dispute relates either to money, which, is due naturally, but not civilly, and then what is paid by an error in fact may be reclaimed, what is paid by an error in law cannot.

Or, on the other hand, it relates to what is due civilly, but not naturally, and in that case what is paid may without distinction be recovered back.

Or what is paid is not due, either civilly or naturally, and in like manner may without distinction be recovered back.

Or lastly, it was due both by natural and civil law, but by means of an exception, was in the same predicament as if it had not been due; and in this case the exception was either dilatory, perpetual, or doubtful.

If it were dilatory, an error of law would prevent the repetition, an error of fact would not.

If perpetual, there is a further distinction; either the exception is favourable, and what is paid may be reclaimed, whether paid by an error of law or fact; such as the exception of *Senatusconsultum Velleianum*. Or it is odious, and the money which is paid may be reclaimed, if paid by an error of fact, if by an error in law it cannot. Such is the *Senatusconsultum Macedonianum*.

Lastly, if the exception is doubtful; the right of repetition attaches without distinction.

In this distinction of the gloss, which, as usual, flows rather muddily (*lutulenter*), there are many things to admit, and many to reject.

Its denial that the law of *Dioclesian* and *Maximilian*, extends to the payment of what is not due, either civilly or naturally, is to be very particularly attended to, as we shall mention hereafter.

But the position that what is naturally due, may be reclaimed when it is paid from an error of fact, as if a person under an error of fact, pays money which he could retain by virtue of the *Senatusconsultum Macedonianum*, is, as we shall prove, plainly and evidently repugnant to all the principles of law.

The further observation that what is due civilly, but not naturally, may be reclaimed whether paid by an error of law or of fact, seems altogether dubious and obscure, not to say false; but of this also hereafter,

If we are unwilling to follow the authority of the gloss, which is so egregiously erroneous, the distinction of *Cujas* is next to be considered, and very attentively examined.

It occurs in *Leg. 8. ff. de jur. & fact. Ignor. Lib. 1. Quest. Pap.*

It also occurs in *L. 7. eod. Lib. 19. Quest. Papin.* where *Cujas* does not seem to agree with himself.

When he afterwards expounds the solemn, and often repeated (*decantatam*) distinction between law and fact, and gain and loss, he concludes as follows :

In reclaiming what is paid without being due, an error of law is injurious : for neither a man or a woman can reclaim what is paid, through an ignorance of law, as in *L. Regulæ. § Penult. & Ult. de jur. fact. et ign. L. cum quis Cod. eod. L. Error, Cod. ad. Leg. Falcid. (a)*. For the object of a person who reclaims what he has paid, is to regain what he has lost, not to avoid losing what belongs to him, and then his solicitude relates to gain and not to loss. A person mistaking the law is assisted so far as that he shall not lose, not so far as that he shall be relieved from having lost ; for a person who endeavours to recover what he has already lost, is seeking for a gain, and not guarding himself against a future loss (*b*).

The distinction of *Cujas* then comes to this ; that if the error of law appear before the payment, there is a right of retention, so that the error shall not hurt ; but if the payment is compleat, if the loss has happened, if the object of a person mistaking the law, is not that he may keep what is his own, but that he may recover that which is now become another's, then he comes too late, as he can only complain of having been deceived and circumvented by himself.

Which distinction, although at first view it may seem reasonable, yet upon a further examination, will be thought hard and unjust, and not less contrary to the authority of the laws, than to the principles of right and equity.

For it is repugnant,

(a) In all these laws, except the law *cum quis*, the question relates to persons who had paid the entire amount of legacies, from which they were entitled to deduct the fourth part, as the Falcidian portion.

(b) Item condicentibus indebita soluta juris error nocet : nam neque mas, neque femina potest condicere, quod indebitum per juris ignorantiam solvit ; ut in *L. Regula, § penult. & ult. ff. de jur. & fact. Ignor. L. cum quis (\*)*, Cod. eod. *L. error, C. ad Legem Falcidiam* : quia condicit quod solvit ; id agit ut acquirat quod amisit, non ut, quod suum est, non amittat denique sollicitus est de lucro, non de damno. Erranti in jure subvenitur ne suum amittat, non etiam ne amiserit ; ne damnum faciat, non etiam, ne fecerit : damnum facta quia infecta facere audet, lucrum captat, non damnum facturum amolitur.

ist, To the law itself which *Cujas* interprets; for what says *Papinian*? *Omnibus juris error in damnis amittende rei sui non nocet.* There clearly all the distinction ceases. Whoever contends for avoiding a loss, is not injured by an error of law. The reasoning of *Cujas* is obviously too subtle, for any body to be deceived by it; for he distinguishes between a person guarding against a future loss, and one who endeavours to repair a loss already incurred; as if a person having lost what was his own, were catching at a gain in aiming at its recovery; or, as if the jurist, whenever there is a question of loss, had separated an impending loss from an existing one.

But if the words of *Papinian* seem to favour the opinion of *Cujas*, (for he says, that error does not hurt *in damnis rei sue amittende*, which words in a certain degree seem to include the future but not the past,) let him read the same law in the *Basilicans*, where the same words are thus rendered: an ignorance of the law induces no hurt to any one wishing to seek his own, *juris ignorantia in damno nemini nocet suum petere volenti*, or, as it is in the Greek, τὸ ἴδιον ἀπαρτίσθαι *proprium repetere*, for that is the genuine signification of τὸ ἀπαρτίσθαι.

But *Cujas* denies that that can be called mine which I have already paid to another: for it has already become the property of the other person, therefore when I reclaim it I am demanding what is not mine but his.

This is plainly an empty subtilty, as will easily appear to any person who attends to it. But that the whole of this quibble (*cavillatio*) may be more compleatly destroyed, we must examine upon what reason of law the right of reclaiming what is unduly paid is introduced; whether it is because the money that was not due remains, even after payment, the money of the person making the payment; or because equity will not allow any man to increase his affluence with the spoils of another, and to enrich himself by another's detriment, (*alienis spoliis ditescere et cum alterius detrimento locupletiolem fieri*;) notwithstanding what he has received may by subtilty be denominated his own.

If the first reason is preferred, the argument of *Cujas* will hold good: for who can doubt but that money which is paid immediately becomes, *summo jure*, the property of the person receiving it? But if this is allowed, the repetition of what is unduly paid (*condictio indebiti*) will almost entirely cease in every case whatever; for whether it is paid by error of fact, or by ignorance of law, the same principle will equally apply: for it is plain, that the thing paid is not now mine but another's. And it is not necessary to go far for arguments, by which this may be demonstrated; for the  
very

very term *condictio* alone is sufficient to manifest it. For when a person sues for his own, he is said, not *condicere* but *vindicare*, and the owner never uses a condictio except in an action of theft; and this is in odium of those who are guilty of theft, and who are liable in several different kinds of action, as *Justinian* says. *Instit. de Act. § 14.* If therefore it can be indiscriminately said, of every *condictio indebiti*, that it is a repetition of a thing which has now become the property of another; either the action must be entirely abolished; or it must be confessed that it cannot be rightly withheld from a person mistaking the law, merely upon the pretext, that he is suing for what is not his own, but another's.

It seems therefore, that we must adhere to the other opinion and rather say, that the action is comprized in this single principle; that it is naturally unjust, that what belongs to one man should without cause be detained by another; which reason equally applies in favour of every person acting under an error, whether of fact or law, and therefore it cannot easily be explained, why the repetition should be denied in the one case, and allowed in the the other; certainly *Cujas* does not explain it, by the subtilty, that the money which is already paid does not belong to the payer, but to the receiver.

But what he subjoins, that a right of repetition is not allowed in case of an error of law, because the person who sues for what is another's, is catching at a gain (*lucrum captat*), cannot be very easily proved to those who prefer the principles of right and equity to the subtilties of law.

For although it may with some degree of subtilty be said, that a person seeking to recover what he has lost, is catching at a gain, yet in truth he only desires to repair an injury which he suffers; he sues that he may not continue to suffer a loss, not that he may acquire a gain (*ne perdidit, non ut lucretur*). But what is the difference, if you merely attend to natural equity, between a loss which is future and one which is past; so that a person who is repairing a loss already passed, shall be said to acquire a gain, and one who wards off a loss that has not arrived, shall only be said to avoid a loss? Neither of them acquires any thing, neither of them is made any richer; the one endeavours not to lose, the other to be relieved from having lost; the one, whilst the loss is still impending, keeps what he was about to have lost, the other recovers what he has already lost without a cause. Each protects himself by the same oracle of the law; that ignorance of the law shall not injure any one in matters of loss.

This was perceived by *Cujas* himself; who may be called at once the maker and destroyer of the distinction.

For when the discussion relates to a woman, who being ignorant of the law, and not knowing that she is entitled to a preference in claiming her portion, allows the other creditors to be satisfied. *Cujas ad eand. Leg. 8. de jur. & fact. ignor.* plainly and ingenuously acknowledges, that she shall recover her portion from these creditors, lest her error should subject her to the injury of losing it, *ab eis creditoribus mulierem dotem suam revocaturam, ne in damno amittenda dotis sue error ei noceat.*

But in this case it is plain,

1st, That the question relates to a loss which is past. This appears as clear as day, from the words of *Cujas* himself.

2d, In this point there is no distinction between men and women; for error of the law is of no avail to women with regard to gain, nor any prejudice to men with regard to loss.

Therefore by the judgment of *Cujas* himself, it is rightly collected from this example.

1st, That he who studies to repair a loss already incurred without cause, does not seek to acquire a gain; for if in fact he was catching at a gain, no assistance would be given to a woman suing for a repetition of her portion, as in that case her error in law would be an advantage to her.

2d, That it is in vain to make any distinction here between past loss and future; when *Cujas* himself acknowledges that an action of repetition is allowed to a woman, not under the apprehension of a loss, but having actually sustained one.

And it is plain enough that *Cujas* would never have thought of this distinction, between past loss and future, unless he had been apprehensive of overturning the decision of the law, *Cum quis*. For when this law plainly said, that what was paid by an error could not be recovered; and *Papinian* on the other side answered, that error of the law should not hurt any one in matters of loss, it would seem at first, that he who paid what in reality was not due suffered a loss, and therefore should not be affected by an error of law; *Cujas* thought he could not get over this difficulty otherwise than by saying, against all natural equity, that a person endeavouring to repair a loss, is catching at a gain. Such then is the whole origin of the scholastic distinction, which even *Cujas* himself did not steadily maintain (*vix ac ne vix constanter tenuit*).

For the same person who found out this distinction, in commenting upon *L. 7 & 8. ff. de jur. & fact. ignor.* when he treats of *L. 66. ff. de Condi. Indeb.* as if overpowered by natural equity, confesses that he who pays what is not naturally due, though it might be legally recovered, is entitled to a repetition, *Qui tutus est exceptione*.

*exceptione* (i. e. an exception which destroys a natural obligation;) *per errorem solvit, repetit; quia non debuit natural.*

But he is much more at variance with himself in one and the same discussion, viz. *ad L. 7. ff. de jur. & fact. ign.*

For in the beginning of this inquiry, he rightly distinguishes between injuries, with respect to which an error of law binds a man to his prejudice, and other cases in which (says he) it does not hurt; as if I pay by ignorance of the law what is not due, a claim of repetition is not to be denied, that is to say, if I owe it neither naturally nor civilly, *ut si indebitum solvero per juris ignorantiam, non mihi ideo deneganda est conditio, puta, si id nec naturaliter nec civiliter debui.*

And yet a little afterwards, when he casts his eyes upon the law *si quis*, his fear of allowing the existence of an antinomy, makes him fall into the grossest contradiction, for he concludes the whole disputation as follows:

“In this question of *conditio indebiti*, that is called *indebitum*, which is not due by any kind of law, that is, the difference is between error of fact, and error of law, so that what I do not owe by any law either civil or natural may be reclaimed, if paid by an error of fact, but not if paid by an error of law.” (a)

How then shall this reconciler of laws be reconciled with himself?

2d, The distinction of *Cujas* is not only repugnant to the law which he interprets, but also to several others; a few instances will be subjoined.

And in the first place, all the laws which speak of the *conditio sine causa*, are in opposition to the distinction of *Cujas*, until it shall be proved that an error of the law is to be accounted as a just and legitimate cause of payment.

Next may be adduced the laws already cited with commendation, which expound the principles of the *conditio indebiti*, and in which it is frequently indicated that this action was introduced upon the ground of right and equity, to recover what belonged to one person and was held without any sufficient cause by another.

But that something more particular may be stated, we shall first take notice of *L. 46. ff. de jur. Dot. L. 64. ff. de Condict. Indeb. & L. 29. § 5. ff. Mandati.*

In *L. 46. § 2. de Jur. Dot.* are these words, *pater etiamsi falso*

(a) In hac questione de conditione indebiti, indebitum dicitur, quod nullo jure debetur, id est, in hoc tantum indebiti genere, valet differentia inter errorem facti et errorem juris: puta, quod nullo jure debui nec civili nec naturali, si per errorem facti solvi, repetam; si per errorem juris, non repetam.

*existimans se filia debitorem esse dotem promississet, obligabitur.* The father, although he falsely supposes himself to owe the portion to his daughter, shall be bound.

Here *Cujas* himself takes notice, and properly, that the question relates to a daughter in the power of her father, otherwise *Julianus* would not rightly affirm *dotem deberi*; in this case therefore, the father being under an error, is only obliged because he is naturally debtor of the portion, and the cause of piety is sufficient to oblige him, although the promise was founded in error: but this reason would cease in case of a daughter who was emancipated; therefore it must be agreed that the law refers to the case of a daughter remaining part of her father's family.

But if we once admit this, it follows that we must confess the question to relate to an error of law; for between a father and a daughter remaining under his power no obligation could subsist, no action could be maintained, the father who supposed himself to be indebted to his daughter, could not be under any error except in point of law; for although the fact was doubtful, yet the whole subject depended on the law, as the father ought to have known the fact, and if he considered himself to be certain in respect of that, he ought not to be ignorant that an obligation, which in fact was entered into between a father and a daughter, was void in law; therefore whether there was or was not any error of fact admixed with the error of law, is of little consequence, since in either case the subject is reduced to an error of law.

Neither can it be supposed, that the father was debtor to the daughter without prejudice to the right of paternal authority, as in the case of her possessing adventitious property: for in the time of *Julianus*, who is the author of this law, the name adventitious *peculium* was scarcely known in the law, and to use the words of *Justinian* in § 1. *Instit. quib. alien. licet vel. non—Olim, quidquid ad filios pervenerat, exceptis videlicet castrensibus pecuniis, hoc parentibus suis acquirebant sine ulla distinctione, et hoc ita parentum fiebat, ut etiam esset eis licentia alio filio vel extraneo donare vel vendere, vel quocumque modo valuerant, applicare.* For *Constantino* first made an exception of the property coming from the mother, of which he ordered that the usufruct only should be acquired by the father; succeeding emperors made other additions which it would be superfluous to particularize. It is certainly clear, that previous to the time of *Constantine*, nothing but the *castrense peculium* (a) was exempt from the parental authority, and it was impossible for that to belong to a daughter.

(a) The property given to a son under the authority of his father, for the purposes of war, or acquired by him in war.

Therefore,

Therefore, to return to the subject, the law relates to a daughter under the authority of her father, therefore the father was under an error of law. For what reason therefore is he obliged? Because he erred in the law? By no means; but because he discharged a natural duty: for this is the true reason of the law which *Cujas* himself embraces, and which may be collected from or rather is proved by the very rubric (title), under which the law is placed: but if the father remain subject to the obligation, upon the ground of his having mistaken the law, the same thing must be decided in the case of a father who had emancipated his daughter, but it applies specially and exclusively to a father retaining his parental authority, therefore the error of law is little regarded, and the father is obliged not on account of the error, but on account of the natural duty.

A much stronger argument in a case nearly similar, may be drawn from law 64. *de Cond. Indeb.*

The words of the law are :

*Si quod Dominus servo debuit, manumisso solvit, quamvis existimans ei se aliquã teneri actione tamen repetere non poterit, quia naturale agnovit debitum: ut enim libertas naturali jure continetur, et dominatio ex gentium jure introducta est, ita debiti vel non debiti ratio in conditione naturaliter intelligenda est.*

Certainly an excellent law, and which seems to remove all ambiguity from this question.

That the case refers to a manifest error of law is indubitable. For the master supposed himself to be liable to the slave in some action, which opinion doubtless deserves the name of careless, and gross, and supine ignorance, (*solute, et crasse, et supine ignorantie,*) terms derived from the laws themselves. Does *Tryphonius* the author of the law impute that to the master? By no means, he does not pronounce that the right of repetition shall be taken away, because the master mistook the law, and because assistance is to be given not to folly but only to error; but solely because the master acknowledged a debt due by the rules of natural equity (*quia Dominus naturale agnovit debitum*).

Therefore, on the contrary, it may be concluded, that if the debt was not due by the rules of natural equity, if the master was not bound by any kind of law, he might reclaim what he had paid.

For who can imagine that *Tryphonius* would have passed over so plain and ready a ground of decision, if it were clear that a payment once made by an error of law, of that which was not in any manner due could not be reclaimed?

But the jurist not only resolves the question proposed, but lays down

down a new and general rule of law, by the assistance of which all questions that can arise in the discussion of this subject, may be easily decided.

This rule is explained by an elegant distinction: liberty, says he, is a natural right, that is, all men are naturally free; therefore all men are bound by the ties of natural obligation; on the contrary, servitude is introduced by the law of nations, (*ex jure gentium introducta est*,) by which alone the contracting with slaves is prohibited, so that they can neither be obliged to others, nor have others under an obligation to them: therefore, two kinds of obligations may be distinguished, the one merely founded on the law of nature, the other on the law of nations or civil law; slaves are incapable of the latter, but not of the former: but from this example, it may be asked whether the term *indebitum* can also be taken in a two-fold sense, viz. naturally and civilly? and this is also supposed by *Tryphonius*, who having considered all these points, at last pronounces generally that the term *indebitum*, whenever the question relates to this right of repetition, is to be understood of what is not due by the laws of natural obligation. *Debiti vel non debiti ratio in conditione naturaliter intelligenda est*. Hence also follows what the jurist had answered in the beginning of the law; that the right of repetition ceases whenever there is a natural obligation, but that it subsists wherever there is not so much as a natural obligation, and in the application of this rule every legal subtilty is rejected: for the terms here are to be understood not civilly, but naturally: and wherever the jurists use the term *indebitum*, generally, they are understood to mean what is not even naturally due, that is to say, when they affirm that it may be reclaimed; but when they deny the right of repetition, the term *indebitum* is often used to import what is not due by the civil law, but may be due by the law of nature, of which several instances will be mentioned in the sequel.

An argument not very different from the preceding, is afforded by the law 40. ff. *de Cond. Indeb.* already stated; and which is repugnant to any distinction between law and fact, and the whole is said to depend upon whether the person making the payment, was or was not indebted by the rules of natural justice.

A third argument is afforded by the law 29. § 1. & 5. ff. *Mandati*.

In § 1. it is asked whether a surety, who was ignorant that the obligation was of no effect, has an action against the principal, and the jurist makes a distinction, that if he was ignorant of fact, this ought to be allowed, but if he was only ignorant of the law it ought not (*si quidem factum ignoravit, recipi ignorantiam ejus potest, si vero jus, aliud*

*aliud dici debet*) and this very properly: for it would be absurd, that by an error of the law a right of action should be acquired against a person who being ignorant of the error, could not occasion the right of action.

But having in the beginning of the law, and in the subsequent sections, proposed various cases, he seems in § 5. to comprize them all generally, so as to state at once what is equitable in all cases; for he speaks as follows:

*In omnibus autem visionibus seu questionibus quæ propostæ sunt, ubi creditor vel non numeratam pecuniam accepit, vel numeratam iterum accepit; repetitio contra eum competit, nisi ex condemnatione fuerit et pecunia soluta: tunc enim, propter autoritatem rei judicatæ repetitio quidem cessat, ipse autemstellionatus crimine propter suam calliditatem plectitur.*

Therefore the gloss infers, that as the case of surety, paying from an ignorance of the law is proposed among other cases, that what is paid without cause even by a person mistaking the law, may be reclaimed although the surety does not acquire an action *mandati* against the principal.

But this argument is weakened, principally by two reasons.

1st, Although the words of the jurist seem to be altogether general, and to apply equally to every thing which he has said before, yet this generality appears to be restrained by the words which follow: for he does not simply pronounce that in all these views, &c. but he immediately subjoins whether the creditor receives money not numbered or receives it twice, which words certainly seem to derogate from the effect of the former, and thus to limit the answer of *Ulpian*, so that it is not to be carried beyond these two cases; of paying money not numbered, and paying twice over.

2d, The words upon which the interpretation of the gloss principally relies are wanting in the *Basilica*; but if they were of so much weight as the gloss supposes, the compilers of the *Basilica* would never have omitted them. However this may be, *Cujas, ad dict. L. 7. ff. de jur. et fact. ign.* certainly condemns the interpretation of the gloss.

3d, The interpretation of *Cujas* seems to be repugnant to equity itself, but as this has been already demonstrated in several places, while we were engaged in other parts of the discussion, it would be superfluous to enlarge upon it here.

4th, *Cujas* is in opposition to almost all the interpreters of the law, who in this respect follow the gloss, at least if we attend only to the question whether what is paid, without being even naturally due, is subject to repetition?

These

These arguments may indeed be opposed to the distinction of *Cujas*; but what do they avail if the law plainly and explicitly decides, without any distinction or exception, that he who being ignorant of the law pays money which is not due, is not entitled to repetition? *L. Cum quis. 10. Cod. de jur. et fact. ign.*

In vain therefore are the doctors, in vain is equity, in vain are the conflicting opinions of the laws, in vain is the rule of *Papinian* itself opposed to *Cujas*, when he supports himself by the clear and evident decision of the law.

Therefore we must either assent to the opinion of *Cujas*, or disallow the authority of the law, or apply a more commodious interpretation to it, whereby its strictness may be tempered with equity.

This was seen by *Johannes Robertus Sentent. Jur. Lib. 1. cap. 66. et seq.* who entered upon the right way for reconciling the difference in proposing this distinction.

We either consider an ignorance of the law simply, and regard the cause of it as destitute of all favour and assistance of equity, and then we are of opinion that no repetition should be allowed under pretext thereof. *Aut simpliciter juris ignorantiam spectamus illiusque causam omni equitatis auxilio et favore destitutam adjudicamus; et tunc ejus pretextu repetitionem dari nunquam existimabimus.* A person is not to be assisted by the application *summi juris*, who alleges himself to have failed from an ignorance of the law.

Or we look into the rules of natural equity, on which the whole law of repetition is founded, and then we admit the right of reclaiming of what was not naturally due, although paid under an error of the law. *Aut vero ipsam naturam equitatem inspiciamus, quæ scilicet tota conditio indebiti continetur, et tunc repetitionem pecunie naturaliter indebita, quamvis errore juris soluta, dari agnoscimus:* not on account or for the sake of this ignorance, or because that ought to afford any benefit, but from a consideration of what is equitable and right; as it is naturally unjust, that one man shall without cause be enriched by the ruin of another: wherefore the right of repetition, (*conditio*), as it repels that injury, is called by jurists a natural right.

But if this distinction is approved, the solution of the law which is opposed to it will be very easy.

For it must either be said, that the question in that law relates to strict right, the error of law being alone regarded, without reference to the principles of equity, and without impugning the rule, that what belongs to me cannot be transferred to another without my consent or default.

Or the term *indebitum*, which in itself is equivocal and ambiguous,

guous, as is obvious to every body, must be understood to refer, in the law in question, to that which in truth is naturally due; but cannot be civilly enforced; for if this were paid by an error of law it cannot be reclaimed; both because there was a cause for the payment, which prevents the repetition, and because the debtor appears by the payment to have acknowledged the natural obligation.

But to this interpretation it may be opposed, that if it were admitted, the term *indebitum* would be used in different senses in the law; for in the first part of the law, it would mean what was naturally though not legally due (*a*); and in the second part, where it is said, *per ignorantiam facti tantum indebiti soluti repetitionem competere*, the same term would designate what was not even naturally due. For if it were naturally due, it would be hardly possible to support what the emperors answer in the same law, that having been paid by an error of fact it may be reclaimed: for whether my recognition of what is really a natural obligation, arises from an error of fact or an error of law, it seems to be an undisputed principle of law, that I am not entitled to repetition.

If therefore this second solution is inadmissible, we must apply a third, and freely acknowledge, that this law is not to be taken absolutely, (*præfracte accipiendam*), as if the emperors had intended altogether to include (*excutere*) every kind of *indebitum*, (nor does the discussion relate, directly at least, to *indebita*), but meant to propose a general rule concerning error of fact, and error of law; and to declare, that what was paid without being due might be reclaimed, if paid by an error of fact, otherwise if paid by an error of law; but to leave it undefined, what kind of *indebita* should be included in the rule, as that was not the subject in question.

But it will be asked, what distinction will remain in the *condictio indebiti*, between error of law and error of fact, so that we can properly say with the emperors, that what is paid by an error of law cannot be reclaimed; but what is paid by an error of fact may?

For the money or other thing is either naturally due, or it is not; if it is, it is to no purpose to distinguish between error of law and error of fact; for there is no right of repetition in either case; but if it is not, the right ought in either case to be admitted.

To satisfy this question, it must, above all things, be acknowledged, that if there was no case in which, what was naturally due could be recovered back after having been once paid, the distinction

(a) Cum quis jus ignorans indebitam pecuniam solverit, cessat repetitio.

between law and fact would be useless and unmeaning, at least with regard to the *condictio indebiti*.

But the case is far otherwise; for it often occurs in the course of the law, that what is naturally due may be reclaimed after having been paid.

It will be sufficient to adduce two examples :

The first is the *Lex Falcidia* (a), in which *Robertus* properly observes, that the retention of a natural debt is introduced by the law itself; therefore there would have been no right of repetition, after the heir had discharged the entire legacies, if a natural debt once paid could never be reclaimed. This, however, is denied by *L. 9. Cod. ad L. Falcid.* The supposition, therefore, that the distinction between a natural and a civil debt, is the only one that can prevail in respect to this question, is not true; nay, the contrary sufficiently appears: for here, although a natural debt is immediately in contemplation, yet something further is requisite to decide whether there is a right of repetition or not, and what is required, except the famous distinction between law and fact; by the assistance of which the emperor *Gordian* decides, whether the heir can reclaim what he has paid to the legatees, beyond the amount of three fourths of the property, for he says, as follows: *error facti, quartæ ex causa fidei commissi non retenti repetitionem non impedit: is autem qui sciens se posse retinere, universum restituit, condictio nem non habet; quin, etiamsi jus ignoraverit, cessat repetitio?*

Therefore there is no reason for considering the distinction between law and fact, as perfectly idle.

Upon this law it may also be observed by the way, that it throws a great light upon the law *Cum quis. de jur. & fact. ignor.* for what does it import by the term law (*jus*)? It is the *Falcidian* law, and other provisions of the same kind, by which a person may defend himself civilly, from the payment of what he naturally owes. But it does not appear at all inequitable, that the debtor shall not be allowed a right of repetition, in consequence of his ignorance of this law, as he is always naturally indebted. Therefore, in like manner, when the law *Cum quis* uses the term *jus*, that kind of law or right may be understood, by which the debtor is allowed the benefit of an exception or retention, and which thus always supposes the existence of a natural obligation.

A second example may be found in *L. Qui exceptionem, 40. ff. de Cond. Indeb. ante*, where it is demanded whether a debtor having a perpetual exception, may reclaim what he has paid by error, and

(a) The *lex Falcidia* protected the heir from paying more than three fourths of the succession to the legatees.

the jurist distinguishes between whether the exception is introduced in favour of the person who owes the money, or in odium of the person to whom it is owing? in the first case, the repetition is allowed, in the second, not; but here there is no distinction between a natural and a civil debt, nay the distinction is absolutely disallowed: for if the only question had been, whether there was a natural obligation or not, it must be answered indiscriminately, that there is no right of repetition; for, whether the exception were allowed in favour of the debtor or in odium of the creditor, it is certain that, in either case, the natural obligation remains, as there is need of an exception. Therefore, the distinction of a natural and a civil debt is not sufficient; as there are other distinctions, by which in many cases a natural debt, after having been paid, may be reclaimed.

But from all this it follows, that what appeared to oppose the second solution above given of the law, *Cum quis*, may easily be answered.

For we said, 1st, that the term *indebitum* might be understood of what was due naturally, but not civilly, but that this solution or interpretation might appear doubtful, because, in that case, the term *indebitum* would be used in the same law, in two senses plainly different from each other, inasmuch as it is decided in the second part of the law, that that *indebitum* only can be reclaimed which is paid by an error of fact, and then it certainly seems that the term cannot be understood of what is naturally due; for the creditor cannot reclaim that, even though he made the payment under an error of fact, and that therefore the term in the first part of the law would be only referrible to what was only not due civilly, and in the second part, it would be referrible also to what was not due naturally. But this conclusion appears to proceed wholly from a false principle; for it supposes that what is not due civilly, but is due naturally, can in no case be reclaimed, which we have already demonstrated to be false in several cases; but if this is once admitted, then the term in question has, in the law *si quis*, one uniform signification. So that the sense is, that what is naturally due cannot be reclaimed if it is paid by an error of law; otherwise, if it is paid by an error of fact, of which a distinguished example occurs in the before mentioned law 9. *Cod. ad leg. Falcid.*

Therefore there is nothing to prevent the threefold solution of the law, *Cum quis*, which is above proposed.

But I am inclined to think it ought to be admitted, chiefly for three reasons, in addition to those already alleged.

The first is deduced from the *Rubric* itself, under which the law *Cum quis* is placed, *viz.* under the title *de jur. & fact. ign.* in which there

there is no question concerning the term *indebitum*; nor is it any object to expound the various interpretations of that word, or to define in what cases the *condictio indebiti* shall or shall not take place. Moreover it is certain, besides other things in which they differ, that there is this great distinction, that, speaking generally and abstractedly, an error of fact does not prejudice a claim of repetition, but an error of law does. Therefore the decision of the law, and the intention of the legislature are abundantly satisfied, when an interpretation is given to the law *cum quis*, which clearly and plainly admits a difference between an error of law and an error of fact, but leaves untouched a question not touched upon by the law, to wit, the different kinds of cases to which the term *indebitum* may be applied.

But another reason is much stronger. For it appears, from what has been already said, that one or the other of the laws, that is either the law *cum quis*, or the laws 7 and 8. *ff. de jur. et fact. ign.* require interpretation and distinction.

For if the law *cum quis* is to be understood absolutely, how can that stand which *Papinian* says in *L. 7 & 8. de jur. et fact. ign.* That error of law hurts no one in matters of loss? Therefore in that case, the distinction between future and past loss will be to be supplied in the answer of *Papinian*, according to the opinion of *Cujas*.

But if the words of *Papinian* in the said laws, are to be understood simply and without distinction, the opinion of *Gordian* on the law *cum quis* will appear manifestly absurd, unless you so temper it that it shall prevail in matters of strict right, without being extended to what is due equitably and by the law of nature; or lastly, that it may be considered as containing a general rule subject to several exceptions.

Therefore, since an interpretation and distinction must necessarily be made in the one law or the other, it remains to inquire which distinction appears to be the more just and equitable; that which rests upon this single foundation, that he who demands the repetition of his own is catching at an advantage, and that what almost every man would denominate a loss, should only be called so when it is future, and can still be avoided; but that when it is past and can no longer be avoided, but can only be revoked and repaired, the reparation should be considered as gain: whether that distinction should be preferred which subverts several laws, and the very principles of equity itself, which ordains that one man shall, without cause, be enriched by the ruin of another; lastly, which in a great measure abrogates and annuls the title in the digest, and code, of *condictio sine causa*?

Or

Or whether there shall be substituted in its room, that much more favourable distinction which is aided by natural reason, by equity, by all the laws, with one single exception, that may be called rather ambiguous than contradictory; or lastly, whether that distinction shall be admitted, which supposes nothing but what is generally notorious; to wit, that amongst jurists one thing prevails in respect of strict law, and another in respect of equity and justice, that there are several kinds of *indebita*, and that so far as relates to error of law and of fact, it ought only to be considered, whether what was naturally due was paid by error of law or of fact, that in jurisprudence all definitions are dangerous; and that there is no rule so universal as not to admit of an exception, and if all these things are certain, manifest, known, and approved, it must be determined that a distinction which is comprized in these principles, is to be preferred to another distinction by which many things that are certain, must necessarily be subverted.

Let us add, that it is laid down as certain, by all juridical writers, that laws are to be favourably interpreted so as to answer their intention (a); that in case of ambiguity in the expressions of a law, that sense is to be preferred which is free from injustice, especially when by so doing the intention of the law can also be collected (b). In case of doubt to follow the more favourable construction, is more just as well as more safe (c); all which considerations are both repugnant to the distinction of *Cujas*, and seem to afford a striking confirmation of the opposite distinction.

Lastly, a third reason which supports the three solutions already offered, may be deduced from the *Basilican* interpreters, *ad Tit. de jur. & fact. ign.*

We have already mentioned, that there is not less discordance among them than among other interpreters, but it is a dissension which can easily be reconciled, if we only distinguish between what is due naturally but not civilly, and what is not due either naturally or civilly.

That this may be better understood, we must refer to the observation already mentioned of the Greek interpreters, upon the words of *Papinian*, "*Juris error suum potentibus non nocet.*"

For instance, say they, a person stipulates for a slave to be given him, worth 20 guineas: the slave being dead, without there having been any delay, the promiser supposes himself

(a) *Benignius leges interpretandæ sunt, quo voluntas earum conservetur. L. 18. §. de Legibus.*

(b) *In ambigua voce legis ea potius accipienda est significatio, quam vitio caret: præsertim cum etiam voluntas legis ex hoc colligi possit. L. 19. ibid.*

(c) *In re dubia benigniorem interpretationem sequi, non minus justius est quam tutius. L. 3. de his quæ in testam. del.*

to be bound by the action, *ex stipulatu*, and pays 20 guineas to the stipulator. He is assisted, or, as it is in the Greek, he is considered with indulgence, (*subvenitur, aut, ut in Græco textu habetur, ignoscitur ei*;) because he contends with reference to the loss of the amount, and he may reclaim what he has paid.

We have already demonstrated that there is here a manifest error of law, both in the view of the interpreters, who intended to state the case of a person mistaking the law, and from the very nature of the fact itself, in which the debtor is ignorant of that solemn and well known maxim of jurisprudence, that the debtor of a specific thing is liberated by its destruction.

Therefore in the judgment of the Greek interpreters, a person who has made a payment in consequence of an error of law, is entitled to reclaim it.

But, it may be said, that here and elsewhere the same interpreters declare, that persons who from an ignorance of the law pay what is not due, are not entitled to repetition.

A great contradiction certainly, but one which will easily admit of a solution, that entirely overturns the distinction of *Cujas*, and establishes the other which is opposed to it.

What then remains, but to resort to the approved (*sepe laudatam*) distinction, and to confess that an error in law does not prejudice a person who has made the payment, not being under any obligation either civil or natural; that on the contrary, if he were bound by natural law, and paid under error of the civil law, the right of repetition is properly denied; so that it shall be a certain and constant rule, that a person under a natural obligation shall only be intitled to repetition, if he pay the money which is not civilly due under an error of fact.

There are two advantages in this distinction :

1st. It easily reconciles the difference among the Greek interpreters: for, in the first observation, the question relates to one who by the death of the slave was liberated, from all obligation both natural and civil; in which case the error of law shall not hurt, nor the right of repetition be denied; in the second observation, it relates to those who, have paid, being naturally indebted, but ignorant of the civil law, by which they might protect themselves, and who are therefore properly said to contend for gain, as no person is understood to sustain a loss in discharging a natural obligation.

2d. This distinction not only removes every contradiction, but is the only one that can do so; nor is it probable only, but necessary. Whence it is justly to be concluded, that the *Basilican* interpreters are supported by it, and mutually support it in their turn;

turn; for as this distinction explains their writings it is also proved by them; for that distinction cannot appear false, without which there would be a perpetual dissention, among those who cannot for a moment be supposed to have held different and still less opposite opinions.

Finally, that we may reduce the chief of the heads of this discussion within certain limits, by a short recapitulation, it seems requisite throughout the whole of the question to admit the following distinctions.

A person ignorantly paying what is not due, mistakes either the fact or the law.

If he mistake the fact, it seems that he is without distinction entitled to repetition, even though he were under a natural obligation; since error of fact is not prejudicial, even to men, either in respect of loss or gain. *L. 8. ff. de jur. et fact. ign.*

But if he erred in point of law, the question relates either to gain or loss.

If it relate to gain, it is agreed that an error of law can never confer an advantage. *L. 7. ff. de jur. et fact. ign.*

If to loss, then without any distinction between past loss and future, it seems that it ought to be held, that error in law shall not induce a prejudice. But that it may be more easily understood, what shall be signified by the name of loss, the following distinction is to be applied:

The person who paid was only under a natural obligation, and then his claim founded on an error of law is not allowed. For a person is rather contending for gain, who seeks the repetition of what he has paid in discharge of a natural obligation. But it may be alleged that assistance is given to a person paying under a mistake of law, by the authority of the *L. 40. ff. de condiç. indeb.* according to which a person who has a perpetual exception, is entitled to repetition provided the exception is favourable, and introduced for the benefit of the debtor, and not in odium of the creditor; such as the exception of the *Senatus-consultum Velleianum*; but in that case, the woman seems naturally indebted, unless you prefer saying with *Cujas*, that the authority of the law is such, as to destroy not only the civil but the natural obligation; which, however, is very difficult to understand. Perhaps it would be safer, notwithstanding we have above thought otherwise, to interpret the law as only applying to error of fact. Yet the law seems rather to import the contrary. But an old interpreter thinks it a special rule, and confined to women, that they may reclaim what they have

paid solely under an error in law, although it were due by the ties of natural obligation.

Or the debt was only civilly and not naturally due, as in case of a person condemned by an invalid judgment, against which there was a right of appeal; but the party, supposing the judgment to be valid, pays the money; and then, as what is adjudged is to be taken as true, I can readily suppose there to be no right of repetition; but this must be more attentively considered. *V. L. 29. § 5. ff. Mandat (a).*

Or the money was due both naturally and civilly, but the party was entitled to a perpetual exception, and being ignorant of that circumstance paid the amount; and as it was held that the person who was only naturally indebted is not entitled to repetition, much more is the person who was indebted by both laws disabled from reclaiming what has been paid; unless indeed the exception is such as to destroy the natural obligation.

Or what was paid was not due by either law, and then what was paid, although by error of law, may, as it has been already proved, be reclaimed, unless, which is lastly to be added, it was paid from a principle of piety; for then the false opinion being out of the question, the consideration of piety remains, a payment founded upon which is not subject to repetition. *L. 32. § 2. ff. de cond. indeb. (b).* For here, the consideration of piety amounts to, and supplies the place of natural obligation; and so long as any the smallest cause of obligation continues, the right of repetition, as we have frequently observed, is properly withheld.

(a) Vide ante, 426, 427.

(b) Mulier, si in ea opinione sit ut credat se pro dote obligatam, quicquid dotis nomine dederit, non repetet: sublata enim falsa opinione, relinquatur pietatis causa, ex qua solutum repeti non potest.

## CHAPTER XLVII. OF BOOK I.

## OF THE SELECT QUESTIONS OF VINNIUS.

*Whether what is paid, without being due by an Error of Law, is subject to Repetition.*

THE question is how to expound what is laid down simply, and generally, that what is paid by mistake, without being due, may be reclaimed; whether it is confined to error of fact, or extends also to error of law. For error is twofold, being either of fact or law. An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not. On the other hand, when a person is truly acquainted with the existence or non-existence of the facts, but is ignorant of the legal consequences, he is under an error of law. *L. 1. ff. de jur. et fact. ign. (a)*. If a person makes a payment knowing that he is not indebted, it is agreed on all hands that he has not any right of repetition. *L. 1. § 1. (b)*. *L. si non fortem 26. § indebitum 3. (c)*. *de cond. indeb.* for a payment which is subject to repetition, if made by mistake, amounts to a donation, if made with full knowledge. *L. Cujus, 53. ff. de reg. jur. (d)*. And on the other hand it is a clear rule of law, that a person is intitled to repetition who pays what he does not owe, believing through a mistake of fact that he does. *L. 6. (e)* *L. 7. C. de cond. indeb. (f)*. *L. Error, 7. C. de juris et facti ignorantia. (g)*. The

(a) Ignorantia vel facti vel juris est, § 1. Nam si quis nesciat decessisse eum, cuius bonorum possessio defertur, non cedit ei tempus. Sed si sciat quidem defunctum esse cognatum, nesciat autem proximitatis nomine bonorum possessionem sibi deferri; aut se sciat scriptum heredem, nesciat autem quod scriptis heredibus bonorum possessionem prætor promittit, cedit ei tempus, quis in jure errat. Idem est si frater consanguineus defuncti credit matrem potiore esse.

(b) Et quidem, si quis indebitum ignorans solvit, per hanc actionem condicere potest; sed si sciens se non debere solvit, cessat repetitio.

(c) Indebitum autem solutum accipimus non solum si omnino non debeat, sed et si per aliquam exceptionem perpetuam peti non poterat; quare hoc quoque repeti poterit; nisi sciens se tutum exceptione, solvit.

(d) Cujus per errorem dati repetitio est, ejus consulto dati donatio est.

(e) Si per ignorantiam facti not debitam quantitatem pro alio solvisti, et hoc adito rectore provincie fuerit probatum, hanc ei; cujus nomine soluta est, restituti eo agente previdebit.

(f) Fidei commissum vel legatum indebitum per errorem facti solutum, repeti posse expleti juris est.

(g) Error facti, necdum finito negotio, nemini nocet; nam causa decessa velimento tali non in fau. a. ur.

only question is, whether a person is intitled to *condictio* or repetition, who has paid what he did not owe, being misled by an error of law. Most of the later writers are in favour of the negative. *Cuj. 5. obs. 39. Duar. ad tit. de cond. indeb. c. 7. Donell. 1 comm. 21. Brenchorst, 2 aff. 36. Perez in ead. de cond. indeb. 12.* The ancient interpreters take the affirmative side of the question, and are followed by *Zas. ad rubr. de cond. indeb. n. 5. Sichard, ad rubr. et L. cod. eod. Wefenb. par eod. n. 9. Thulden, L. eod. n. 4. Grotius, lib. 3. introd. ad jurispr. Batav, c. 30. Cbristin. Vol. 3. decis. 8. Bachov. disput. 4. de act. thes. 17.* But before we open our own opinion, since the question relates to a payment of what is undue, (*indebitum*), it will be worth while to examine what juridical writers means by that term. And no body doubts that that is to be considered as undue, which is not due either civilly or naturally. But suppose a debt is due civilly but not naturally, or *e converso*? If it is only due civilly, that is, if it is due by an obligation, which produces no equitable claim; so that *summo jure*, it is subject to a right of action, but may be repelled by a perpetual exception, it is considered as really undue, and if it is paid by mistake may as such be reclaimed. *L. si non sortem, 26, § 3. (a). L. qui exceptionem, 40. (b). L. si quis, 43. (c). L. ex his omnibus, 54. (d). ff. de cond. indeb.* For such a demand is only nominally, and not really due; not being due by the law of nature, nor in effect by the civil law. *L. 3. §. I. ff. de pecun. constit. (e). L. nihil interest. 112. ff. de reg. jur. (f).* But what is naturally due, although *summo jure* it is not civilly so, is in this respect considered as a real debt, and therefore although it cannot be recovered, when it is actually paid, even under a belief that it might have been so, it cannot be reclaimed; as appears by several authorities, *L. naturales, 10. ff. de obl. et act. (g). L. indebiti. 15. (h). L. si pane 19. (i). L. si non sortem. 26. § libertus. 12. (k) L. Julia*

(a) Vide ante, p. 437.

(b) Vide ante, 416.

(c) Si quis jurasset se dare non oportere, ab omni contentione discedetur: atque ita solutam pecuniam repeti non posse.

(d) Vide ante, 417.

(e) Si quis, autem constitisset, quod jure civili debebat, jure prætorio non debebat, id est, per exceptionem: an constituto teneatur, quaerimus? Et est verum ut [de] Pomponius scribit, eum non teneri: quia *debita jure* non est pecunia, quæ constituta est.

(f) Nihil interest, ipso jure quis actionem non habeat, an per exceptionem infirmetur.

(g) Naturales obligationes non eo solo æstimantur, si actio aliqua earum nomine competit: verum etiam ea, si soluta pecunia repeti non potest.

(h) *Indebiti soluti* condictio naturalis est. Et ideo ei quod rei solutæ accessit, venit in condictioem; ut puta partus qui ex ancilla; vel quod alluvione accessit; imo et fructus quos is, cui solum est, bona fide percepit, in condictioem venient.

(i) *Libertus* cum se putaret operas patrono debere solvit, condicere eum non posse, quamvis putans se obligatum. *Julianus* scripsit, natura enim operas patrono debuit.

(k) Si *panæ* causa ejus, cui debetur, debitor liberatus est, naturalis obligatio manet; et ideo solum repeti non potest.

*nus*, 60. (a). *ff. de cond. indeb. L. 3. § ult. ff. quod quisq. jur. (b)*. And since that which is naturally due, may be made the subject of compensation, it is highly reasonable that no repetition of it shall be allowed when it is paid by mistake. But even where the debtor has a perpetual exception, if it is for a cause which does not destroy the natural obligation, still there is no right to reclaim what has been paid by mistake. Such is the *exceptio rei judicata*; the sentence of the judge cannot destroy the natural obligation, arising from the consent of the party; and therefore, *Julianus* and *Paulus* have decided that a real debtor who has paid the debt, after having been discharged by a judgment, has no right of repetition. *d. l. Julianus, 60. de cond. indeb.* To the same principle, many refer the exception of the *Senatus-consultum Macedonianum*. For if a son, while under the dominion of his father, borrows money, and pays it after he becomes his own master, he has no right of repetition, as he is under a natural obligation. *L. 9. in fin. et L. seq. (c). ff. de senatusc. Mac.* Another reason for denying the repetition, is assigned in *qui exceptionem, 40. ff. de cond. indeb. (d)*. but that does not always apply, as appears by the before mentioned law of *Julianus*. And in this case, I think a distinction should always be made, between an error of law and of fact. *L. ult. ff. de senatusc. Mac. (e)*. And therefore, here the term *debitum* may be applied to what is due only naturally, and *indebitum* to what is only due by the strictness of civil law. We here apply the expression of a natural debt, according to its ancient signification, as having all the effects as well of a civil as of a natural obligation; the right of action only excepted (*f*). But if even the natural obligation is expressly disapproved by the civil law, as in the case of a woman engaging as surety, *L. si mulier, 16. § 1. (g). ad sen.*

(a) *Julianus verum debitorem post litem contestatam, manente adhuc judicio, negabat solventem repetere posse: quia nec absolutus, nec condemnatus repetere posset. Licet enim absolutus sit, natura tamen debitor permanet, similemque esse ei dicit qui ita promisit siue navis ex Asia venerit siue non venerit: quia ex una causa alterius solutionis origo proficiscitur.*

(b) *Ex hac causa solutum repeti non posse. Julianus putat: superesse enim naturalem causam, quæ inhibet repetitionem.*

(c) *Et hi tamen, qui pro filio famulias sine voluntate patris ejus intercesserunt non repetent; atquin perpetua exceptione tuti sunt. Sed et ipse filius et tamen non repetit: quia hi demum solutum non repetunt, qui ob pœnam creditorum actione liberantur, non quoniam exonerare eos lex voluit. Quanquam autem solvendo non repetunt. L. 9. Quia naturalis obligatio manet. L. 10.*

(d) *Vide ante, 416.*

(e) *Si is, cui dum in potestate patris esset, mutus pecunia data fuerat, paterfamilias factus, per ignorantiam facti, novatione facta eam pecuniam expromissit, stipetatur ex ea stipulatione, in factum excipiendum erit.*

(f) *See the preceding Treatise, P. II. C. II. p. 108.*

(g) *Si ab ea muliere que contra senatus consultum intercessisset, fidejussorem accepisset;*

*sen. Vell.* of a prodigal making any promise, *L. 6. ff. de verb. obl.* (a). or is destitute of the assistance of the civil law, in other respects as well as the right of action, although it may admit of accessions, as the obligation of a pupil, contracted without the authority of his tutor, repetition is without any natural reason allowed, in the same manner, as if what is paid was not even naturally due, *L. qui exceptionem, 40. (b). L. seq. (c). de cond. indeb. L. 9. Cod. ad sen. Vel. (d) d. l. 6. ff. de verb. obl.* Of the same kind is the natural obligation, induced by the will of a testator, not accompanied by the requisite solemnities, or giving a larger portion of his property than the law allows by way of legacy; although this has the effect of a natural obligation with respect to error of law. *L. 9. C. ad leg. Falcid. (e). L. 7. C. de cond. indeb. (f).*

With respect to the question proposed, I subscribe to the opinion of the old interpreters, that repetition should be allowed even of what is paid by error of law, provided there is not any natural obligation. In the first place, I am influenced by the consideration, that the *condictio indebiti* is introduced *ex aquo et bono, L. pen. ff. de cond. indeb. (g).* and therefore can only be excluded by exceptions founded upon equity on the opposite side. But what equity can a person pretend to, to whom any thing has been paid, which was not even naturally due, whether because the cause of the supposed debt was invalid *ab initio*, or because it had not effect, as in the case of a mere civil debt, or what colour has he for excepting to a claim of repetition? For as such a debt has not any of the effects of a real debt, it is not allowed in compensation. *L. 14. ff. de compens. (h).* it does not admit of accessions, *L. 3.*

*sem*; Gaius Cassius respondit, ita demum fidejussorj exceptionem dandam, si a muliere rogatus fuisset. Julianus autem recte putat, fidejussori exceptionem dandam, etiamsi mandati actionem adversus mulierem non habet; quia totam obligationem senatus improbat, et a prætere restituitur prior debitor creditori.

(a) Is cui bonis interdictum est, stipulando sibi acquirit, tradere vero non potest, vel promittendo obligari, et ideo nec fidejussori pro eo intercedere poterit, sicut nec pro furioso.

(b) Vide ante, 416.

(c) Quod pupillus sine tutoris auctoritate stipulanti promiserit, solverit, repetitio est; quia nec natura debet.

(d) Quamvis mulier pro alio solvere possit, si præcedente obligatione quam senatus copulatum de intercessionibus efficacem esse non sinit, solutionem seceperit, ejus senatus consulti beneficio maritum se ignorans, locum habet repetitio.

(e) Error facti, quartæ ex causa fidei commissæ non retinetur repetitionem non impedit. Is autem qui sciens se posse retinere [universum restituit] conditionem non habet; Quinetium ius ignoraverit cessa repetitio.

(f) Vide ante, 417.

(g) Hæc condictio ex bono et æquo introducta quod alterius apud alterum sine causa reprehenditur, revocare consuevit.

(h) Quæcumque per exceptionem perimi possunt, in compensationem non veniunt.

§ 1. *ff. de pecun. constit.* (a). *L. 7. ff. de fidej.* (b). the prætor, if the fact is clear, does not allow an action for it; in a doubtful case he only allows it subject to the exception, *L. nam, postquam. q. ff. de jurej.* (c). by which he shews that it is not considered as a debt, and who can suppose, that if it is paid by mistake, it is not subject to repetition? For it is a first rule of equity, that one man ought not to be enriched by the detriment of another. *L. nam hoc 14. de cond. indeb.* (d). Therefore if any person should obtain a promise from another by fraud, I cannot think that what is paid on account of such a promise, although by error of law, can be retained, and that a man shall be allowed to take advantage of his own iniquity, upon the mere pretext that the money was paid by the other party, under an ignorance that he would have been protected by an exception of fraud or fear. And that we may not appear to speak without authority, the text of *L. 7. ff. de cond. ob turp. causam.* (e), where *Pomponius* says, that, if money is exacted on account of a stipulation extorted by force, it is a case for repetition, is evidently decisive upon that subject. And *Julianus* answers after *Nerva* and *Atilicinus*, that money paid by a person who supposed himself to owe it, when he could have been protected by an exception of fraud, may be reclaimed. *L. qui se debere. 7. ff. de condic. causa data.* (f) There are similar passages in *L. cum. is 32. § 1. (g) L. si quis 43. (b) L. si fidej. 59. ff. de cond. indeb. (i) L. 5. cod.*

(a) Vide ante, 438.

(b) Quod enim solutum repeti non potest, conveniens est hujus naturalis obligationis fidejussorem accipi posse.

(c) Nam postquam juratum est, denegatur actio: aut si controversio erit, id est, si ambigitur, an jusjurandum datum sit, exceptioni locus est.

(d) Vide ant., 410.

(e) Ex ea stipulatione, quæ per vim extorta esset, si exacta esset pecunia, repetitionem esse constat.

(f) Qui si debere pecuniam mulieri putabat, jussu ejus, dotis nomine promisit sponso, et solvit; nuptiæ deinde non intercesserunt: quaesitum est, utrum ipse potest repetere [eam] pecuniam, qui dedisset, an mulier? *Nerva* et *Atilicinus* responderunt, quoniam putasset quidem debere pecuniam, sed exceptione doli mali tueri se potuisset, ipsum repetiturum, sed si cum sciret se nihil mulieri debere promisit, mulieris esse actionem, quoniam pecunia ad eam pertineret; si autem vere debitor fuisset, et ante nuptias solvisset, et nuptiæ secutæ non fuissent, ipse possit condicere, causa debiti integra muliere ad hoc solum manente, ut ad nihil aliud debitor compellatur, nisi ut cedat ei condictionis actione.

(g) Fidejussor, cum pacifitur, ne ab eo pecunia petatur, et per imprudentiam solverit condicere stipulatori poterit: et ideo reus quidem manet obligatus, ipse autem sua exceptione tutus est; nihil enim interest fidejussor an heres ejus solvat. Quod si huic fidejussori reus heres extiterit et solverit, nec repetet et liberabitur.

(b) Si quis jurasset se dare non oportere, ab omni contentione disceditur: atque ita solutam pecuniam repeti posse delinquendum est.

(i) Si fidejussor jure liberatus, solverit errore pecuniam, repenti non oberit; si vero reus promittendi per errorem, et ipse potest pecuniam solverit, non repetet, cum prior solutio,

*cod. eod. (a)*. And it is evident that in these passages, the question is respecting error of law, as they relate to the acts of the party himself, and no person can be ignorant of his own acts without the grossest negligence, and an ignorance of that kind is similar to an ignorance of law. *L. 9. § 2. ff. de jur. et fact. ign. (b)*. for no person can pretend to be ignorant of his own acts. *L. 7. ff. ad senat. Vell. (c)*. adde *L. mandatum, 57. ff. mandat. (d)*. *L. 1. pr. ff. ut in poss. leg. (e)*. I am also influenced by the consideration that in the whole title of the *Pandectis, de condic. indeb.* although it is rather diffuse, the right of repetition is never applied solely to error of fact, or denied to error of law, but is referred generally to error, whether what is paid was not due in any sense, or whether the claim of it could be repelled by a perpetual exception; so that it is to be understood that the right of repetition is not prevented by the nature of the error, but by the knowledge of the person making the payment and by that only, as is clearly proved as well by the laws *I. § 1. (f)*. *si non fortem 26. § 1. ff. eod. (g)*. as by the reason which is assigned, why a person cannot reclaim

solu io, quæ fuit inrita, naturæ vinculum non dissolvit, nec civile, si reus promittendi tenebatur.

(a) Si a patre emancipatus, ei non intra tempora præstituta jure honorario successisti quiddam indebitum postea per errorem (utpote patris successori) dedisti ejus conditionem, tibi competere non est incerti juris.

(b) Sed facti ignorantia ita demum cuique non nocet, si non ei summa negligentia objiciatur; quid enim si omnes in civitate sciant, quod ille solus ignorat? Et recte Labeo definit scientiam neque curiosissimi neque negligentissimi hominis accipiendam; verum ejus qui eam rem diligenter inquirendo notam habere possit.

(c) Quanquam igitur fidejussor, doli replicatione posita, defensionem exceptionis amittat, nullam tamen replicationem adversus mulierem habebit: quia facti non potest ignorantiam prætere. Sed non erit iniquum, dari negotiorum actionem in detentorem; quia mandati causa per Senatus-consultum constituitur irrita, et pecunia fidejussoris liberatur.

(d) Mandatum distrahendorum servorum, defuncto, qui mandatum suscepit, intercidisse constitit; quoniam tamen heredes ejus errore lapsi, non animo furandi sed exsequendi, quod defunctus suæ fecerat, servos vendiderant, eos ab emptoribus usucaptos videri placuit: sed vendiclarum ex provincia reversum, Publiciana actione non utiliter acturum, cum exceptio justæ dominii causa cognita detur, neque oporteat eum, qui certi hominis fidem elegit, ob errorem aut imperitiam heredum, adfici damno.

(e) Si quis, cum vetitus esset satis accipere, acciperit an repeti satisfactio ista possit, ut heres condicatur liberationem? Et quidem [si] sciens heres indebitum cavet, repetere non potest, quid deinde si ignoravit remissam sibi satisfactionem potest condicere. Si vero hoc non potuisse remitti crediderit, nunquid condicere possit, qui jus ignoravit; adhuc quæritur quis dixerit satisfactionem condici posse. Quid deinde, si commissæ sit satisfactio? Fidejussores putamus exceptione uti posse, an non; et magis est, [ut] utantur exceptione: quia ex ea causa intercessit satisfactio, ex qua non debuit.

(f) Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio.

(g) Supra duplum autem usurarum et usurarum usuras, nec in stipulationem deduci nec exigi possunt: et solvuntur repetuntur, quemadmodum futurarum usurarum usuras.

what he has paid knowing it not to be due from him, viz. that he is presumed to have given it. *L. 53. ff. de reg. jur. (a) L. 7. cod. de cond. ob caus. dat.* which certainly cannot be said of a person who thought himself under the obligation, and necessity of paying. *L. 1. pr. ff. ut in pass. leg. (b)* the rescission of a security is allowed, in case it was given by one who was ignorant of the law, but denied, if it was given knowingly. In the last place, I am chiefly influenced by the sentiment of *Papinian*, in *L. 8. ff. de jur. et fact. ign. (c)*. that ignorance of law is not injurious to any one in respect to losing what belongs to him, (*AMITTENDÆ rei sue*). This appears to me plainly to indicate, that what is paid even by an error of law; without being due, may be reclaimed; for if we deny this, we must necessarily acknowledge, that an error of law does subject a man to the loss of what belongs to him, in opposition to the judgment of *Papinian*. Neither do I see how any answer can be given to this argument without a cavil: for certainly the answer which is given in support of the modern opinion, viz. that the person making the claim does not contend *de re AMITTENDA*, but *de re AMISSA*, is nothing more; for if a man, by paying through a mistake of law what is not due from him, so loses his property as to have no recovery, then his mistake has the effect of injuring him *in damno amittenda rei sue*. And the question relates not to the time of instituting the action, but to that of making the payment, and *Papinian* denies that a person mistaking the law thereby loses his property, that is, so that he can never recover it. And it is almost (*tantum non*,) ridiculous to say, that a person would derive a gain from his error of law, merely by recovering his own property back again, for that having been transferred to another; it would be a new acquisition. As if a man did not suffer any loss in the deprivation of his property, (*quasi damno non officiator, qui dominium rei sue amittit*,) or the reparation of a loss was to be regarded as a gain. Nothing can be said to be a gain, except after deducting the loss; and the action in question is only for recovering the amount of the loss that has been sustained. And the declaration of *Papinian* in *L. 7. ff. de jur. et fact. ign. (d)*. that ignorance of the law, is of no detriment to persons seeking their own, is referable to all who only endeavour to avoid a loss. Neither is the *L. si fidejussor. 29. § 1. ff. mand. (e)*. at all at variance with this decision, for there the case is proposed of two persons, each contending for the avoidance of a loss; a debtor who was intitled to a perpetual exception, and a surety, who, with a knowledge of the facts, discharged the amount of the debt; and it is ruled that in this case the

(a) Vide ante, 437.

(b) Vide ante, 442.

(c) Vide ante, 412.

(d) Vide ante, 412.

(e) Vide ante, 433.

surety has not any action *mandati* against the debtor, but nothing is said with respect to his right of repetition against the creditor. The same passages clearly shew the error of those who maintain that there is no difference between a knowledge and an ignorance of the law. Suppose the person who receives the money mistakes the law, shall he be charged with theft (a)? Or if he knows that the money is not due to him and yet pretends that it is, shall he be free from that imputation, on the ground that the other party who mistakes the law, is to be regarded as having acted knowingly, and as having made a donation. *Vid. L. Quoniam, 18. ff. de cond. furtiv. (b) L. falsus, 43. pr. ff. de furt. (c)* What then is the conclusion? An error of the law is of no avail to those who are desirous of making an acquisition. *d. L. 7. ff. de jur. et fact. ign.* of which there are examples, in *L. 4. ff. eod. (d). L. 10. ff. de honor. poss. (e). L. nunquam, 31. ff. de usucap. (f) L. 11. eod. de jur. et fact. ign. (g).* but it is no detriment to those who only seek their own property, and contend against the injury of losing it. *d. L. 7. et d. L. 8.* And what is said in law *9. ff. eod. (h).* that ignorance of the law is injurious, is to be understood as meaning that it shall not afford any advantage, that shall not be attended with any gain; but not that it shall be actually productive of loss. For it must be remembered that error of law, as was before observed, only prevents a party from being deprived of the right of repetition, provided there is not any natural obligation. But if the payment was founded upon such a debt, as would give a just ground of retention to the person who received it, the distinction is to be made between error of law and error of fact; and a repetition is to be allowed in the latter case, but not in the former.

(a) The term theft, (*furtum*) has a much more extensive application in the *Roman* than in the *English* law.

(b) *Quoniam furtum sit, cum quis indebitos nummos sciens acceperit, videndum si procurator suos nummos solvat, an ipsi furtum fiat? Et Pomponius Epistolarum, lib. 8. ipsum condicere ait ex causa furtiva: sed et re condicere, si ratum habeam, quod indebitum datum sit; sed altera conditione altera tollitur.*

(c) *Falsus Creditor (hoc est is, qui se simulat creditorem,) si quid acceperit, furtum fecit, nec nummi ejus sient.*

(d) *Juris ignorantiam in usucapione negatur prodesse; facti vero ignorantiam prodesse constat.*

(e) *In bonorum possessionibus juris ignorantia non prodest, quo minus dies cedat, et ideo heredi insituto, et ante apertas tabulas dies cedit: satis est enim, scire mortuum esse, sequi proximam cognatum fuisse, copiamque eorum, quos consuleret, habuisse; scientiam enim non (hunc) accipi, quam jurisprudentibus sit; sed eam quam quia aut per se habeat, aut consulendo prudentiores adsequi potest.*

(f) *Vide. ante, 413.*

(g) *Quamvis in iure nec summius jus ignorantibus subveniri soleat; attamen contra statum imperfectam locum hoc non habere retro Principum statuta declarant.*

(h) *Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.*

Therefore

Therefore if I have borrowed money whilst under the authority of my father, and paid it after becoming my own master, I am not intitled to repetition if I only mistake the law, but it is otherwise if I mistake the fact. *Arg. L. qui exceptionem, 40. de cond. indeb. (a). L. 9. in fin. cum L. sequent. juet. L. ultim. de senatus conf. Macedon (b).* I discharge a trust imposed by the will of a testator, which is defective for want of the proper number of witnesses (c). § *ult. inst. de fideicom. hered. (d).* I pay the whole of a legacy without retaining a fourth to which I am intitled by the *lex Falcidia*: I am intitled to repetition in case of error in fact; but not of error in law. *L. 2. cod. si adv. solut. (e). L. 7. cod. de cond. indeb. (f). L. 9. C. ad leg. Falcid. (g).* not merely because I am bound by my error of law, but because the natural obligation arising from the will of the testator, gives a just cause of retention. *Arg. L. 2. C. de fideicom. (h). L. in testamento, 38. de fidei libertat. (i). L. 5. § si quis, 15. ff. de don. inter ux. et vir. (k)* And I think the same sentiment is intended to be conveyed by *Grotius, lib. 3. introd. ad*

(a) Vide ante, 416.

(b) Hi qui pro filio familias sine voluntate patris ejus intercesserunt solvendo non repetent. Hoc enim et Divus Hadrianus constituit et potest dici non repetituros. Atquin perpetua exceptione tuti sunt, sed et ipse filius et tamen non repetit: quia hi demum solutum non repetunt, qui ob pœnam creditorum actione liberantur, non quoniam exonerare eos lex voluit § 5. Quamquam autem solvendo non repetant l. 9. Quia naturalis obligatio, l. 10.

(c) Si is, cui, dum in patris potestate esset, mutua pecunia data fuerat, pater familias factus, per ignorantiam facti, novatione facta, eam pecuniam expromis et si petatur ex ea stipulatione, in sursum excludendum erit.

(d) This section has not any relation to the right of repetition.

(e) Indebito legato licet per errorem juris a minore soluto repetitionem ei decerni; si necdum tempus, quo restitutionis tribuitur auxilium, excesserit, rationis est.

(f) Vide. ante, 437.

(g) Vide ante, 440.

(h) Et si inutiliter fideicommissum relictum sit, tamen si heredes comperta voluntate defuncti, prædia ex causa fideicommissi avo tuo præstiterunt; frustra ab heredibus ejus de ea re questio tibi movetur, cum non ex ea sola scripturâ, sed ex conscientia relicti fideicommissi defuncti voluntati satisfactum esse videatur.

(i) In testamento quod perfectum non erat, alumnæ suæ libertatem et fideicommissa dedit, cum omnia ut ab intestato egissent, quæsit imperator an [ut] ex causa fideicommissi manumissa fuisset? Et interlocutus est. *Etiâ si nihil ab intestato pater petisset, prius tamen filios manumittere eam quam pater dilexisset; pronunciauit igitur, recte eam manumissam et ideo fideicommissa etiam ei præstanda.*

(k) Si quis rogatus sit, præcepta certa quantitate, uxori suæ hereditatem restituere, et is sine deductione restituerit, Celsus, lib. 10. Digestorum scripsit, magis pleniore officio fidei præstandæ functum maritum, quam donasset, videri. Et rectam rationem huic sententiæ Celsus adjecit, quod plerique magis fidem exsolvent in hunc casum, quam donant: nec de suo putant proficisci quod de alieno plenius restituunt, voluntatem defuncti secuti, nec immerito sæpe credimus aliquid defunctum voluisse et tamen non rogasse. Quæ sententia habet rationem magis in eo, qui non erat deducta quarta rogatus restituere, et tamen integram fidem præstitit, omisso senatus consulti commodo: hic enim vere fidem exsolvit, voluntatem testatoris obsecutus. Hoc ita, si non per errorem calculi fecit, cæterum indebiti fideicommissi esse repetitionem nulla dubitatio est.

*jurispr. Batav. c. 30.* And it is to these or other causes of a similar nature, that we should apply the passages in the code, in which a right of repetition is denied in case of error of law, or confined to cases of error in fact, as in *L. 10. cod. de jur. et fact. ign. (a)*. *L. 6. cod. de cond. indeb. (b)*. For the mere circumstance of my having mistaken the law, does not alone give you a just reason for retaining what was not in any manner due to you; and in this case it is better to favour the right of repetition, than the acquisition of an adventitious gain. *L. 41. § 1. ff. de reg. jur. (c)*

(a) Vide ante, 414.

(b) Si per ignorantiam facti non debitam quantitatem, pro alio solvisti, et hoc aditō rectore provincie fuerit probatum, hanc ei, cujus nomine soluta est, restitui eo agente providēbit.

(c) Melius est favere repetitioni quam adventitio lucro.

## NUMBER XIX.

## SELECTIONS

FROM

THE PLEADINGS OF D'AGUESSEAU.

*SINCE* the greater part of this volume was printed, it has occurred to me to embrace the opportunity of inserting the two following specimens of the pleadings of D'Aguesseau, in his character of Advocate General.

The nature of these compositions, as being the counsels of an assessor to the parliament of Paris, is explained in the preliminary observations of the preceding number of the Appendix, and also in the general Introduction to the present work.

The first of the following selections is an entire pleading upon the question of legitimacy, in a case where the adultery of the wife was clearly manifest, and there was considerable reason to infer, but not absolute ground to conclude, the non-access of the husband. I have fixed upon this production as an instance of co-incidence with the English law, and as a perspicuous explication of the general principles which prevail with respect to the important subject of the discussion.

The other is an abridgment of the two pleadings, in the case of the Princes de Conty, from which I had inserted a few extracts in the course of the present volume, previous to my forming the intention of giving this more extensive view of them.

The following is a slight sketch of the subjects embraced in this cause :

The Duke de Longueville, who was also Abbé d'Orleans, being a person of a weak frame of mind, but having a testable capacity, made a will by which he gave his property to his brother the Count de St. Pol, whom he instituted his heir ; and in case of his death without issue, he instituted his mother Madame de Longueville as heir, praying her at her decease, to dispose of the property in favour of his Cousins German, the Princes de Conty, and by a general clause directing that his will should avail as a testament, a codicil, or in any other way by which it lawfully might. Afterwards he made another will, whereby  
the

the right, before intended for the Princes de Conty, would in effect devolve upon Madame de Nemours, his half-sister as heir by blood, but which latter will was impeached on the ground of insanity; and it was an undisputed fact, that he was in a very short time afterwards in a state of absolute madness, which continued until his death, during a period of several years; the Count de St. Pol, and Madam de Longueville, having died before him.

The first pleading was upon an appeal from a sentence upon a suit instituted by the Prince de Conty, and admitting him to prove by witnesses, the incapacity of the testator at the time of the second will; it being the course of the law of France not to allow a proof by witnesses, without an express sentence for the purpose.

Upon the hearing of this appeal, the first question was, with respect to the validity of the title of the Princes de Conty, under the former will, and involved a discussion of the general rules of the Roman Law, respecting testamentary dispositions, which was followed in the Province where the question arose. Originally a will could only be made by the institution of an heir, and in case of the death of the instituted heir before the testator, or his refusal of the succession, the whole will became void; afterwards the use of substitutions was invented, by which a different heir might be appointed, in case of the succession not being taken by the first; but this was merely an alternative, and if the first did take the succession, the substitution could not attach. At a latter period fideicommissa were invented, by which the instituted heir was directed to restore the succession to a third party. These were analogous, partly to trusts, and partly to limitations in remainder in the English Law, but (reversing the case of a substitution) could not take effect, unless the succession had been taken by the instituted heir.

A codicil (according to one signification of the term) is of nearly cotemporary institution, and is a prayer, which has an obligatory force addressed to the heir by blood, to perform the dispositions which it contains; and a clause directing that a testament shall take effect, as a codicil (called a codicillary clause) gives the testament the same effect as a proper codicil.

The points established in the appeal are, that the disposition to the Princes de Conty was a fidei commissum, and as the heir first instituted, and the heir who was substituted, both died before the testator, it could not take effect in that character, but that by virtue of the codicillary clause, the disposition was obligatory upon Madame de Nemours, the heir by blood.

This being established, the objections to receiving proof by witnesses, of the incapacity of the testator at the time of making the second will, which were founded upon the reasonableness of the will itself, and upon certain other instruments executed about the same time, were taken into consideration, the general principles respecting the capacity of testators were

were expounded, and it was shewn that a proof by witnesses was necessary to elucidate the fact, and that no conclusion of sanity could be drawn from the instruments themselves.

The proof by witnesses having been taken, a general sentence was pronounced in favour of the title under the first will, and supporting the allegation of insanity as affecting the second. And the second pleading is upon an appeal from that sentence. After examining several exceptions to the witnesses, it was first shewn that the former sentence had effectively decided upon the validity of the first will; as the proof adduced only related to the second, and would have been nugatory, unless the court had established the validity of the first. It was then shewn that even supposing the question to be entire, the same conclusion ought to be drawn. The general nature of the sanity requisite in cases of testaments, and the principles applicable to the proof of it, were stated with more particularity. The inferences arising from written instruments were examined, and it being then established that the case must be decided by witnesses, the particulars of the evidence were observed upon terminating in a conclusion of the fact of insanity; and lastly, the argument that the will might be made during a lucid interval, was discussed and refuted.

It will perhaps be thought that the conclusion of insanity might, under the circumstances, have been drawn with much less difficulty, as the facts seem too strong to be reconciled with any other supposition, and the discussion may perhaps in other respects be looked upon as too florid and diffuse; but the knowledge, and ability, and eloquence which it exhibits, will, I hope, through all the imperfections of a translation, display the very masterly talents of its author.

The abridgment which I have made consists in the omission of the arguments of counsel, of the refutation of an argument that the Prince de Conty was entitled to a decision, independently of the effect of the codicillary clause, and of the repetition in the second pleading of some of the statements, and observations in the first.

The pleadings as preserved are in fact only preparative notes, found in the possession of the writer at his decease, after an interval of 50 years. The pleadings actually pronounced were not read, or repeated, but spoken in the language suggesting itself at the time. It is said in a prefatory advertisement, that the fire which animated him at the time of speaking, excited still more brilliant images, more sublime thoughts, more forcible reflections, than those which presented themselves at the time of composition, so that the pleadings which strike the most in reading would have even a superior strength and beauty, if it had been possible to print them as they were pronounced.

## C A S E

OF THE

## SIEUR BOUILLEROT DE VINANTES (a).

*The question relates to the state of a child, whose mother had concealed her pregnancy, and had been condemned for adultery, without the sentence declaring the child to be a bastard; the husband having been only absent from his wife three months.*

THIS cause is as much distinguished by the name and merit of those who have been engaged in it, as by its own importance, which has justly attracted the attention and concurrence of the public. The *arrêt* which you are to pronounce will for ever establish the real principles for deciding upon questions of parentage; which are the solid foundations of the different states of civil society.

You have heard the son of a guilty mother, disavowed by him, whom he calls his father, imploring in your audience the authority of the laws, the force of presumptions, the name and favour of marriage.

You have seen an unfortunate husband, compelled to renew the recollection of the crime of his wife and of his own dishonour; always equally to be commiserated if you pronounce against him, whether blinded by his passion he disavows his own blood, or obliged by the authority of the law to acknowledge as his son, one whom adultery has introduced into his family.

A third party appears in the cause, but it is only to increase the doubt and uncertainty of it; and the destiny of the child whose state is the subject in dispute, is so unfortunate that he cannot find a certain father, either in the honourable connection of marriage, or in the criminal engagement of adultery.

Great as his misfortunes are, he should look forward to a more favourable destiny, since in his defence an illustrious protector has entered upon a career, which will be equally glorious to himself,

(a) This pleading was pronounced in 1693; and is the 23d in the printed collection.

and advantageous to the public (a). His name alone will be a favourable omen to those whose interests he supports, and his merit will not require the assistance of his name, to render him the strength of the weak, and the asylum of the unhappy.

What must have been the joy of that great man who revives in him, if he could have been witness of this auspicious outset, and seen the heir of his name defend the cause, of the pupil whom he had taken under his protection, with the same eloquence which you daily admire in him, who, in the advancement of justice, supports with so much dignity the cause and the interests of the public. Such is the recompence which heaven allots to virtue, such are the benedictions which the Scripture has promised to the just, and has accomplished in the person of that great Magistrate, whose name will endure as long as this assembly. *Ecclesiastic*. Ch. 35.—4. *Mortuus est, et quasi non est mortuus; similem enim reliquit sibi post se.* The fact which gives rise to the present contest, is as clear as the decision upon it is important.

*Nicolas Bouillerot, fleur de Vinantes, Maitre d'Hotel* of the dukes of Orleans, in the year 1664 married *Marie-Anne de Laune*, who was then about 12 or 13 years of age. This marriage, which was happy in its commencement, was followed by the birth of seven children whose state is certain: death has taken away five of these, two of them only now remain, and the appellant insists that he is a third.

Whether the conduct of the *Dame de Vinantes* was for a long time innocent, or whether her irregularities were kept secret, nothing appears to have disturbed the tranquillity of the marriage until the year 1690, or rather until the birth of the appellant. His birth, which confirmed the suspicions that the husband had already conceived against his wife, appears to have determined him in preferring an accusation of adultery.

We shall state in the sequel, with more particularity, the circumstances which accompanied the birth of this child, and the inferences which have been drawn from them, to prove that he owes his life to the criminality of his mother. But we cannot forbear observing at present, that his birth was for a long time concealed, and that the knowledge of it was studiously withheld from the husband, from the public, and the church; that even the nurse to whom he was intrusted was not informed of the secret of his origin; and that he would not even yet have received the ceremony of baptism, if the curé (b) of the parish, being apprized of the

(a) M. Chretien de Lamoignon, son of M. de Lamoignon; then first Advocate General, and grandson of the first president Lamoignon.

(b) Answering to Restor.

neglect, had not urged the *Dame de Vinantes* at length to acknowledge her quality of mother, by having the child baptized in her name. The circumstances of this baptism are the strongest proofs which are opposed to the child whose state is in dispute.

Three months after his birth, an unknown woman of another parish, brought him at 10 o'clock in the evening, of the year 1690, to the church of *la Ferté Loupiere*; she declared that he had been baptized (a); that he was the son of *Marie de Laune*, wife of the *Sieur de Vinantes*; (she did not name the father,) no relations were present at this ceremony. The nurse was the god-mother, the beadle the god-father, and the spiritual birth of the appellant in the church was as much concealed as his natural birth was obscure. The nurse took him thence with her with the same secrecy. But whatever care was taken to conceal this ceremony, the shades which kept the knowledge of it from the husband were removed. The birth of this child, the mystery with which he was bringing up, the obscurity of his baptism, awakened his former suspicions, and he thought it time to institute the charge of adultery against his wife.

He represented to the Lieutenant Criminal, the just complaints which he alleged himself to have against his wife. He stated that he should equally betray the interests of his own honour, and that of his real children, if he any longer deferred demanding vengeance of a crime which was but too certain. He stated all the circumstances, the suspicious residence of his wife in a house in the country, the continual visits of the *Sieur Quinquet*, the secret birth of an illegitimate son, conceived during his absence, and who could only be regarded as a living proof of the irregularities of the mother.

The husband was so unfortunate as to prove by a great number of witnesses the scandalous deportment of his wife. They mentioned several important facts; the pregnancy concealed from the public; the still more secret delivery; the *Sieur Quinquet* alone apprized of the birth of the child whom he disavows; his almost parental cares; the repeated confessions which the mother had made of her criminality; and her contradictory declarations respecting the state of her son.

All these grave, important, and decisive facts, obliged the judges to award a judgment for her apprehension. Conducted to the prisons of the *Châtelet*, she at first confessed her crime, and soon afterwards repenting of her sincerity, she furnished, by her denial, stronger proofs against herself, and even against her son, than she had done by her acknowledgment.

(a) What is sprinkled, (*ordoyé*), as appears by the sequel. Note in the original.

Her process was carried on and perfected; the witnesses were examined and confronted; never was a crime more clearly proved; the sentences of the first judges, condemned her to all the punishments directed by the authentic. The property of her portion was adjudged to her children, the usufruct to her husband. The *Sieur Quinquet* was condemned to banishment for contumacy.

The appeal which *Marie de Laune* instituted against this judgment served only to render her disgrace the more public. The sentence was confirmed by an *arrêt*, to which there has not even yet been any opposition.

*Quinquet* was more fortunate; he surrendered; he purged his contumacy; he appeared criminal, but the number of offenders, and the forbearance of the husband during a long scene of public disturbance, excused or diminished his crime. The second sentence moderated the punishment pronounced by the first; and the court softening still farther the severity even of the latter judgment, condemned him only to pay the husband his costs.

Such, Sirs, was the commencement, the progress, and the termination of the accusation preferred by the husband against his wife, and against the last accomplice of her misconduct.

It is time, however, to state the procedure which was instituted, to assure the state of the child, who had received his birth during the long continuance of the illicit intercourse, between the *Dame de Vinantes* and the *Sieur Quinquet*.

Whether *Maria Bertelot*, his nurse, was absolutely ignorant who was the real father, or whether her ignorance was only affected, she at first required to be paid for her care of the child, by *Magdeleine Landry*, who had placed him with her immediately on his birth.

*Magdeleine Landry* declared that the child did not belong to her, and that she had done nothing except by order of the *Dame de Vinantes*, to whom the nurse must look for payment.

Upon this declaration, the nurse assigned the *Sieur de Vinantes* before the *Bailli de Montargis*; and took the same conclusions against him.

The cause was referred to the *Requettes du Palais*. The father disavows the person who is alleged to be his son, and demands that the *Sieur Quinquet* shall be obliged to acknowledge him.

A tutor was appointed for the child, to defend his state.

The cause was solemnly pleaded at several audiences. A sentence was pronounced, appointing a discussion of the principal question, and directing, that in the mean time the child shall be provisionally allowed the sum of 500 livres a-year, from the property of his mother.

The parties have respectively appealed from this appointment. Each side equally demand an absolute judgment in their own favour; and contend that the cause will never be more ripe for judgment than it is at present, and that you ought now either to confirm the state of the child, or restore to an unfortunate husband the tranquillity which he has been deprived of, by the criminal conduct of his wife.

On the part of the child whose state is contested, you have heard the different kinds of proofs which were introduced, by custom, in an age of ignorance, to prove the reality of birth, and to assure the legitimacy of children, and without dwelling upon those arguments which are always equally uncertain and dangerous, the case was rested upon an explication of the principles established by the *Roman* jurisprudence, or rather by equity and public utility.

Of however great importance the certainty of filiation and legitimacy may be, it must be admitted that nature refuses the proof of it, because it depends upon the unknown moment of conception.

Such is the disposition of the laws, and this maxim is not a vain subtilty of the jurists; it is a principle founded upon natural reason, and common to every system of jurisprudence.

In defect of legitimate proofs, recourse must be had to presumptions. If these are of great importance in other cases, they are decisive with respect to filiation, and it is with that view that the laws have fixed the number, and determined the nature of them.

The mother is always certain, the father is uncertain. Where amidst this uncertainty shall we find the rule for assuring the state of children, but in the legitimate presumption, which the name of marriage induces in favour of those who are born under its sacred protection? *L. 5. ff. de in jus. vocando. Pater is est quem nuptiæ demonstrant.*

The dignity of marriage, the preservation of families, the order of successions, the unanimous concurrence of writers, established this rule as an inviolable principle; your *arrêts* have always followed it in their dispositions, and as the law gives it the whole force of its authority, it can never be invalidated except in those cases, which are indicated by the law itself.

Jurists recognize only two circumstances, which can balance the force and authority of this presumption.

The first, is the absence of the husband; the second, an infirmity which will not suffer him to claim the name of a father.

Whatever colour may have been given to this cause, it is impossible

impossible that either of these exceptions can be applied to it.

The argument deduced from the absence of the *Sieur de Vinantes*, is a frivolous pretext, destroyed by the circumstances that were adduced to establish it.

It is true that he was absent for three months, but the pregnancy of his wife might have preceded his absence, or been subsequent to his return, without infringing the rules of nature or probability; and besides, when the distance between the place of his residence, and that of his service, was so inconsiderable, who can tell whether he was always separated from his wife, and whether his continuance at *Paris* would ever be considered as interrupted?

If this absence cannot justify his disavowal of his son, what weight is there in the other arguments, by which he would exclude the light of truth?

If it is contended that the *arrêt* which adjudges the mother to be criminal, has declared the son to be illegitimate, it is answered in the first place, that the child was no party to this *arrêt*, and in case it is adduced against him, he formally declares his opposition to it; but further, he maintains that it cannot be regarded as any prejudice against him; that no consequence as to his state can be drawn from the crime of his mother, and that she might be guilty without his being illegitimate. The disposition of the law, *Miles*, II. § 9. *ad legem Juliam de Adulteriis*, may be successfully applied to this cause. *Non utique crimen adulterii quod mulieri objicitur, infanti præjudicat, cum possit et illa adultera esse, et impubes defunctum patrem habuisse.*

In fact so far is this *arrêt* from containing any thing which can be opposed to him, that he conceives it to be entirely in his favour.

The husband, blinded by his passion, seeks to punish the mother in the person of her child; he disavows his own son; he alleges his birth as one of the principal proofs of the adultery. The process is instituted. The presumptions, the *indicia*, the conjectures are examined. The mother is condemned, but the son is not excluded from the family of the husband; and this silence with regard to him is a formal judgment in his favour, since having been born during marriage, and not having been declared a bastard, he must necessarily be a legitimate child.

If the *Sieur de Vinantes* would oppose to his son the declarations of his wife, the son will invoke in his favour the authority of the law, which does not subject the state of children to the absolute power of their parents, nor, in a matter of such importance, listen

to declarations which are as suspicious in fact, as they are useless in law.

The person who makes these acknowledgments, is a woman accused of a crime, animated by the desire of avenging herself upon her husband, or intimidated by the fear of the punishment she had merited, seeking to deprive her husband of a legitimate heir, or wishing to purchase his clemency, at the price of the state, and fortune of her son.

If the crime of the mother, the *arrêt* which condemns her, the disavowal of the father, can never prejudice the quality of the appellant, he hopes that by assuring his state, you will confirm the most authentic title by which the birth of children can be proved.

But if the court has any difficulty in pronouncing at present absolutely in his favour, he maintains that the sentence of the *requêtes du palais*, must at any rate be deemed invalid, because it is repugnant to all the principles of law; which unanimously give provision to those in possession of their state, and besides that its execution is impossible. It only allows aliment to the appellant, from the property of his mother. Now his mother has no property, she lost it by her crime: it was adjudged to her husband, and to the other children whose state is not disputed, and even if the court should defer the judgment of this cause until the time of his majority, he insists that the favour of the presumption in his behalf, the quality of the contest, and the very name of marriage are sufficient titles, for adjudging him a provision until he is confirmed in the peaceable possession of his state.

However strong these considerations may be, their authority is balanced by the very name of the father, in the person who opposes them, by the judgment which he pronounces against his asserted son, by the presumptions which he borrows from the facts, by the proofs which the declarations, and the conduct of his wife, furnish him with against the state of the child.

He admits that the authority of writers, and the jurisprudence of *arrêts*, seem to oppose an invincible obstacle to him, in the common and established maxim, that *Pater is est quem nuptie demonstrant*.

It is however this principle which he calls in question. He offers to shew that this rule, however general it appears, is not without exception, that it only forms a probable presumption which may be destroyed by evidence to the contrary.

It is supposed that the inclinations of a husband and a wife are conformable to their state, and to the object of their engagement.

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The law does not attend to the absurd caprice of a husband, *L. 6. ff. de his qui sui vel al. jur. Qui cum uxore sua assidue moratus, nolit filium agnoscere*; and whilst the birth of children can be ascribed to a legitimate source, the law will not suppose criminality, in order to disturb the peace and repose of families.

Such is the nature of this presumption; probability and the appearance of truth are the foundation of it; but as it frequently happens that nothing is more distant from the reality of truth than the appearance of it, and as falsehood itself has often the semblance of probability, this presumption is like all others which depend upon the same principle; they may be destroyed by other arguments, and if that probability from which they derive their only force, is combated by more solid reasons, the judges reject these delusive phantoms (*fausses lueurs*), to give their suffrages to the real light of truth.

This is the judgment even of the jurists themselves, who authorise the presumption.

The title under which it appears is entirely foreign to questions of state. The case in which it is proposed, has no relation to the quality of a legitimate child.

If this rule had occurred under the title *De Statu hominum*, and not in that *de in jus. vocando*, the jurist would have developed its principle, its consequences, and its exceptions; the purpose for which it was mentioned, rather required it to be proposed than examined; he thought it sufficient cursorily to indicate it, and it is not to be concluded from his silence that it can never be impeached, since this omission is supplied in several other titles of the law.

If we glance over all the dispositions of the laws upon this subject, we shall find that the same probability, which occasions this principle to be established, with regard to children born in marriage, has induced the jurists to extend it to children who owe their existence to a concubine; and as in this last case, nobody doubts but that the argument may be repelled, it ought to be acknowledged that it is of no higher authority in respect to marriage.

The whole title *de agnoscendis liberis*, may be considered as a general exception to the rule, *Pater est quem nuptiæ demonstrant*.

The law distinguishes three kinds of cases, in which the quality of filiation, and legitimacy, may be contested.

The child is born either during the marriage, or after the separation of the husband and wife by a divorce; or lastly, after the dissolution of the marriage by death.

Now in all these cases, the law teaches us that the state is not entirely

entirely assured, that the mere name of marriage does not place it out of the reach of examination, that it may be assailed by every kind of proof, that an oath may be required from the mother, and that even after she has taken it, the legitimacy of the child may be disputed.

The law makes no distinction; every kind of argument may be received, inability, absence of the husband, enmity, forced or voluntary separation, the disavowal or the acknowledgment of the father; in a word, every proof resulting from the circumstances of the case, that natural conviction, those silent *indicia*, which time, or place, or persons may furnish upon these occasions, proofs the less suspicious as they are the more spontaneous. Justice admits all these elucidations, and never did they occur in greater numbers than in the present cause.

The crime manifest, public, acknowledged, the absence of the husband at the time of the conception, the presence of the adulterer, the pregnancy unknown to the husband, the domestics and the neighbours, the birth of the child made a secret, the ceremonies of his baptism deferred, his nurture a secret; the denial of so evident a fact, in the interrogatories of the mother.

Who can believe that this child was the pledge of a legitimate union, when we see a mother solicitous of concealment, placing her child in unknown hands, fearful that the confidants of her misfortune might betray it, stifling the sentiments of nature towards her own blood, acknowledging that the birth of the child is a necessary proof of her guilt; declaring to some of the witnesses that he is not the son of her husband, renewing this declaration at the face of the altar, in the register of baptisms, which contains the most solemn proof of the state of individuals?

However great the favour of ordinary presumptions may be, can it be compared to so many different proofs, which are not less strong against the *Sieur Quinquet*, than against the person to whom he has given existence? Accomplice in the disorders of the mother, he alone was deemed worthy to witness the birth of the son; depositary of the secret, he betrayed himself by his care in the nurture and maintenance of the child.

It is hoped that you will not suffer him to add to the injury, which he has done to the husband, the mortification of giving him heirs in spite of himself, and obliging him to divide his fortune, between the children of his marriage, and the offspring of adultery; and treating as his son one whom he can never regard, but as a constant proof of the infidelity of his wife.

Lastly, the *Sieur de Quinquet* alleges in his favour the authority of your *arrêt*, which does not subject him to any punishment.

If he is guilty, his guilt is divided with many others, and he is surprized to find the *Sieur de Vinantes* fixing upon him alone as the object of his suspicions.

He advances the same principles which were urged on the part of the child. To these he adds circumstances of fact, personal to himself; he produces a certificate, to shew that he was absent at the same time as the husband. He contends that the parental cares which are now imputed to him, are facts which may flatter the vengeance of an irritated husband, but cannot detract from those inviolable rules which public order has established, and which you never can maintain in any cause more distinguished and important than the present.

WITH RESPECT TO OURSELVES, after having laid before you the respective interests, and the principal arguments of the parties, it might seem that the natural order of the case would oblige us here to examine a preliminary question, which, in the *Roman* law, always preceded the judgment in causes of state, such as that at present before us; that is whether we ought at present to enquire into the condition of the child, or defer the judgment until he attains his majority?

But this question appears to us of slight importance, and when we consider the state of the contest, we do not see any obstacle which requires you to suspend the judgment of it.

We know that the laws are watchful, to preserve the honour and dignity of families; that they take minors under their protection; that their weakness is the measure of the defence afforded to them; and although their tutor is charged with all the circumspection of the law, and his power is compared to that of a father, and a master, the jurists have deemed it dangerous, to allow the state of a child to depend upon the fidelity of his tutor, and hold that this important judgment which is to be decisive of the whole fortune of his life, ought to be deferred to a more mature age, when the minor, capable of defending himself, can only impute the failure of his cause to his own neglect or misfortune.

Whatever respect we may have for the decisions of the great men, who are the authors of these laws, we think it may be affirmed that our usages have not adopted them, that nothing is more common, than to agitate in this tribunal questions of state on behalf of a minor, and even of a child under the age of puberty; and that on the other hand it would be difficult to find any instances, of a practice conformable to the *Roman* jurisprudence.

But besides, even if this cause was to be decided by those laws, and had been pleaded before the *Prætor*, who proposed the *edictum carbonianum*, it would be easy to shew that we might be allowed

to anticipate the age of puberty, and to give at present a definitive judgment.

To decide this question, it would be sufficient to cite the authority of the rescript of the emperor Adrian, which we should enfeeble by stating in any other terms than its own. *ff. de carb. ed. L. 3. § 5. Si Pupilli idoneos habeant a quibus defendantur et tam expeditam causam ut ipsorum intersit maturè de ea judicari et Tutores eorum judicio experiri velint, non debet adversus pupillos observari quod pro ipsis excogitatum est.*

We shall not make any application of these words, the court can form a better judgment than we can do, whether the child can ever hope for a better defence, than he has had in your audience.

The tutor demands a judgment. All the parties consent to it. Written documents, witnesses, all the arguments both of fact and law, are fully brought forward.

If the quality of a legitimate son is established by all these proofs, can we leave in suspense, a state which ought to be assured? And if on the contrary it is destroyed, equity will not suffer the repose of a whole family to be exposed to all the variations of the will of a minor, who, having nothing to fear for himself, may trouble with impunity the tranquillity of the real children.

We confine ourselves then to the real question in the cause, which consists in comparing the force of the presumptions alleged on the one side and the other; and entering into an examination of the proofs which the law has established, and to the difficult exercise of that discernment, upon which the cause entirely depends.

It seems at first sight, that what we call an important question hardly merits the name, and that to decide it, it is sufficient to say in a word—The child was born during the continuance of a legitimate marriage; can there be any doubt as to the father, when the law has pointed him out, and, to use the expressions consecrated to the subject, when marriage has demonstrated him?

Yet this principle is now assailed, and it is from the very law which establishes it, that arms have been borrowed to combat it; and when we examine the objections that have been opposed to it, with so much erudition and eloquence, it seems that the maxim, if not destroyed, has lost at least a part of its authority.

Permit us, Sirs, before we enter upon the examination of these objections, to propose, in a very few words, the general principles established by the laws and the writers with regard to the proof of filiation, and the quality of legitimacy.

If it were necessary here to treat of the nature of proofs in general, it would be easy to shew that the greater part of the truths, which are the subject of questions of state, are not natural and immutable truths, but positive and arbitrary, depending on the inconstancy of the will, and as they are uncertain in their nature, the proofs upon which they are founded can never have that character of firmness and evidence which is capable of producing an entire conviction, and forming a perfect demonstration. All the wit of man, all the prudence of judges, consists in deducing from a known fact, a certain consequence by which they may attain the knowledge of another fact that is doubtful.

If it were permitted to enter into the detail of different proofs, it would be easy to shew that they might all be referred to this general rule; and that it is only by the supposition of one fact as certain, that they lead the mind to the discovery of another which is obscure and difficult.

Thus when it is certain, that a person accused had an interest to commit the crime imputed to him, it is concluded to be probable that he did commit it; when minority is clear, it is easily presumed, that there was inequality in a contract (a); and lastly, if a child is born in the course of marriage, it is natural to believe that the mother is innocent, and that the husband is the real father.

Such in general is the nature of these arguments. Let us however examine wherein they are distinguishable, and whether some of them are not more favourable and efficacious than others.

Every presumption is founded upon the natural connection, which subsists between the truth which is known, and that which is sought for; and as this connection may be more or less necessary, it is evident that the presumptions may be more or less infallible, and that the degree of certainty will depend upon the relation, between the fact which is known and that which is not.

If it is a necessary connection, it is impossible that the first truth can be certain, and the second, doubtful; the presumption is then considered as the most certain proof, and will alone produce a perfect conviction in the mind of a judge.

Thus to shew the falsity of an instrument, it is proved by authentic testimony, that the person by whom it appears to have been signed, was absent on the day of the act being passed; this fact alone is a sufficient proof of the fabrication; because if the absence is certain, it is impossible that the act can be true.

(a) On presume facilement la lesion.

If, on the contrary, the fact to be proved is not absolutely a necessary consequence of that which is certain, the presumption is only probable, and then the doctors make a distinction, the presumption is either expressly recognized and approved by the law, or it is not so.

In the first case, although the argument is not so strong as to exclude all proof to the contrary, it is nevertheless considered as true, until it is destroyed by invincible arguments.

If the law does not authorize the presumption, it submits it to the prudence of the judge.

Let us apply these principles to the presumption before us. Two characters are essential to a presumption to render it decisive, or at least to have it considered as the truth until it is destroyed.

The first is, that it be founded upon a necessary and infallible connection, between the fact which is known, with that which is to be proved.

The second, that it be authorized by the law. Let us examine whether these two characters accord with the presumption under examination? Whether it is infallible? Whether it is legitimate?

The fact supposed from which the consequence is drawn, that *pater est quem nuptiæ demonstrant*, is the certainty and truth of the marriage, and that being ascertained, it is concluded that the child born under the sacred name of marriage is legitimate. But is this conclusion necessarily infallible, indubitable? Does its certainty exclude every proof to the contrary? We think we should abuse the time allowed by the court for the judgment of this cause, if we were to dwell upon the proof that nothing is farther from the fact.

We shall not here repeat all the dispositions of the laws, which have been cited in support of this principle.

The whole of the title *de agnoscendis liberis*, is full of these decisions. The jurists every where acknowledge, that notwithstanding this presumption in favour of children, the father may always disavow them, provided he can shew by certain proofs that they owe their existence to the guilt of their mother. Even the silence of the father, his tacit acknowledgments, the omission of the requisite formalities, cannot deprive him of the right of contesting the birth of the person alleged to be his son.

*Si, uxore denuntiante se pregnantem, maritus non negaverit, sive maritus neglexerit facere quæ ex Senatusconsulto debet, natum cogitur omnimodo alere, ceterum recusare poterit filium. L. 1. § 14 & 15. ff. de agn. liberis.*

The effect of the presumption, according to this law, is confined to obliging the father, even when by his silence he has acknowledged the state of the child, to provide him with aliments; but even whilst it ordains this provision, he may refuse him the quality of a legitimate child.

We forbear adding to this authority all the others which have been cited. The court must remember the force and solidity with which the maxim was proved, and besides we think that the principles which we have established, respecting the quality of presumptions, are sufficient to shew that this common argument, not being founded upon an infallible consequence, can only be considered as a probable presumption, as a powerful conjecture, but as one which may be combated by proofs more strong and convincing; and if it were possible to doubt this maxim, it would be sufficiently established by the very name of an adulterine bastard; a name which could not be known to the science of jurisprudence, if it were impossible that a child conceived (a) during marriage could be illegitimate.

But if this presumption has not the first condition, which is necessary to render it decisive, it has at least the second, which is sufficient to render it legitimate. It is written in the law, it is invested with its authority, it has a character which every writer on the subject, and which your *arrêts* have always respected.

Public utility, the repose of families, the tranquillity of marriages, are the solid foundations upon which it is established, and the same reasons which originally occasioned its introduction, have induced you to preserve it in all its force.

Let us add another motive which renders this presumption almost inviolable, that is the impossibility which commonly exists of proving the contrary, and in a case of doubt, the law always presumes in favour of the innocence of the mother, and the state of the child.

Let us combine these principles, and conclude with all the writers, that if this presumption is not infallible, it is at least very legitimate, and that if on the one hand it is open to a proof of the contrary, on the other it is considered as the truth, until it is destroyed.

But what is the proof which the law allows to be opposed to it? This it will be easy to explain, by the same principles.

(a) This is not quite correct, as the term is applied to the illegitimate child of a married man, by a single woman.

The presumption capable of opposing that of the law, ought to be written in the law itself; it ought to be founded on an infallible principle, before it can destroy a probability so great as that which is the foundation of this proof.

Now it is evident that if we adhere to these maxims, there are but two exceptions to the general rule, both of them founded upon a physical and certain impossibility of the presumption being true.

They are contained in the law itself, which gives the definition of a legitimate son.

*Filium eum definimus qui ex viro et uxore ejus nascitur, sed si fingamus abfuisse maritum, verbi gratia per decennium, sed si ea valetudine fuit ut generare non possit, hunc qui in domo natus est, licet vicinis scientibus, filium non esse. L. 6. ff. De his qui sui vel alieni juris sunt.*

There are then only two proofs, which can be opposed to so favourable a presumption.

The long absence of the husband, and we may add conformably to the spirit of the law, that this absence must be certain, and continual.

Incapacity, either permanent or temporary, is the second. The law allows no other, and it is evidently impossible even to imagine any other, since so long as there is neither absence, nor any obstacle which separates those whom marriage has united, it will never be presumed that the husband is not the real father.

Let us now apply these different principles, to the particular circumstances of the present cause.

We might decide it at present, and as no proof has been given either of a long absence, or of any other impediment, the presumption of the law ought to subsist in all its force.

Yet as it has been argued that the combination of all the different presumptions, arising from the facts of the case, may be compared to the general exceptions contained in the law, we are obliged to enter into the discussion of these arguments, and thereby finish the examination of the cause.

The absence of the husband, the presence of the adulterer, the secrecy which was given to the pregnancy of the wife, and the birth of the child, the circumstances which accompanied it, the obscurity of his nurture, the cares of the *Sieur de Quinquet*, the declarations of the mother, the disavowal of the father; these are principal grounds which have been urged in opposition to the legitimacy of the child.

To answer these arguments, we feel it our duty, in the first place,

to ascertain the facts, and afterwards to examine the inferences which have been drawn from them.

We have not here to treat of one of the ordinary questions in cases of state, to determine whether proof by witnesses shall be admitted. This proof has already been made, in convicting the mother of the adultery of which she was accused; and it is contended that the quality of adulterine bastard in the son is thereby proved by anticipation.

It is in the information, then, that we are to seek for the proof of these facts.

The first is the absence of the husband for three months. The second, the presence of the adulterer. Both these facts appear from the informations. The eighth witness states as follows: (*here the deposition was read.*)

Besides the proof arising from this evidence, the mere quality of the husband supports the fact. He had the honour to be an officer of the Duchess of Orleans, and he produces regular certificates, that he served his quarter during the months of *April, May, and June*, in 1689.

The proof which the *Sieur de Quinquet* opposes to this argument does not appear to be of much importance: He produces a certificate of his being present at the review at *Montargis*, on the 4th of *May*, 1689. He adds an attestation which shews that he was serving that year in the second battalion of the *Orleannois*. But what inference is to be drawn from these attestations? The first proves that he was absent a single day, in *May*, and the other speaks in general of his service, without shewing either its commencement, its continuance, or its conclusion.

The certainty of these two facts then cannot be disputed: The absence of the husband for three months, and the presence of the adulterer for the same time.

The secrecy of the pregnancy, the darkness and mystery with which it was endeavoured to cover the birth of this child, are not less manifest.

(*The deposition of the fifth witness read.*)

The public was ignorant of the pregnancy; the birth of the child was concealed; the endeavour to suppress the knowledge of it is attested by this evidence; and the depositions, which we are about to read, confirm still farther the truth of this important fact.

In all the circumstances which accompany the birth, we equally recognize the fear of the mother to render it public, and the care

which was taken by the *Sieur de Quinquet* of the child of whom he is alleged to be the father.

The detail of all these facts appears in the deposition of *Magdeline Landry*, the only depositary of the secret of her mistress, and the only witness of the birth of the appelland.

(*Her deposition reads*.)

The facts which regard the *Sieur de Quinquet* are also confirmed by the deposition of the ninth witness, who went to fetch him at the time of the delivery; and by the testimony of the sixteenth witness, who declares that he brought to the *Valet of Quinquet* cloaths suitable for a child of three months old.

The circumstances of the baptism, not less important than those already mentioned, are exactly stated in the deposition of the seventh witness.

Lastly, you have heard all the different declarations of the mother; express declarations related in the depositions of the witnesses; and tacit declarations, stronger than the most formal acknowledgments, in all her conduct, in the pains to hide her pregnancy, and to conceal the birth of the child, who she thought would be regarded as a proof of her guilt.

Let us add a last fact still more considerable: she not only wished to conceal her situation during the continuance of her pregnancy; she even ventured to deny both the pregnancy and the delivery in the face of justice. She thought that she should pronounce her own condemnation, if she acknowledged the birth of her son.

Such are all the proofs which result from the information; proofs so considerable when they are combined, that even the principles of law and the most certain maxims seem to become doubtful, when we consider so great a body of unsuspecting testimony concurring to support the presumption, that the person who claims the state of a legitimate child is the fruit of his mother's criminality.

Let us not, however, abandon the authority of the only principles which can assure the birth of individuals; and let us not be overcome by this multitude of presumptions, as to weaken the foundations of civil society.

The arguments are probable, but they are not invincible; and to begin with that which appears the most specious; the absence of the husband does not appear sufficient to throw doubt upon the state of the son. Two conditions equally essential are absolutely wanting for the production of that effect; the length of its continuance, and the distance between the places.

The

The absence of the husband began in *March*, and ended in *June*. From his departure to the birth of the child there was only a period of about ten months; after his return there was a complete interval of seven months; and in each of these cases the laws have decided in favour of the legitimacy of children.

But besides, who can be sure, that the *Sieur de Vinantes* was so assiduous in his service, that he was not absent from his duty a single day? Who can prove that in so small distance as twenty leagues he never came to his country house; and shall the certainty of the state of a child, and the quality of legitimacy, be allowed to depend upon such a fact as this?

But it is said, the wife of the *Sieur de Vinantes* has been condemned, her guilt therefore cannot be called in question.

We have no other answer to make to this objection than the law which has been cited to you. *Potest et illa adultera esse et impubes defunctum patrem habuisse*. You cannot involve the son in the condemnation which you have pronounced against the mother. She may be criminal and he legitimate.

The second fact, which may be attended with even more difficulty than the first is, the declaration of the mother, her repeated acknowledgments, her denials, and her conduct which speak still more forcibly than her acknowledgments.

To destroy this presumption we shall only say that justice pays no regard to those forced acknowledgments, which the fear of infamy, the desire of revenge, or the blindness of passion, may extort from a mother.

Every one knows that guilt is timid, that persons accused frequently deny the most indifferent facts; and that the chief of the *Roman* poets formerly applied to an impassioned woman the description of *omnia tuta timens*.

But even if we may believe the mother to have been exempted from those emotions which are common with persons accused; what are we to conclude from all these circumstances, except that she may have been in an error respecting the commencement of her pregnancy, and have apprehended that her husband would probably form the same judgment with himself? But neither her passion nor her error can prejudice the state of her son; and, besides, the motive which determined her to conceal her pregnancy is too uncertain, to govern the decision upon the condition and fortune of the appellant.

If the *Sieur de Quinquet* took that care of the child which in-

duces a presumption that he was the real father, it was perhaps a consequence of the same error; the secrecy of the baptism, the mystery of the nurture, may have had the same foundation; and whatever the motive may have been, the law forbids our pronouncing upon such presumptions as this against the state of a child.

Lastly, it is of no avail to resort to the suffrage of the father for the decision of this contest; his testimony is decisive, whenever it is in favour of a child, whose quality is uncertain. *L. 1. § 12. ff. de agnos. lib. Grande præjudicium affert pro filio confessio patris.* But this powerful prejudice becomes a very feeble presumption, when the father disavows his son, and especially when it may be presumed that he wishes, to avenge upon the son the offence of the mother.

We add to all these reasons, a reflection arising from the *arrêt* which you have pronounced against the mother. The husband alleged the birth of the appellant as the strongest proof of adultery.

The same arguments, the same witnesses, the same presumptions, which are employed to day were then before you. In several instances, the court, in pronouncing upon the crime, had declared the child who was the fruit of it to be an adulterine bastard. Yet in this case nothing was pronounced upon the subject.

You confirmed then his state by your silence, and we could not wish for any better guide in the decision of the cause.

We think therefore that the party of *M. Cbrtien de Lamoignon* ought to be supported in his possession of the quality of a legitimate son; that the party of *M. Arrault* ought to be enjoined to acknowledge him as his son, and to pay for his maintenance.

An *arrêt* conformable to this conclusion was pronounced the 15th of June, 1695, by the First President *Harlay*.

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In the above pleading we see that the law, *Pater est is quem nuptiæ demonstrant*, only establishes a presumption which may be combated by proof; besides which the only object of the law was to decide, that there is no certain father for a child *vulgo conceptus*; whereas the issue of a solemn and public marriage has a person whom he can call his father: on the other hand, that a child may be legitimate if born of a woman residing with her husband,

husband, although she may have been guilty of misconduct. As the decision of causes of this nature depends upon the application of the principles to the circumstances, different judgments have been given according to the difference of facts. There are some which reject the demands of those who pretend to have been born in wedlock, without having either proofs or possession of state. In the present case the birth of the child was proved, as well as the residence of the mother with the husband; who only alleged an absence of three months; and the *arrêt* which, in declaring the mother criminal, did not declare the child to be illegitimate, appears to have been founded upon this circumstance. *Note to the original.*

## P L E A D I N G (a).

*Pronounced in two Audiences, the last on the 10th of January  
1696.*

**In the Case of the Prince de Conty and the Duchefs de  
Nemours.**

Upon an appeal from a sentence of the *Requêtes du Palais*, which ordained a proof, by witnesses, of the time when the insanity of the *Abbé d'Orleans* last male issue of the house of *Longueville*, commenced.

- I. *Whether the caducity of the institution induces the caducity of an institution, conceived in terms of request and purely fidei-commissary.*
- II. *Whether a codicillary clause in this case supports the fidei-commissary substitution.*
- III. *Whether the author of this substitution, having executed a second testament, which changed the disposition of the first, a donation and several other acts, and having six months afterwards been placed under an interdiction for insanity, proof by witnesses could be admitted of the insanity, having commenced at the time of the testament.*

THE circumstances of exterior splendour that accompany this cause, the greatness of the parties who are waiting in suspense for the judgment which you are to pronounce, and every thing which attracts, this day, the attention, the wishes, and the concurrence of the public, must, (such is the severity of our duty,) be forgotten at the outset of this discourse.

Whatever respect we may have for the parties, we shall not hesitate to say, that we are no longer here to regard the person of a prince, whose valour, whose virtue, and whose royal ancestry we honour in common with all Europe, nor the inheritress of the fortunes of the house of *Longueville*, who seems to bring here the favour which belongs to a name of such exalted celebrity; and in

order to avoid the equally dangerous influence of a prepossession, favourable or adverse to the one party or the other, we can only contemplate them to day, as they are contemplated by justice herself.

Divested in her presence of these exterior advantages, they lay at her feet the splendour of their dignity; they submit all their grandeur to the empire of the law, to receive from its oracles the certainty of their destiny.

Let us leave to those who have the good fortune of being mere spectators of so illustrious a contest, the pleasure of remarking that a cause, private in its nature, appears to have become public; that the interest of an individual is regarded as the interest of all; and that, whatever variance there may be in opinions, the views and wishes upon the subject are at least in unity.

As for ourselves, we will venture to declare, that an interest still more great and elevated attaches all our application; it is the interest which the public ought to take in the decision of a cause where the grounds of determination appear to be in conflict with each other; where the intention of a testator is combated by an opposite intention; where sanity and incapacity appear to be equally probable; where the favour of the testamentary heirs is balanced by that to the heirs by blood; and where we are to seek for, to discover, and to establish the solid principles of human certainty, by which we may for ever confirm the real state of those who are gone down to the grave, and assure the execution of their found intentions.

The fact, which is the foundation of these different questions, is one of the principal and most important parts of this cause.

*Henry d'Orleans, duke de Langueville*, was twice married, and each time he had the honour to renew the ancient alliances of the house of *Longueville* with the sacred blood of our kings.

*Madame de Nemours* owes her birth to the first marriage, and the second was followed by that of two children, the last and only hopes of an exalted race, which hitherto had given the state almost as many illustrious persons, as the number of subjects that it had produced.

*Jean Louis Charles d'Orleans*, whose testaments are the subject of this dispute, was the eldest. He came into the world the 10th of *January*, 1646; the 12th of *January*, in the year 1671, therefore, was the term of his minority, and almost of his civil life, since all the parties agree that a few months afterwards he in a manner died both to himself and his family, by a madness which only terminated with his natural life.

*Charles Paris d'Orleans, Comte de Saint Pol*, his brother, who was younger by two years, would have come of age in 1673, if a premature death had not snatched him away in the flower of his age.

You recollect the different portraits which both parties have drawn of the different characters of these two brothers; divided, or rather opposed, upon every other fact, they are agreed upon this, and have called upon you on the one side and the other to observe,

That the *Abbé d'Orleans* had received from nature, inclinations so little suitable to the grandeur of his birth, that she seemed purposely to have prepared his family for the misfortune which was to happen in the sequel:—the weakness of his mind corresponded to that of his frame; born to obey, rather than to command, incapable of conceiving views proportionate to the elevation of his condition; an avarice unworthy of his rank, a natural levity which induced him continually to remove from place to place, without any other object than that of change, were the two leading passions which appeared during the time that he was in possession of his reason.

The *Comte de Saint Pol*, on the other hand, truly worthy of the name of *Longueville*, born with all the great qualities which had shone forth in the heroes of his race, seemed to revive in himself the famous *Comte de Dunois*, whose memory will last as long as the monarchy itself.

It seems that the *Abbé d'Orleans* had seen without any jealousy the extreme difference of merit between his brother and himself, and that he was the first who endeavoured to repair by his liberality the injury which nature had done to the *Comte de Saint Pol*, by refusing him the name and quality of the elder brother.

Scarcely had his age and reason rendered him master of his liberty, when he wished to make a sacrifice of it, by engaging in the profession of religion.

He entered, during the life of the duke *de Longueville* his father, into his noviciate with the Jesuits; and, if he relinquished it after his death, it seems that he always retained the desire of renouncing the engagements of the world, and seeking, in the state of a simple ecclesiastic, a kind of life more conformable to the obscurity of his inclinations.

His continual journeys, or other reasons which are unknown to us, suspended for some years the execution of his design.

Without attempting at present to give an exact relation of all his proceedings, it will be sufficient to remark, that he passed near three years, travelling within and without the kingdom, examining

ing himself the accounts of his expences, signing the orders for payment, and living with a parsimony which we could hardly conceive possible in a person of his rank, if the accounts which are produced to day were not an indisputable testimony of it.

It was in the course of his first journies that, at the age of 22, he began to give indications either of his slight attachment for temporal dignities, or of his great affection for his brother.

He went with him to *Neufchatel*, and on the 21st *March*, 1668, in an assembly of his principal officers, he voluntarily renounced the most splendid of his titles, and deprived himself of his quality of *Sovereign Comte of Neufchatel and Valengin*, in order to confer them on the *Comte de Saint Pol*.

He himself explains the motive which engaged him to make this resignation. The esteem which he had for the *Comte de Saint Pol*, in whom he observed all the grand qualities which could sustain the dignity of his house; the affection which he had for his subjects at *Neufchatel*, whom he hoped to render happy in giving them a sovereign, capable of imitating the great examples of his ancestors, and of supporting his state with its original dignity.

It was thus, and almost in these identical terms, that he declared the reasons of his choice: he adds, that it was many years since he had formed this design, to which he had not met with any opposition, except in his own family.

The only condition which he attached to his liberality, was a right of reversion to himself, in case his brother should die before him without children.

This first donation was followed, two days afterwards, by another which can only be considered as the continuance and execution of the first.

In order to mark in a still stronger manner, that he no longer regarded the territory of *Neufchatel* as a property belonging to himself, he gave his brother, by way of donation, whatever might be due to him in any respect as sovereign lord of that territory.

And finally, the same day, thinking that his liberality was confined in too narrow bounds, if he did not extend it beyond the limits of *Neufchatel*, he made a donation to his brother comprizing generally all his effects, without any reservation or exception; and as this donation was to have its effect in the kingdom, he expressly declares that the motive which determined him to make it, was the desire of giving his brother more effectual means of rendering service to his king and country, according to his own good intentions and the obligations of his birth.

The conditions upon which this donation was made evince that the

the intention of the donor was to make a kind of testament: he speaks of the place of his burial, and gives directions concerning his funeral; he charges his donatory to pay several annuities to different persons of his family; finally, he declares that this disposition is his last will, that he revokes all other testaments which he might already have made; and, in order to assure still more strongly the execution of this act, he adds a kind of codicillary clause, by which he wills that the present donation *causa mortis*, shall avail by this mode and by every other better form by which it might avail and legally subsist.

Not content with having rendered his brother master of *Neufchatel*, and giving him all his moveable effects; he wished to assure to him the title of his heir by a testament, clothed with all the solemnities of the *Roman* law.

After having, on his return from *Neufchatel*, run through *Burgundy* and *Provence*, he returned to *Lyons*; and arrived there about the 26th of *September*, 1668.

We are ignorant what was the exact time of his continuance there; but we certainly know that it could only be very short, as he had not arrived on the 26th of *September*; and was at *Milan* on the 18th of *October* following.

If we subtract the time which was necessary for going from *Lyons* to *Milan*, it will be easy to conclude that he did not at most spend at *Lyons* more than eight or ten days.

It was in this interval that the testament which is the foundation of the prince *de Conty's* claim was made: and, as this act is one of the most important which we have to examine in the sequel of the cause, suffer us to attach ourselves scrupulously to an explication of the time, the place, the form in which it was passed, and the principal dispositions which it contains.

This testament was made the 1st of *October*, in the year 1668; six months after the donation of *Neufchatel*, and those which accompany it.

It was made at *Lyons*, in the house of the priests of the oratory.

It is clothed with all the solemnities prescribed in the *Roman* laws, and preserved by the usage of those provinces, which follow the rules of the written law.

It is a nuncupative testament, that is to say, a testament dictated by the testator, and signed by him in the presence of seven witnesses and a notary.

Of these seven witnesses, six were priests of the oratory; the seventh was an ecclesiastic, not belonging to that congregation.

In point of form there can be no impeachment of so solemn an act; that is a fact which all the parties equally acknowledge.

If we pass from the exterior solemnity of the act, to the substance of the dispositions which it contains, we may remark at first the preamble, all the terms of which have been taken notice of, in order to throw some suspicions of suggestion upon this first testament.

It is observed that one of the principal reasons stated, as inspiring the *Abbé* with a design of making a testament, is that there may be no process for his succession amongst his relations and friends.

After having given an account to the public for the reasons of his conduct, he enters into the detail of his dispositions; and beginning by what relates to his funeral, he forbids all kinds of ceremonies, he will have neither pomp nor funeral oration; indifferent as to the place of his burial, he desires that his body may be interred in the parish of the place where he may happen to die; he regulates the number of masses, and the quality of the prayers which he wishes to be said for him after his death. He joins to the dispositions concerning his burial, some pious legacies; he gives 20,000 livres to the poor of his estate, and leaves an annual sum of six hundred livres for a mission there every year.

The domestics and other persons who had been long attached to his family, are the third object of his regard; he leaves them life annuities: we shall only observe one of these legacies, it is that of 800 livres a-year to Porquier, and we observe it because it has been made use of to justify his conduct at the time of the last testament.

These dispositions are followed by two different institutions, the one particular, the other universal.

The particular institution is made in favour of *Madame de Longueville* his mother, for the sum of 30,000 livres; and, in order to satisfy another formality of the written law, he institutes each of his relations whose omission might prejudice his testament for the sum of 100 livres.

The universal institution is composed of several degrees.

We may take notice of four.

The first is the institution of his brother. The second comprizes the children of that brother. In the third, *Madame de Longueville* is appointed in default of the two first degrees; and lastly, the testator intreats her to dispose of his effects in favour of the *Princes de Conty*.

But as this clause makes one of the principal difficulties of the cause, and is the foundation of the other questions of law, which have

have been brought before you, we think it is our duty to state it fully without changing any of its essential terms.

“ And as the institution of an heir is the chief and foundation of every testament and last will; the testator has made and instituted as his universal heir, *Charles Paris d'Orleans, Comte de Saint Pol*, his younger brother, and after him his lawful children, preferring males to females; and in case of the death of the said *Comte*, before or after the testator, without children, the testator has substituted his honoured mother, humbly intreating her to dispose of the said goods at her death, in favour of the *Princes de Conty* his cousins german.”

These are the terms in which the institution and substitutions are conceived; you observe the four degrees which we have distinguished, the *Comte de Saint Pol*, his children, *Madame de Longueville*, the *Princes de Conty*.

You remark also on the one side that continuation, that connection of expressions, by which, although there are several institutions and substitutions comprized in these words, they nevertheless only compose one and the same clause. An important reflection, from which it is argued that all these dispositions, though different from each other in expression, were not so in the mind of the testator.

But you have remarked at the same time on the other side, that the testator all at once changes his expression with regard to the *Princes de Conty*; and that after having called all the others to the succession directly, he only calls them by words which are indirect and uncertain; and it is upon this observation that *Madame de Nemours* concludes, that with respect to them, the testator changed his intention as he changed his expressions.

Finally, after having given assurance to his testament by the institution of an heir, he confirms it by a codicillary clause conceived in the most extensive terms, that the style of a notary could suggest.

He declares that he wills, “ that his testament shall avail by way of nuncupative testament; and if it cannot avail by way of testament, it shall avail by way of codicil, *donatio causa mortis*, and every other disposition in the nature of a last will, by which it may lawfully prevail and best subsist.” And after this declaration, he revokes all former testaments, and even the donation made at *Neufchatel*, the 23d of *May*, 1668; by which he gave his moveable effects to his brother.

After having explained the form and substance of this testament, we think it material to observe that the testator caused a copy of it to

to be made, which he placed, as it is contended, in the hands of the *Princes de Conty*; it is added that he left with it the project of this same testament in his own hand writing, in which we may still perceive the plan of the principal dispositions which it contains: this paper, almost consumed by length of time, has been adduced and admitted, in the *Requêtes du Palais*.

It is entirely written in the hand of *Monsieur de Longueville*, who intitled it, *Resolutions concerning his Will*. One part of the writing is effaced by time. There are besides two lines effaced with ink, but from what remains it is evident that the testament and the project perfectly accord.

We find in it the principal clause, that is to say, that of the institution and the substitutions, conceived in simple terms, such as *Monsieur de Longueville* might and naturally would be acquainted with; but terms which are energetic, which comprize in substance every thing, which the notary has merely drawn out at length, and clothed in technical terms. And in this project the *Princes de Conty* are called to the succession, in the same language of request which appears in the testament; the codicillary clause is alone wanting in this writing. Immediately after this testament, the *Abbé* set out from *Lyon*s, and arrived at *Milan* on the 15th, and traversed a part of *Italy*, with as little attention to the preservation of his dignity in foreign countries as in *France*. It appears that at that time, he even wished his very name to be forgot, as he laid it aside and assumed another belonging to one of his estates.

The year 1668 was passed in travelling.

The following year is not remarkable in the cause, except by a single fact which has been made use of as a fixed point, dissipating every suspicion which might be thrown upon his state, in 1688; and which incontestibly establishes his sanity.

He passed part of that year at *Rome*, and it was there that he resolved to execute the design, which he had apparently conceived long before, of entering into holy orders.

*Madame de Longueville* was apprized of this design; and whether she was persuaded by her spirit of piety, that the character of her son's mind was not sufficiently elevated to enable him worthily to aspire to the awful functions of the priesthood, or whether she had other reasons which are not explained, it is certain that in the month of *October*, 1669, she signified to the archbishop of *Paris*, that she formally protested against all letters demissory, which might have been surprized from him for the *Abbé*; and, in case there was none yet granted, she opposed it in his hands for reasons which she would afterwards explain.

This

This opposition came too late, the demiffory was already fent off; and upon the credit of that act, by virtue of a difpenfation from the pope, the *Abbé* received in lefs than three weeks all the degrees of holy orders, and was at laft ordained prieft in the month of *December*, 1669.

At the age of 24, and invested with the facerdotal character, he was not yet emancipated; and it was not till the month of *July*, 1670, that the family were affembled to give their opinion refpe&ing his emancipation, and that of his brother who was then about the age of 22.

The illuftrious relations with whom they had the honour to be connected, judged them both capable of adminiftering their revenues, under the authority of *M. Ifally*, an advocate in the court, who was named their curator.

And the 22d of *July*, 1676, the advice of thefe relations was confirmed by an order of the court.

This order is an inviolable epocha in the caufe, which the one party and the other equally refpect.

Thus far the sanity of the *Abbe d'Orleans* is not lefs evident by the fuffrage of his family, than by the authority of the court.

But it is infifted that nature foon took from him that liberty which his family had given him, that ſhe reduced him to the moft melancholy and fevere of all fervitudes. We do not offer at prefent to enter into the examination of this important fact; and if we ſpeak of it, it is only to indicate the fatal moment, when all the facts, which hitherto have appeared fufficiently certain, begin to be doubtful and obfcure.

And that we may not penetrate into this obfcurity before the proper time, we ſhall confine ourfelves at prefent to a fimple and curfory explication of thofe facts, as they are written in the acts which are equally reforted to by both parties.

The emancipation gave the *Abbé* the free adminiftration of his revenues, but it could not extend fo far as to give him the power to alienate his immoveable effects.

Yet hardly any thing elfe was wanting to place him at liberty, with regard to *Madame de Longueville*.

By a tranſaction that paſſed in the year 1664, between *Madame de Longueville*, and the *Duc de Retz*. as tutor of her children, all the rights which ſhe could exerciſe againſt them were liquidated and fixed at the ſum of nine hundred and fifty thouſand livres.

She offered to take eſtates in payment, and the minority of her  
ſons

sons did not allow them to make this alienation without being authorized, upon a consultation of their relations.

They were assembled the 26th of *August*, 1670; and unanimously approved of a proposition made to them, for abandoning some of the estates, in order to extinguish a debt, which was equally favourable and legitimate:

The *Abbé* himself demanded the confirmation of this opinion; and the court by an order of the 2d of *September*, 1670, permitted him to treat with his mother upon the conditions approved by their relations.

It seems that it was first intended to execute this order with dispatch, and we see that proper persons were appointed to value the estates, intended to be given to *Madame de Longueville*.

But whether there were found, in the sequel, some unexpected difficulties in making the valuation, or whether it was judged more proper to defer the execution of the plan, until the *Abbé* should attain his age of majority, which would only be five months; it appears that these first projects remained in suspense until *January*, 1671. If we are to enter into the detail of the conduct of the *Abbé* during this time, that is to say, from his emancipation to his majority, it is not useless to observe in the outset, that when the order permitting him to treat with his mother was obtained, he had already left *Paris* on the 13th of *August* preceding.

Let us not inquire as yet into the reasons and motives of this departure, let it be as you please, an effect of his natural volatility, or a sage precaution of his family; this is what we are to examine hereafter. It is always a certain fact, that he set out from *Paris* on the 13th of *August*, 1670.

It is in the course of this journey, that the greater part of those facts which have been mentioned to you, without being precisely and formally alleged, are asserted to have taken place. It is during that period of time, that he began, as it is maintained, to show the sad, but infallible presages of the misfortune which afterwards attended him; or, to speak more correctly, that he is stated to have exhibited the too sensible proofs of his imbecility.

If we follow him exactly in the course of his journies, we see him first go from *Paris* to *Orleans*, accompanied by some gentlemen, and a small number of domestics, he sets out in the *Orleans* coach, which he had taken entirely for himself and his attendants.

He arrives at *Orleans* on the 30th of *August*, and stays there till the

the 9th of *September*, in a common inn; where his own expences do not amount to forty sols a day.

The 9th of *September*, he goes by water to *Tours*, from *Tours* to *Angers*, from *Angers* to *Nantes*; and in all these different cities, his expence is upon the same scale as at *Orleans*.

The 14th of *November*, after having employed more than two months in running through the provinces which are situate along the coast of the *Loire*, it appears that he took the resolution of returning to *Paris*.

He engages the coach at *Angers*, and follows the common road till he comes within one day's journey of *Paris*, that is to *Gué de Lore*, a village situate half a day's journey from *Chartres*.

He there meets a footman of the *Comte de St. Pol*, and immediately takes the resolution of quitting the *Angers* coach, and returning to *Orleans*.

What was the cause of this sudden change? Shall we attribute it to a sudden impulse of which nobody could prevent the effect? Shall we rather suppose that the news which he received from *Paris* induced him to take so unexpected a resolution? This is a point upon which we are absolutely ignorant, and which we can only discover by conjectures.

Let us follow the *Abbé* in this sudden return, and see what were his proceedings.

He hires three horses and three chairs, and is followed only by two attendants; he arrives the second day, by a cross road, at *Orleans*.

The rest of his domestics continue their route to *Paris*, and do not return to him till a long time after.

We see by the accounts of his expence, that he remained from the 20th of *November*, to the 29th of *December*, that is for 39 days, in a common inn at *Orleans*, at 40 sols a day.

*Dalmont* his ecuyer, and his other officers, came there towards the end of *December*; *Dalmont* quits him on the 29th to return to *Paris*, and the same day the *Abbé* embarks a second time upon the *Loire*, to see once more the city of *Tours*, and at last he resumes the route for *Paris*; and, more constant this second time than the first, he arrives there the 15th of *January*, 1671; being only three days after attaining his majority.

He staid there from the 15th of *January*, to the 6th of *March* following, that is, near two months; and it is in that interval of time, that he executed all the acts which have been stated to you so much at length.

The first act is of the 16th of *January*, that is to say, the day after

after his arrival, the last is of the third of *March*, that is, two days before his departure; the first act can only be considered as an execution of what had been proposed in *August* preceding for the payment of *Madame de Longueville*.

His majority having taken place in this interval abridged the formalities, which were necessary to alienate the property of a minor.

It is no longer as acting under the authority of a consultation of relations, that he treats with *Madame de Longueville*; his majority put him in possession of perfect liberty; he not only treats for himself but also for his brother; he acts and stipulates for him, and promises to procure his ratification as soon as he attains the proper age.

Dispensed by his majority from going through the delays of a valuation, instructed himself as to the value of the estates, he fixes a price in concert with his mother; and because this price was not equal to nine hundred and fifty thousand livres, he engages to pay the remainder, and at the time of the contract he promises to give forty thousand livres to *Madame de Longueville*.

This act was executed the day after his arrival in the forenoon.

Scarcely was it signed, when he began to execute it, by borrowing from *M. Voisin* the sum of forty thousand livres upon three contracts, for annuities executed the twentieth of *January*, by the *Abbé* as well in his own name as in that of his brother.

The thirty-first of *January*, he executed another instrument, equally important with those already mentioned, as to the inferences which have been drawn from it.

Every thing in this instrument is considerable, the parties, the place, the notary, the time, the execution: those who executed are on the one side, the *Prince de Condé*, then *Duc d'Anguien*, as bearing the special procuration of the *Prince de Condé*, his father, and on the other the *Abbé d'Orleans*, who engages as well for himself as for his brother.

The place where it was executed is the *Hotel de Condé*, and the notary who keeps the minute of it, is the one employed by the family of *Longueville*.

The time is the thirty-first of *January*; and the procuration transcribed at the foot of the project of this contract, in which no alteration is made, is dated the fifteenth of *January*, the day of the *Abbé's* arrival.

Finally, the effect and execution of this act are to give to the *Abbé* and his brother, in payment of interest for the portion of *Madame de Longueville*, the barony of *Mesle*, for the sum of one

hundred and seventy thousand livres; and this estate is at present possessed by the *Prince de Conty*, to whom it was sold by *Madame de Longueville*, as curatrix to the *Abbé d'Orleans*, for one hundred and ten thousand livres.

The donation and testament, which make the principal difficulty in the present cause, follow soon after this last act, there being only an interval of three weeks; this instrument was executed the twenty-first of *January*, and the donation the twenty-third of *February*; from the twenty-third to the twenty-sixth, in the course of four days, the *Abbé* executes twelve different instruments: the first is, the donation of which all the clauses are extremely important.

After having expressed the same motives, which he had indicated in his former donations, the esteem and affection which he entertained for his brother, the desire of contributing to support the dignity of his house; he adds additional motives derived from the change in his own situation, in embracing the state of an ecclesiastic.

He afterwards gives all his effects to the *Comte de St. Pol*; but the disposition only comprizes his present effects, without mentioning those he may have in future.

Extensive as his disposition is, he yet reserves the usufruct of some estates; amongst which is the *Comté de Dunois*, the enjoyment of a moiety of the *Hotel de Longueville*, a certain quantity of furniture, and, lastly, a power of charging a sum of sixty thousand livres, with the liberty of cutting some timber.

He imposes several conditions upon his liberality, without which he declares that he would not have made the donation.

The first is, that notwithstanding the donation, he shall retain all the honorary rights in the lands, of which he reserves the usufruct, and that he shall have liberty of nominating to the offices and benefices attached to them.

The second condition is, the liberty of disposing by will of the revenue, for two years after his decease.

The third, is the law which he prescribes to the *Comte de St. Pol*, and the necessity which he imposes upon him, of executing all the contracts which he had made, whether with *Madame de Longueville*, the *Prince de Conty*, or *M. Voisin*, of confirming the discharge which he had given to *Madame de Longueville*, for the jewels mentioned in the inventory, of giving her another discharge from the obligation of rendering an account of his tutelage, and finally of exonerating him from all the debts of the family.

The last and most important is the right of reversion, which he stipulates

stipulates in his own favour, and in favour of *Madame de Nemours*, in case the *Comte de St. Pol* should die without children; a reversion nevertheless which should not prevent the donatory from disposing of the property that was given to him.

The twenty-fifth of *February*, the *Abbé* executed four different acts.

By the first, he gives a general power to *Madame de Longueville* to confer in his absence the benefices in which he has a right of collation, to nominate to those of which he has a right of presentation, and to fill up the offices which might become vacant in his territories.

By three others he gives life annuities to *Mademoiselle de Vertus*, to the *Chevalier de Montchevreuil*, and to *Monsieur Frouillard*.

The twenty-sixth of *February* is marked by a great number of instruments, and the will of the *Abbé* would alone be sufficient to render it an object of distinction.

The form of this testament is not less exempt from suspicions than that of the former.

It was passed before notaries, and it has been pointed out to you, that they have omitted to insert the ordinary clause, *that the testator appeared of sound understanding*.

We first observe, that one of the principal reasons which determine him to make his testament, is the resolution which he had taken of making long journies; in the next place, that he confirms the donation that he had made three days before, and declares that he only intends to dispose of the goods, of which he had reserved the free possession.

After some charitable legacies, and other legacies which only regard his domestics, and amongst others the *Sieur Porquier*, who is a legatee of eighteen thousand livres, he makes the *Comte de St. Pol* universal legatee, and revokes all other testaments which he might before have made; we will mention in the sequel, what became of this testament. Let us proceed to state the other instruments executed by the *Abbé d'Orleans*.

The same day he signs five appointments to his governments; he gives a procuration as extensive and general as possible to *Porquier*, to administer during his absence the revenues of the property which he had reserved, subject to rendering him an account every six months.

Finally, eight days afterwards, on the third of *March*, it appears that the *Marquis de Beuvron*, wishing to redeem an annuity that he owed to the family *de Longueville*, was not satisfied with the acquittance of the *Comte de St. Pol*, but required that his payment

should be assured by the presence and signature of the *Abbé d'Orleans*.

Such are all the acts executed by the *Abbé d'Orleans*, during his stay at *Paris*; two days after the last of them he set out in the coach for *Lyons*, with the same domestics who accompanied him in his former journies.

It appears that from *Lyons*, he went first to *Provence*, and afterwards to *Strasburgh*, and that he took the waters in *Germany*, about the month of *September*: this is all that we know of his journies from the sixth of *March*, 1671.

During all this time he wrote several letters, he audited his accounts, signed releases, bills of exchange, and directions which were necessary for the expence of his family. In general we see no vestige of that necessary counsel, which it is insisted that his family had given him; there are only two or three pieces in which it is intimated, that he took the counsel and advice of the *Sieur Dalmont*.

Thus passed about six months from his leaving *Paris*, and without examining what was then his real situation, it is certain that in the month of *October* it was thought that there was no other way of the preventing the noise which his insanity, whether ancient or recent, would make in the world than by shutting him up in an *Abbey*.

They at first chose *Hauteselle*, where he was conducted by the *Sieur de Morcaut*, by virtue of a letter *de cachet* from the king; they removed him afterwards to that of *Chezal Benoit in Bery*, and afterwards to that in the diocese of *Lizieux*, where he continued during the remainder of his life.

Although he had entirely lost his liberty, they hesitated in publicly depriving him of his civil life by a juridical interdiction.

They even deferred it until the year 1672, in order to deliberate upon the conduct which should be observed in the administration of his property.

It was on the nineteenth of *January*, 1672, that a small number of his illustrious relations assembled, to give their opinion upon the condition of the *Abbé d'Orleans*.

*Madame de Longueville*, the *Prince de Condé*, the *Duc de Anguien*, the *Princes de Conty*, the *Comte de St. Pol*, were the only relations who attended at this assembly.

The result of their deliberation was, that as long as the affairs of the *Abbé* would permit, they should make use of the procurations which he had given in *February*, 1671.

That *Madame de Longueville* should continue to present to the benefices and offices which might become vacant, by virtue of

of the procuration given to her; that *Porquier* should administer the effects and revenues as he had hitherto done, conformably to the procuration of the twenty-sixth of *February*, 1671.

At length in the month of *March*, 1672, the malady appeared absolutely incurable, and *Madame de Longueville* had recourse to the sad, but necessary remedy of an interdiction.

She stated in the memorial which she presented to the king, that the *Abbé d'Orleans*, her son, *seven or eight months after his tutelage was finished, and he had attained his majority, having undertaken divers journies in foreign countries, by reason of the fatigue which he had undergone, and the kind of life which he led, was rendered incapable of managing his affairs.*

The whole family were assembled, and gave their opinion in favour of the interdiction; and the greater part, of them, in order to shew the nature of the malady of the *Abbé d'Orleans*, called it *his present infirmity*, and speak of the *actions which he had committed in Germany*; from which expressions it is supposed that great assistances may be derived in fixing the commencement of the insanity.

Before pronouncing the interdiction, the king commissioned *Monsieur Tubeuf, Maître des Requêtes*, to interrogate the *Abbé d'Orleans*, and to receive the depositions of the domestics employed about his person.

Neither the interrogatory, nor the depositions of the witnesses are now adduced; but it is highly probable that the *Abbé* pronounced his own condemnation by his answers, and that the witnesses confirmed the proof of his insanity, as the king a short time afterwards gave an order for his interdiction.

*Madame de Longueville* was appointed curatrix, and the letters patent giving her that character were registered in this court.

Such was the course and termination of the rational life of the *Abbé d'Orleans*, in which, as has been already observed, we may distinguish two periods.

The one of undisputed sanity, during which he made the donations of *Neufchatel*, and the testament of which the *Prince de Conty* demands the execution; and this first period finished about the month of *August*, 1670, shortly after his emancipation.

The second, doubtful, obscure, full of darkness and uncertainty, in which he made the donations, and the testament relied upon by *Madame de Nemours*, as defeating that of 1668, and this latter period commences with his emancipation, and terminates about the month of *October*, 1671.

It seems, that after having followed him to that fatal moment, in which he entirely lost the life of a reasonable being, we may pass at once to the time when he lost the life of nature, since his con-

dition was afterwards no more than a protracted death; but as the parties contend that they can derive an advantage from some acts which took place in the family after his interdiction, it may be necessary shortly to state them, and thereby terminate the recital of the principal facts of this cause.

The *Comte de St. Pol* only survived a short time the interdiction of the *Abbé d'Orleans*, and the house of *Longueville* received in the same year two mortal blows. The first of which deprived the *Abbé d'Orleans* of his reason; and the other, the *Comte de St. Pol* of his life.

He was killed at the famous passage of the *Rhine*; and if *France* beheld on this occasion the greatness of his valour, she only beheld it to augment the grief which she experienced at his loss.

The right of reversion which the *Abbé d'Orleans* had always retained in the donation which he made to his brother, would take effect by his death, and restore to the *Abbé* the large property of which he had divested himself in favour of his brother.

The family assembled to deliberate on the manner in which this right of reversion should be exercised, in the name of the *Abbé d'Orleans*.

They considered that although this condition was imposed on the donatory, in the donations of the twenty-third of *February*, 1671, he was notwithstanding at liberty to engage and hypothecate the property that was subject to the right of reversion; and the family thought that, according to this clause, they ought to begin by paying the debts contracted by the *Comte de St. Pol*.

They gave a still more extensive interpretation to this clause, and decided that it was sufficient in itself to support a legacy of five hundred thousand livres, which the *Comte de St. Pol* had given in favour of the *Chevalier de Longueville*; and all the relations agreed that this legacy should be paid out of the effects, comprized in the donation of the twenty-third of *February*, 1671; this opinion was confirmed by an order of the court.

*Madame de Longueville* rendered fealty and homage to the king in her quality of curatrix, for the property comprized in the donation.

She obtained a gift of the feignorial rights, which was registered in the chamber *des comtes*.

From that time she continued to exercise the functions of curatrix until her death, which took place in the year 1679. After her decease, the charge was at first divided between the *Prince de Condé* and *Madame de Nemours*, and afterwards was exercised solely by the *Prince de Condé*.

All the accounts of the curatorship were rendered to him, and amongst these the ordinances, the bills of exchange, and the allowances of accounts signed by the *Abbé d'Orleans*, in the second period, that is to say, in the time which we have called a period of darkness and uncertainty, are adduced as pieces free from suspicion and as approved titles between the parties.

The *Abbé d'Orleans* died on the fourth of *February*, 1694, at the age of 48; and with him was extinguished for ever the race of the *Ducs de Longueville*. A race happy in its origin and progress, by the splendid actions of the illustrious persons whom it produced; unfortunate in its termination, whether by the premature death of the *Comte de St. Pol*, or by the still more melancholy and deplorable life of the *Abbé d'Orleans*.

Fourteen days elapsed after his decease, without any other testament appearing than that which favoured the pretensions of the prince *de Conty*; at length on the eighteenth of *February*, the widow of *Porquier* brought to the *Lieutenant civil* two sealed packets, the one sealed with the arms of the house of *Longueville*, the other with the arms of *Monsieur Porquier*; on the first was written, *Testament of the Abbé d'Orleans*; on the second, *Demission du gouvernement de Normandie, &c. des places de Caen, Dieppe, Pont-de-l'Arche, & Bailliage de Caen*.

*Madame Porquier* declared that both the inscriptions were the hand-writing of her deceased husband; she added, that neither of these packets had been out of her hands since his death, and required them to be opened.

The lieutenant directed the parties interested to be cited, and on the same day, in the presence of the counsel of *Madame de Nemours*, the two packets were opened; in the first was found the testament of the twenty-sixth of *February*, 1671, accompanied by two loose papers, one of which appears written in the hand of the *Abbé d'Orleans*, and has been recognized by the *Requêtes du Palais*; it contains eighteen names, to each of which there is a line drawn to the sum which corresponds with it; and it appears that this is a memorandum of legacies, which the writer intended to give to some persons of his household.

The other paper is in the hand-writing of *Porquier*, who has entitled it, *project to a codicil which the Abbé d'Orleans wishes to make in confirmation of his testament*.

At the end of the last line are these words, in the hand-writing of the *Abbé d'Orleans*: To *Dalmout*, the carriage and its appurtenances.

The second packet was opened on the same day, and contained

the five appointments of the *Abbé d'Orleans*, signed on the twenty-sixth of *February*, 1671.

The production of this testament did not prevent the *Prince de Conty* requiring the execution of the first; he appeared on the fifth of *March*, 1694, before the *Requêtes du Palais*, and demanded, as testamentary heir, to be confirmed in the possession of all the effects, of which the testator had power to dispose; and at the same time he commenced the same action in a different character, by requiring the deliverance of the universal legacy, as he called the disposition of the *Abbé d'Orleans* giving him the succession.

*Madame de Nemours*, in her defence against this demand, declared at first, that she did not admit the jurisdiction of the court; nor that of the other judges of the realm so far as relates to *Neuf-ehotel*; and with respect to the other property, she insisted that the testament upon which the title of the prince *de Conty* was founded, was void, and besides that it was revoked by that of the twenty-sixth of *February*, 1671.

The *Prince de Conty* relied upon arguments of law in opposition to the first defence; but he was obliged to borrow his arguments in opposition to the latter, from the allegation of facts; and being unable to contend that a first testament is not legally revoked by a subsequent one, he is reduced to contend that the testator was deprived of the use of his reason, and notoriously in a state of insanity for six months, and more, before the testament of 1671.

He has alleged this fact by a precise declaration; he requires to be admitted to the proof of it; the sentence has given him that permission. *Madame de Nemours* has preferred an appeal, and requests the court to dismiss the *Prince de Conty* from his demand, this is the point to which the whole proceedings are reduced.

Such are all the circumstances of fact; such is the nature of the acts which have been stated to you. We have felt it a duty, in a case which is no less splendid than important, not to omit any of the facts that have been proposed, either by the one side or the other, however trifling and insignificant some of them may appear; and we also conceive it to be our duty, to lay before you with the same exactness the arguments of the respective parties.

[The above extract extends from p. 249. to 274. The arguments of the respective parties are next detailed at length, extending to p. 302. The pleading then continues as follows.]

Such, sirs, is the real state of the contest, upon which you are to pronounce.

We

We have endeavoured to place before your view, the principal circumstances of fact, and the essential points, which render the decision of this cause obscure, uncertain, and difficult. We shall endeavour to-morrow to discover the real presumptions of the intention of the testator, in the first period; and of his sanity or insanity, in the second. These are the two essential points, to which this whole contest is reduced.

## SECOND AUDIENCE.

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AFTER having stated to you in the last audience, the essential circumstances of fact, and the principal points of argument insisted upon by the respective parties, we cannot without apprehension behold the moment approach, in which we shall be obliged to lay before you our own sentiments upon an affair of such great importance.

Extended as it is, it appeared easy to state, when we had only then to place in the balance, the arguments of the one party and the other; and not to decide upon their force and efficacy.

We had then only to oppose one testament to another testament, to place one set of laws in conflict with another, to destroy facts by facts; in a word, it was sufficient to render the cause doubtful; and it seems that to-day we shall be obliged to make it appear as clear and as easy to decide, as it was yesterday obscure and uncertain.

Happy in this state, if the obligations of our function would permit us to remain in doubt, and after having represented to you the reasons adduced by the respective parties, we might be allowed, with the public, to wait for your decision, without being obliged in some degree to anticipate it; and to walk before the light which we should look to, as our guide.

But since the law of our duty is so far from permitting us to remain in silence upon this occasion, that it imposes upon us the honourable necessity of addressing you, in the name of the public, whose interests are reposed in our hands; after having satisfied you, that if we dare not hope to fulfil the whole extent of our ministry, we have at least sufficient knowledge to feel and tremble at the weight of it, we shall no longer defer the explication of what we consider as the real state of the cause.

You have to pronounce upon an appeal from the *Requêtes du Palais*, which permits the *Prince de Conty* to prove by witnesses, that the *Abbé d'Orleans* was in a state of insanity, six months and more, before the making of his testament.

*Madame de Nemours* contends that there is at present sufficient room to invalidate the sentence, and to dismiss the *Prince de Conty* from the principal demand, which is the subject in dispute.

Although the sentence is in appearance only interlocutory;  
it

it is nevertheless certain that it decides a great part of the principal questions of this cause; to be convinced of which it is sufficient to consider that the defence of *Madame de Nemours* is composed of two different parts: she contends first, that the *Prince de Conty* has no title at all; and secondly, that even supposing he had one, it was revoked by a subsequent testament, which cannot be impeached by the testimony of witnesses.

If the first defence of *Madame de Nemours* is just and legitimate, if she can prove that the testament, from which the *Prince de Conty* derives his whole title, is a void and a useless disposition, the second defence becomes superfluous; and if it was once decided that the *Prince de Conty* had no title, you may see what would be the necessary consequence. If he has no title, he has no quality; and if no quality, no action; and if he has neither action nor interest in the cause, why should he be admitted to prove a fact which to him would be absolutely indifferent; since even supposing the insanity to be certain, it would be *Madame de Nemours* who would take advantage of it, and it would only shew that the *Abbé* had died without a testament.

But, on the contrary, when we examine this revocation, when the *Prince de Conty* is admitted to prove, that it was made by a person in a state of imbecility, it is implied that he has a solid interest, a legitimate action, a certain quality, a subsisting title; and this is what the *Requêtes du Palais* have done. It is true they have not pronounced expressly on the quality of the *Prince de Conty*, they have not formally decided that the first testament was not an invalid title, but they have decided it tacitly by receiving his demand, which could have no other solid foundation; and it is thus that the court frequently decides upon bars or prescriptions opposed by either of the parties; by admitting the action which is contended to be extinguished or prescribed, it disallows the bar or prescription; and this tacit judgment is not less strong or less decisive, than if it had been expressly and formally pronounced.

We may then conclude from these reflections, that the sentence should be considered not as a mere preparatory judgment, which leaves the rights and arguments of the parties entire; but as a sentence of adjudication upon the first question of the cause, that is to say, the solidity of the title, and which pronounces an interlocutory upon the second question, with respect to the revocation of the same title.

The appeal from this sentence then brings before you the ground and substance of the contest, and such is the condition of the parties, that if you reverse the sentence, you pronounce at the  
same

same time a definitive judgment upon the very foundation of the dispute; and if, on the other hand, you confirm it, you leave the latter part of the cause in suspense, until after the deposition of witnesses shall have *enlightened the religion of justice* (a). Thus the advantages of the parties are so unequal upon this occasion, that the one may absolutely gain the cause and cannot entirely lose it; whilst the other may wholly lose, but cannot gain it.

After having stated the true decision of the sentence, which does not appear to be so indifferent as has been represented, we shall follow the natural order which the two principal questions of the cause present to the mind, and examine in the two parts of this discourse, the two testaments which are the subject of it. Has the first testament become void? Was the second capable of revoking it? To these two points the whole contest is reduced.

To discuss with some degree of order the first question; that is to say, the invalidity of the disposition, we shall consider it under the two different aspects, in which it has been presented to you by the respective parties.

We shall examine first, the *fidei-commissary* disposition itself, and as distinct from the rest of the testament; we shall endeavour to penetrate into the mind of the testator, to sound the depths of his intention, and shall not consider it sufficient to have discovered it, unless it appear conformable to the maxims of law, and the inviolable rules of *Roman* jurisprudence.

We shall afterwards consider it as connected with the codicillary clause, of which we shall endeavour briefly to explain the origin, the nature, and the effects.

But without dwelling longer upon the plan and decision of this cause, let us proceed to the examination of the disposition considered in itself, and independent of the other clauses of the testament; and as the *Roman* jurists themselves acknowledge that there is nothing more abstruse or subtle in the whole system of law, than the questions which regard the nature and force of substitutions, you will permit us for the purpose of giving as clear an explanation of them, as the extensive nature of the subject will admit, to premise some general principles, from which we may collect the kind and quality of the substitution, upon which you are to pronounce.

By a just and solemn law all successions devolved upon the heirs by blood; and the founders of the *Roman* jurisprudence were of opinion, that to deprive them of it, it was necessary to make a law not less just or solemn than the first; and because it would have been equally absurd and impossible to make one general law derogating from

(a) *Eclairir la religion de la justice* is a very usual expression in these pleadings.

this natural law in favour of the heirs by blood, they gave to every individual once in his life the authority of a legislator; but at the same time that they invested him with this character, they imposed upon him the necessity of propounding his testament; not as a domestic act, but as an authentic and solemn law. The whole people were witnesses to these private laws, in the same manner as to the laws which regarded the interests of the public. This was not all, the testament was not only a public law by its exterior solemnities, it was so likewise by the forms in which it was necessary to be expressed. The testator who dictated an inviolable law to his family, was bound to speak in the same manner as the legislator who proposed a law to the whole *Roman* people, and hence arose that rigorous necessity, which was only abrogated by the emperor *Constantine*, of using in the institution of heirs, and even in legacies, words consecrated to the laws, and which the jurists call direct terms, terms which are imperative and suited to the majesty and power of a legislator.

The premature death of the instituted heirs, or their refusal to accept the quality of heir, frequently eluded the execution of this law. It was to remedy this inconvenience that they invented the use of direct and vulgar substitutions, in order to support, by a long succession of heirs, the execution of the intention of the testator. Nobody is ignorant of the nature of these substitutions. They were not, properly speaking, any thing else than a second institution, or, if you please, the institution of a second or third heir, in case the first did not take the property of the testator, whether for want of power or inclination.

To this mode, which was the only one permitted until the end of the republic, a second was added in the time of the earlier emperors. Testators who had hitherto spoken only in the language of command, began to make use of intreaties, by which they requested the instituted heirs to render their succession, or a part of their effects, to such person as they thought proper to appoint.

The law which had not hitherto authorized this disposition, did not at first impose any necessity of accomplishing it. As decency, good faith, and natural equity were the only foundation of it, they also formed the only obligations which engaged the heir to execute it; and if he betrayed the last wishes of the testator, he dishonoured himself, without losing the succession.

*Augustus* first avenged the testator against this perfidy. He made that a matter of inviolable necessity, which in its principle was only an engagement of honour; and *fidei-commissa* from thenceforth became as frequent as legacies and other direct dispositions.

If the terms of request in which they were conceived were less solemn, they were more efficacious than the direct terms which formed the essence of a testament; they might be addressed not only to the instituted heirs when there was a testament, but also to the legitimate heirs, when there was not. The favour shewn to the intention was so great in this kind of disposition, that they seemed to have been apprehensive of weakening it, if they had made the execution of it depend upon the least solemnity.

The use of *fidei-commissa* induced the jurists to distinguish two kinds of substitutions, for we do not speak here of pupillary substitutions, which have no application to the present cause.

The first kind of substitution was that which they called direct and vulgar, on account of the use of it being common, and permitted to all testators, and with respect to all kinds of heirs.

The second is that which we have called a *fidei-commissary* substitution; but which the jurists almost always express by the single term of *fidei-commissa*.

Here it will not be immaterial to make a pause, in order exactly to compare these two kinds of substitutions; their different characters are absolutely essential to the decision of this cause.

The vulgar substitution is, as we have already observed, nothing else than a real institution of an heir. *Secunda heredis institutio*, is the expression of all the jurists: a second institution, which does not require less solemnity than the first, and which does not give less right in respect of the entire succession. The one is pure and simple; the other is conditional, and can only have its effect on failure of the institution; hence it follows, that as often as this essential condition is wanting, that is to say, wherever the instituted heir takes the succession, the vulgar substitution must fail; *aditâ hereditate evanescit*, is the expression of all the laws; and it would be a paradox in jurisprudence to assert in general, that the succession can be taken both by the instituted heir and the party claiming by way of vulgar substitution.

Thus this institution has, as it were, a double character.

As an institution, it ought to be invested with all the solemnities which the civil law has established for the validity of testaments.

As a second institution, it can never have effect, except where the party instituted in the first instance does not become actually the heir; an essential condition to which the fate of a vulgar substitution is inseparably attached.

A *fidei-commissum* has two characters directly opposite to those which entirely constitute the essence of a vulgar substitution.

First, it may be made by any kind of expressions.

Every thing which explains, or rather, every thing which induces

duces a presumption of the intention of the testator, is sufficient to support this kind of substitution.

But what characterizes it still more particularly, and manifests how entirely its nature is opposite to that of a vulgar substitution, is, that whereas the one is irretrievably extinguished, as soon as the first heir has taken the effects, the other, on the contrary, only derives its operation from his actually taking them.

They are then made upon two conditions directly opposite.

The one supposes that there is no heir, the other on the contrary supposes that there is one.

The existence of the instituted heir annihilates the vulgar substitution; the existence of the instituted heir causes the *fidei-commissary* substitution to subsist. The one disappears the instant the succession is acquired; the other, on the contrary, derives its force from the succession being actually taken. What causes the cessation of the one is the conservation of the other; and what is an essential defect in a vulgar substitution is a necessary condition for the execution of a *fidei-commissary* one.

Let us then compare the clause in the testament of the *Abbé d'Orleans* with these clear and certain notions of the nature of substitutions.

But to do this the more easily, let us state the very terms of the clause, and endeavour to discover their real meaning.

*The institution of an heir, being the foundation of every testament and declaration of last will, he has made, and instituted as his universal heir Charles-Paris d'Orleans, Comte de Saint Pol his younger brother, and after him his natural and legitimate children, preferring males to females, and in case of the death of the said Comte de Saint Pol, before or after the testator, without natural and legitimate children, then the testator has substituted, both vulgarly and by way of fidei-commission, his honoured mother, humbly requesting her to dispose of the said property at her death in favour of the Princes de Conty, his cousins german (a).*

You see, sirs, that the intention of the testator was to make four different degrees of heirs, or rather of successors.

He names, first, the *Comte de Saint Pol* as his heir: here is the first degree of institution, and he charges him with a substitution

(a) Etant l'institution d'héritier le chef et fondement de tout testament et ordonnance de dernier volonté: a fait et institué son héritier universel Charles-Paris d'Orléans, Comte de Saint Pol, son frere puîné, et après lui ses enfans naturels et légitimes, préférant les mâles aux femelles; et venant le dit seigneur Comte de Saint Pol, à mourir avant ou après le dit seigneur testateur, sans enfans naturels et légitimes: aux dits cas et chacun d'eux le dit seigneur testateur a substitué et substitué vulgairement, par fidei commiss, la dite dame Anne Geneviève de Bourbon sa tres honorée mere; la suppliant tres-humblement de disposer des dits biens; elle venant à mourir, en faveur de M. M. les Princes de Conty, ses cousins germains.

in favour of his children; but as that event has not taken place, we may pass over the second degree, and proceed immediately to the third, which is that of *Madame de Longueville*.

How is she substituted to the *Comte de Saint Pol*? The intention of the testator cannot be doubted. He declares himself, that he intends that she shall be substituted both vulgarly and by way of *fidei-commission*. Let us develop these expressions, and substitute the thing for the terms used to signify it. What was the intention of the *Abbé d'Orleans*, when he said he substituted her vulgarly and by way of *fidei-commission*? Let us not seek for the explication of the clause elsewhere than in the clause itself. He has marked the case in which the vulgar substitution might take place, and also the case in which the *fidei-commissary* substitution might have its effect.

And in case of the death of the *Comte de Saint Pol* before the testator, here is the case of the vulgar substitution, *si prior heres, heres not erit*, or, after the testator without children, here is the case of the *fidei-commissary* substitution, that is to say, that if the *Comte de Saint Pol* cannot be his heir, *Madame de Longueville* shall; and if, on the other hand, the *Comte de Saint Pol*, after having become his heir, should die without children, he shall render the effects of the testator to *Madame de Longueville* by reason of the *fidei-commissary* disposition.

The last degree of substitution which comprises the *Princes de Conty*, is not more difficult to explain than the two preceding; it is sufficient to read the terms in which it is conceived, to discover that it is no more than a simple *fidei-commission*.

Requesting her (*la suppliant*), &c.

All the terms of this clause evidently shew that the testator intended only to make a *fidei-commissary* substitution.

1st, We see the terms of request, which are consecrated by law to the use of *fidei-commissary* dispositions, terms which can never accord with a vulgar substitution, which, as we have said, is only a second institution equally solemn with the first, and consequently cannot be made by expressions which are oblique, precarious, and indirect, such as those made use of by the *Abbé d'Orleans*.

2d. We observe that the testator has expressed the case in which it was to take effect, and that is only and precisely the case of a *fidei-commissary* substitution.

Let us here resume the terms of the testament, *requesting her (la suppliant)*, &c. upon her death (*elle vivant à mourir*), &c.

It is then only at the moment of her death that the testator charges her with rendering the effects to the *Princes de Conty*. He supposes then that she will have taken the succession during her life. Now, as we have already observed, this is a case directly

opposite to that of a vulgar substitution, which on the contrary supposes that the succession will never be taken by the first heir.

In a word, the terms of this *fidei-commissio*n, are the same as those of the law, *Epistolam*, 75. S. *Mulier*, in the digest, *ad senatus-consult. Trebell.* which the jurist calls the words of a *fidei-commissary* disposition. *Fidei-commissit in hac verba ; rogo te ut id quod ad te ex bonis meis pervenerit, facias pervenire ad filium tuum.*

If it is said the testator has only changed his expression, out of respect to his mother : in the first place it may be answered, that this respect did not prevent his substituting at all events, the *Princes de Conty* to his mother. Or where indeed is the want of respect ? As a son he owed every thing to his mother. The law of nature would not permit him to have any other sentiments. As a testator he owes her nothing. The civil law subjects every thing to his disposition. His liberality which was purely gratuitous, with regard to *Madame de Longueville*, had no other rules than his inclination : and who can imagine that *Madame de Longueville*, would have been offended at finding herself obliged at all events, to leave the property of her son to the *Princes de Conty*, that is, to her natural heirs, to those whom nature, the law, their rank and their merit, would induce her to wish for her successors ?

But besides, we can only know his thoughts from his expressions, which are the natural images of them. He has expressed himself in a different manner, then he had a different intention ; and we can never regard this clause otherwise then as a real *fidei-commissary* substitution.

Let us examine whether the failure of the institution is sufficient to annul such a substitution, or whether the defect may be repaired by presumptions of the testator's intentions ?

Whatever opposition there may be, between the maxims which have been proposed to you by the respective parties, concerning this difficulty ; we have at least this advantage, that they are at length agreed upon two general principles, which we may take for granted as rules established by the laws, explained by the doctors, and confirmed in this cause by the admission of the one party and the other.

The first principle is, that as long as the testament subsists, a mere interruption of the degrees is not sufficient to interrupt the course and progress of a substitution, and that when a degree happens to fail, that which is next in succession takes its place, and is intitled to all its rights.

Thus for instance, suppose that the *Comte de Saint Pol*, in case of his death without children, had been merely charged with rendering the effects to *Madame de Longueville*, and *Madame de Longueville*.

*villæ*; in her turn, had been charged with rendering them to the *Princes de Conty*, the death of *Madame de Longueville*, before that of the *Comte de Saint Pol*, would not have excluded the *Princes de Conty*, for ever, from the succession: on the contrary, they would have stood in her place, and would have received the property from the hands of the *Comte de Saint Pol*, instead of receiving it from the hands of *Madame de Longueville*.

This principle is founded upon the common maxim: *substitutus substituto est substitutus instituto*, and although the 27th and 41st laws, *ff. de Vulg. et Pupill. Subst.* only establish this maxim, with regard to vulgar substitutions, the sentiments of the doctors have with reason extended them to *fidei-commissary* substitutions. *Cujas* decides it formally, not only in the consultation which has been cited to you, but also in his Commentary on the 27th law, and the reason which he gives, is taken from the very nature and principal character of a *fidei-commissary* substitution, which has no rule more certain, or more inviolable than the intention of the testator.

Now it is evident that when a testator establishes several degrees in his succession, it is not for the purpose of excluding the most distant, but to invest them with it only after those who precede them in the order in which they are mentioned, (such is the expression of the law,) as well as in the order of the testator's benevolence and affection; so far, therefore, is the interruption or rather the failure of a nearer degree, from excluding one that is more remote from the right, which the testator has given in his succession, that it only serves to approximate it and remove the obstacles, which retard or diminish its expectations.

We shall not adduce at present the opinions of other expositors. We might cite almost all who have written upon these subjects. We shall content ourselves with observing, that *M. Maynard* has collected several decisions of the parliament of *Toulouse*, which have confirmed this maxim by their authority, and that *Faber*, who stands alone in his book *de Erroribus Pragmaticorum*, against the unanimous sentiment of other writers, candidly admits, that the question has been adjudged conformably to the general opinion by the senate of *Chambery*.

The second principle, which is more important, and more essential to the decision of this cause than the first, is one upon which all parties have agreed in their last replies, that is, that as a general rule, the fate of the testament is attached to that of the institution of the heir; that the particular legacies are as it were borne down by the ruin of the institution, and that the rigour of the law regards those as dead without a testament, who, after having made one,

one, have not had the good fortune to revive in the person of the instituted heir.

But it is contended that a general exception ought to be made, in favour of universal *fidei-commissa*.

[*The examination and refutation of this argument occupy 15 pages, from 315 to 330; which are here omitted.*]

But if the caducity of the institution is always followed by that of the *fidei-commissary* disposition, when we consider the testament merely as a testament, ought we to decide the contrary when it is regarded as a codicil? That is a second question of law, which we have to examine, with regard to the title of the *Prince de Conty*.

Remember here, if you please, Sirs, the terms in which this clause is conceived. We will repeat them, in order that we may the more easily examine its nature and effects.

*He declares that he wills, that his testament shall avail by way of a nuncupative testament, and if it cannot avail by way of testament, it shall avail by way of codicil, donatio causa mortis, and every other disposition in the nature of a last will, by which it may lawfully prevail and best subsist.*

The terms of this clause are very extensive. They comprise all kinds of disposition, and sufficiently indicate that the testator designed that his last will should be executed, under whatever form it might be considered.

It seems at first that the mere reading of this clause would be sufficient to decide the contest in favour of the *Prince de Conty*.

The only ground which renders the *fidei-commissary* disposition ineffectual, is a failure of the institution; now this ground ceases, the instant the testament is regarded as a codicil; so far is it from being necessary in an instrument of that nature, that there should be an institution of an heir, that it would be void if there was one; and the greatest favour, or rather the greatest condescendence of the jurists is limited to converting into an universal *fidei-commission*, that which bears in a codicil the marks and character of a direct institution, and since the institution of an heir is not only useless, but forbidden in a codicil, may we not reasonably conclude, that the failure of the institution does not annihilate the other dispositions, which occur in such an act?

Whatever appearance of truth there is in this proposition, it is attacked by a great number of objections which appear very considerable.

In the first place, it is said that the *Prince de Conty* can no longer have the aid of the codicillary clause, after having solemnly

renounced it. Such you are told is the rigorous disposition of the 8th law of the *Cod. de codicil (a)*, which decides that all variation and inconstancy are forbidden upon this subject; and that the person who has once taken the quality of a testamentary heir, cannot afterwards claim by virtue of the codicillary clause, which supposes the testament no longer to subsist.

But in the first place, we may ask those who offer this argument, where is the law, where is the ordonnance which regulates this proceeding amongst us in so rigorous a manner? And although, for the decisions of questions of right, we are obliged to follow the authority or rather the reason of the *Roman law*, who can suppose that in regulating the proceedings before the *Requêtes du palais*, it was necessary to go and consult the formulæ and terms of actions which were established by *Roman law*, and which with us are regulated by more equitable principles?

Besides, we might maintain with a great deal of reason, that we are not precisely within the case of that law; that it supposes two rights united in the same person, the one by virtue of a direct institution; the other by virtue of an oblique and *fidei-commissary* substitution, to be presumed from the codicillary clause. And the emperors *Arcadius* and *Honorius* obliged him who had these two different titles, to confine himself to one of them; the choice was opened to him at the commencement of the action, but when once made could not be varied, but here the *Prince de Conty* has not made any election. He has united the two rights in his demand, without attaching himself to the one rather than the other. He has demanded to be admitted as testamentary heir, and he also claims by virtue of the codicillary clause, by demanding a deliverance of the legacy from *Madame de Nemours* as heir *ab intestato*.

We cannot deprive him of either the one action or the other, and we may even say that there is no more reason to deprive him of a right which he has in execution of the codicillary clause, than of that which he claims by virtue of the institution. He has chosen the one, as he has chosen the other, the two qualities unite and are blended in his person, and if the reason opposed to him was just, he might lose both the one quality and the other, as he has equally assumed them both.

(a) Si quis agere ex testamento quolibet modo, sive scripto, sive sine scriptura confecto, de hereditate voluerit; ad fidei-commissi protectionem adspicere cupiens, minime permittatur. Tantum enim abest, ut aditum cuiquam pro suo migrandi desiderio concedamus: ut etiam illud sanciamus, si testator faciens testamentum, in eodem *pro codicillis etiam id valere* complexus sit: qui hereditatem petit ab ipsis intentionis exordie, utrum velit, eligendi habeat potestatem, sciens se, unius electione, ab altero sibi aditum præclusisse.

All that *Madame de Nemours* can conclude from this law, in regard to the present cause, is, that the *Prince de Conty* should be obliged to make his option at a given time, and declare whether he will have the title, of which he demands the execution, regarded as a testament or as a codicil. Then there might be some colour for this pretence, but at present, it cannot be said that the *Prince de Conty* has renounced either of his rights, because he has proposed both of them equally.

The second objection, that has been made against the codicillary clause, is one which it does not appear more difficult to destroy.

They have cited the authority of a doctor, who has written a treatise upon the codicillary clause, in which he says, that it can have no effect, when the force and nature of it have not been explained by the notary. What probability, say they, is there, that it was explained to a man, who has not yet learned to distinguish his relations from his friends, as appears by the preamble of his testament ?

The principle which this author establishes, may be justly contested ; but, even admitting it, what will be the consequence, supposing it was necessary that the notary should explain the force and effect of the codicillary clause ? Shall it not be presumed that he has done so, and shall the performance of last wills depend upon the proof of a fact of this description ? If such a point was proposed in your audience, and an allegation was offered, that the notary had not explained the effect of this clause to the testator, would you admit the proof of it ? Is not every thing, which is of the substance and essence of the act, proved by the act itself, and when a testator is endowed with sanity and reason, will the interest of the public permit you to receive proof, that he did not understand the clauses which he has himself signed ? They may say as much as they please that this clause is a clause of style ; for that very reason it is rather to be presumed that the testator understood it, and if this liberty was once allowed, parties would soon demand a right of proving that a sane and reasonable testator did not comprehend the essence and consequences of a derogatory clause, or of a general revocation, and nobody is more interested than *Madame de Nemours*, in contending that proof shall not be permitted that a testator did not understand what he has signed as his testament.

You see then, Sirs, that this objection is not less contrary to the particular advantage of *Madame de Nemours*, who proposes it, than to the interest of the public : let us proceed to the other arguments, that have been urged against the codicillary clause,—arguments much more important than those which have been already considered.

You have been told that it was necessary to distinguish between two kinds of codicillary clauses, the one vague and general, such as that in question; the only effect of which is to supply the defects of solemnity, and never those of intention. The other precise, express, and particular, by which a testator requests by name, his legitimate heirs, to execute his last will; and as this last kind of codicillary clause is a new will of the testator, it is doubtless sufficient to supply any want of intention in the testament.

They have supported this reasoning by the authority of *James Godefroy*, upon the *Theodosian* code, who lays it down as a certain maxim, that the mere codicillary clause cannot supply the defect of intention, or repair the vices which affect the substance of the testament.

Here these two circumstances are united.

The defect of intention, as the *Princes de Conty* are only appointed under a condition, which has never taken place.

An essential vice which affects the substance of the testament. Can there be a greater defect than the failure of the institution, which, according to all the jurists, is the foundation, the basis, the life of the testament? Before we answer this objection, which is the only one that has any colour, we must take a cursory review of the general principles which the law has established concerning the nature and effect of codicils, in order that we may afterwards make a just application of them to the codicillary clause.

Without enquiring here, into the origin of this disposition by way of codicil, which may be justly called a testament according to the law of nations, and which in effect is the only one, of which we have retained the use; let us barely remark, that a codicil is nothing else than a request addressed by a dying man, to his heir, by which he intreats him to execute a will less solemn than a testament. Hence it arises, that according to the first principles of *Roman* jurisprudence, direct terms and imperative expressions are absolutely unknown in this kind of disposition, and whilst they are essentially necessary in testaments, they are fatal in codicils. A testator commands, but he who makes a codicil entreats. The one ordains, as invested with the authority given him by the law; the other supplicates by virtue only of the power, which nature seems to have attached to the prayers of a dying man.

Let us pause a while upon this just and natural idea of a codicil, which can only be contested by those who have not any tincture even of the first principles of the civil law. Every codicil is naturally and essentially an efficacious prayer (*une priere ENIXE*) (a), a sup-

(a) The word *enixe* appears from other pleadings to be a term of particular energy in the French jurisprudence.

plicatory intention addressed to those who have already the title of heirs.

By virtue of this prayer, which is always sure to obtain what it demands, this intention is certainly efficacious; and we may say of testators, what was formerly said of kings, that their requests are commands. But it is always a prayer, it is always a supplicatory intention, and it is that which distinguishes it essentially from a testament.

As there are two sorts of heirs, the one testamentary and the other legitimate, there are also two sorts of codicils: and their difference is founded upon the different quality of the persons to whom those prayers, which form the whole essence of codicils, are addressed.

The codicils of the first kind are those which are made (according to the language of the laws) *ad testamentum*, which are regarded as a sequel, as an accessory, as a dependency upon the testament; because in this case it is only to the instituted heir that the testator addresses his requests. Hence it follows that this kind of codicil follows the nature and destiny of the act to which it is attached; and, as it subsists, if the testament subsists, it is also extinguished with the testament. But there is also a second kind of codicils, independent of a testament; and these are such as every man, having a testamentary capacity, makes without making a testament. And whereas in the first, the codicil is regarded as a prayer addressed to the instituted heir; in the last, it is always considered as a prayer to the legitimate heir.

This distinction is clearly established in the law, 16. *ff. de jure codicill.* where the jurist explains it in these terms: *Et ut manifestius dicam, intestato patrefamilias mortuo, nihil desiderant codicilli, sed vicem testamenti exhibent, testamento autem facto, jus sequuntur ejus.*

Such is the nature of a codicil, and such are its different kinds, and, this being premised, nothing appears more easy, than to explain the effects of the codicillary clause.

What is a codicillary clause? It is a disposition which has the effect of changing a testament into a codicil, of substituting in the place of an absolute law a request, which is often more efficacious, to cause that which cannot avail as testament according to the strictness of the law, to be executed as a codicil according to the rules of equity. But as we have distinguished two sorts of codicillary clauses, the one attached to a testament, the other independent of a testament, what will be the effect of the codicillary clause, in that favourable conversion which it makes of a testament into a codicil? Will it be to make such a codicil as follows the nature and destiny of the testament, or on the contrary, a co-

dici] which will subsist by itself, without any necessary relation to any other act, without any dependence on a testament ?

It is not difficult, but it is very important, to answer this question.

We say first, that it is not difficult, because it is evident that a codicillary clause can never make a codicil of the first kind, that is to say, a codicil which is inseparably attached to the destiny of a testament ; for since it is the testament itself, to which it gives the form and nature of a codicil, to what testament shall it be attached, as there is no longer any subsisting, and the testator has only added this important clause to supply the default of a testament, to take its place and be executed as a settled intention, (*comme volonté exise*) in case the testament cannot have effect as a solemn act ? Now if it is absurd to say, that a codicillary clause can ever render a testament a codicil of that kind which the law calls *appendicem et sequelam testamenti*, what conclusion can remain, but that the force and virtue of this clause consists precisely in making a codicil of the second kind which subsists of itself, without borrowing its life and being from the testament ? We say, in the second place, that it is important to answer this question, however easy it may be to decide it, because from this single answer we may deduce all the principles which regard the codicillary clause, and the solution of all the objections by which it is contended to be useless, under the circumstances of the present case.

In fact, if the nature of the codicillary clause is to render the testament to which it is added entirely similar to a codicil, that would subsist without the support of a testament, the definition of this clause will be the same with that of such a codicil. Now what is the definition of this kind of codicil, if it is not, as we have already cursorily hinted, a prayer addressed by a dying man to his legitimate heir, by which he conjures him to accomplish his last wishes ? For since every codicil is essentially a supplication made to the heir, and as there are two sorts of heirs, the one testamentary and the other legitimate, from the moment that this supplication can no longer be addressed to the testamentary heirs, because the law supposes there not to be any such, it necessarily follows, that the legitimate heir is its only object.

The whole nature and force of the codicillary clause then is included in these two principles, which we ought not to be called upon here to prove ; first, that this clause is made to supply the defect of a testamentary heir, and consequently that it supposes there not to be any such heir ; second, that it has the effect of substituting the legitimate heir, in the place of the testamentary heir, by those  
 efficacious

efficacious and energetic prayers, which every testator is presumed to address to his heirs by blood, by the mere terms of the codicillary clause.

What is the natural consequence of this definition and these principles? it is, that you are not, as has been attempted in this cause, against the most clear texts of the civil law, against the unanimous concurrence of all the doctors, without any one exception, to distinguish two sorts of codicillary clauses; the one express, formal, supremely efficacious, addressed by name to the heirs by blood; the other vague, general, clauses of style rather than of intention, and which can at most only repair some defects of solemnity.

It is agreed, that if the codicillary clause which we are examining, was conceived like those of the first kind, the pretension of *Madame de Nemours* would not be maintainable, and that she would be without difficulty chargeable with the *fidei-commission*, in favour of the *Prince de Conty*.

But it is contended that as the codicillary clause in the testament of the *Abbé d'Orleans*, is only conceived in general terms, it does not contain any formal prayer which is obligatory upon *Madame de Nemours*.

In the first place, we should be glad to ask those who propose this distinction where they have found it. Is it in the text of the law; is it in the sentiments of the doctors; is it in the authority of decided cases? they have not as yet cited any law which establishes it, any doctor who follows it, any judgment which confirms it. Let us pause a moment to weigh the force of this argument; although it is negative, it almost forms a demonstration in regard to the present question.

If it were true that this distinction of two kinds of codicillary clauses was known in the law, it would doubtless be a first principle and a fundamental maxim upon the subject. But if that was so, how would it be possible for the scrupulous exactness of the counsel of *Madame de Nemours*, who have extended their researches to laws, the most indifferent, and the most remote from the present case, not to have found in the whole range of the law, at least some obscure and difficult text, from which they might deduce by a doubtful interpretation, this important distinction upon which their whole defence is to turn? How could this useful and necessary principle have escaped the attention of all the jurists, in the infinity of laws, respecting testaments? How happens it that *Justinian* has made no mention of it in his *Institutes*? How does it happen that of all the ancient and modern interpreters of the law, pregnant with distinctions, fertile in questions, authors of

of an infinity of novel doctrines, which are frequently repugnant to the text of the laws, none have hit upon this essential difference, between the different kinds of codicillary clauses ?

Let it not be said that a mere comparison of some laws is sufficient to manifest this distinction. In some, as for instance, in the law, *Titia*, 13. ff. *de inf. testam.* (a) the heirs, *ab intestato*, are *nominatim*, and expressly requested by the testator, to accomplish the dispositions of his testament, in others as in law 8. *C. de codic.* the testator merely says, that he wills his testament shall avail as a codicil, *pro codicillis etiam id valere* (b), and that from these different formulæ, we may and ought to conclude that one codicillary clause is often very different from another.

Those who make this difficulty, forget that we are examining, not the form, but the effect of the codicillary clause.

If we were only inquiring about the form, the division would be very imperfect, they might not only distinguish two kinds, but also reckon up five or six, of which we have examples in the Digest, and it is shewn by *Cujas*, and all the other expositors, that the number is not determined; that there is not in regard to this subject, any fixed inviolable formula, which consists in a certain arrangement of words: the good faith that governs these dispositions, which were fortunately invented to mitigate the rigour of the law, does not suffer them to be confined within such narrow bounds; every expression, even every conjecture which induces a presumption, that the testator intended his testament to be executed, even though the instituted heir should not be in a situation to maintain it, is sufficient to have the character of a real codicillary clause.

But here what is it that we seek? it is not the form, it is the execution, it is the effect of the codicillary clause. Now, in this respect, all codicillary clauses are equal. This is what we have as yet only proved, by a negative argument, from the silence of the laws and the doctors. We are at present to prove it, by the principles of the law, by the authority of the jurists, and by the opinion of the interpreters; three positive arguments, which will place this truth beyond a shadow of doubt.

Can the principles of law admit of any difficulty, after all the

(a) *Titia* filiam heredem instituit, filio legatum dedit, eodem testamento, [ita] cavuit, " *Et omnia, quæ supra dari, fieri jussi, ea dari, fieri volo ab omni herede, bonorumve possessore, qui mihi erit etiam jure ab intestato, item quæ dari jussero, ea uti dentur, sicut [quæ], fidei ejus committo.*" Quæritur est, soror centumvrali judicio obtinuerit, an fidei-commissa ex capite superscripto debeat? [Respondi.] Si hoc queratur, an jure eorum, quos sibi ab intestato heredes, bonorumve possessores successores credat, fidei-committere possit, respondi posse. Paulus notat: probat autem, nec fidei-commissa ab intestato data deberi, quæ a demente.

(b) *VI. supra*, p. 500. note (a).

reflections we have already made? Let us resume the course of our propositions. The codicillary clause reduces the testament to the condition of a codicil; this is its natural effect, even in the form which has been cited, as an example of codicillary clauses that are vague, general, and imperfect. This is the first proposition which we have examined. The codicil which this clause substitutes to a testament, is a codicil independent of any testament. The second proposition is, that every codicil independent of a testament is a prayer, addressed to the legitimate heir, and can be nothing else; for, in fine, there are in the law but two kinds of dispositions,—dispositions, which are direct, absolute, imperative,—dispositions which are oblique, precarious, supplicatory. A codicil is certainly not a disposition of the first kind; it belongs then only to the second. Then by a necessary consequence, as the codicillary clause makes a codicil subsisting by itself, and a codicil of this quality is a prayer to the legitimate heir, every codicillary clause is a prayer, either expressed or implied but always equally efficacious, which the testator addresses to those who are destined by nature to succeed him. There are then in truth two kinds of codicils, the one addressed to the heir by blood, the other addressed to the legitimate heir; but there can be only one codicillary clause, because it necessarily supposes the default of an instituted heir, and consequently it can have no other object than the legitimate heir.

To whom does the testator speak, When he says, *I will—I wish—I desire—that my testament may be executed as a codicil?* Is it to the instituted heir? He supposes at the moment, that he is not in a condition to reap the fruit of his benefits. It is then always to the legitimate heir. Let him do it in express terms, or by a general clause, still he does it, both in the one case and in the other, and consequently the execution of his intention will be always equally inviolable.

Let us join the authority of the laws, to the force of principles; and without making a heap of citations, let us apply ourselves, to a single text, which completely establishes the maxim upon which the law and our opinion is founded. Every man, says *Ulpian*, who makes a codicil, ought to be considered as if he had instituted for his heirs, all those to whom his property would belong, after his death; *Paterfamilias qui testamenti factionem habet, et codicillos faceret perinde haberi debet; ac si omnes heredes ejus essent ad quos, legitima ejus hereditas vel bonorum possessio perventura esset.* L. 3. ff. de Jure Codicillo.

Nothing is more clear or decisive than this law; the force of the codicil consists wholly in this, that the legitimate heirs are regarded

regarded as testamentary heirs (a). Why so? Because the testator gives them whatever he does not take away, *dedit dum non adimit*, says the same *Ulpian* elsewhere. Now the codicillary clause makes a real codicil, then its effect is to substitute the heirs by blood to those by the testament; it is to them only then that it is addressed.

Finally, if this principle could yet be doubtful, it would suffice to open any interpreter of the law, without exception; we shall not find any one, who has not taken it for granted, or expressly confirmed it; but let us pass by this multitude of authors, in order to contemplate only two of the greatest luminaries of the law, the one in *Italy*, the other in *France*, *Bartolus* and *Cujas*; What decision can be more formal than that of the former, when he says upon the first law, of the *Digest* de jure codicill. *ista sunt paria, relinquere a venientibus ab intestato, et dicere si non valet jure testamenti valeat jure codicillorum?* It is the same thing to charge *nominatim* the heirs, *ab intestato*, with the execution of a testament, or to say, if my testament does not avail as a testament, let it avail as a codicil; could he more expressly condemn the new distinction of two kinds of codicillary clauses? *Cujas* does not express himself less precisely than *Bartolus*, when he says, upon the title of the code, *de fidei-commis*, that if the testament becomes void, the *fidei-commissa* which it contains are not due from the heirs of by blood, *addendum tamen deberi si ab intestato succedentes rogati probantur vel rogati intelligantur ex generali et simplici sermone testatoris vel ex clausula codicillari*. You see, Sirs, that this great interpreter of the law, in like manner with *Bartolus*, considers the codicillary clause as equivalent to an express prayer, made to the heirs by blood, and that he would have regarded the distinction which is proposed to you, as a paradox in the principles of law.

It is with reluctance that we detain you, by proving so much at length so certain a principle; but as this is the capital point upon which all the arguments of *Madame de Nemours* depend, it was absolutely necessary to confirm the principle by all these reflections, after which nothing will be more easy than to answer the difficulties which are opposed to the codicillary clause.

Those who have defended the interests of *Madame de Nemours*, agree that if the testament of the *Abbé d'Orleans* contained an express prayer, addressed to the heirs by blood, the case of the *Prince de Conty* would be indisputable: now we have shewn by general principles, by the authority of particular laws, by the sentiments

(a) The English lawyer will of course here be struck with the recollection of a directly opposite principle.

of expositors, that it is the same thing to request the heirs by name and to request them in general by a codicillary clause : where then can be the difficulty ? Let us however answer a little more at length the two principal objections, by which they would elude the power and efficacy of this clause.

We have already glanced at them in passing.

It is said, in the first place, that the codicillary clause was only applied to repair a want of solemnity, and not an essential defect, in the substance of the testament, such as a failure of the institution.

After the principles which we have established, three very short reflections will be sufficient entirely to destroy this first objection.

So far is it from being true, that the codicillary clause cannot remedy the essential defect of the failure of the institution, that it was precisely for that purpose that it was introduced. It was only, as we have so often said, for the purpose of substituting the legitimate to the testamentary heir. If the institution was not void, the codicillary clause would be useless, and it is now argued that it shall be destroyed by the very circumstance which is the cause of its subsisting, and that it shall lose its efficacy precisely in the very case for which its assistance is resorted to.

Let us go further, and add, in the second place, that however slightly we consult the principles of natural reason, we shall agree that what distinguishes a testament from a codicil, an institution from a *fidei-commissum*, is a mere subtlety of civil law, which only consists in the term HEIR. What is a testament ? *Directa hereditatis datio*. What is an universal *fidei-commissum* ? *Obliqua hereditatis datio*. What they have both in common is a donation of the property of the testator. Wherein do they differ ? In this, that the one is made in terms of command, the other in terms of request. Now what is there in all this but a mere formality which nevertheless, by the rigid principles of law, occasions, as we have shewn, a failure of the testament ? If then it is agreed, that the codicillary clause has the force of repairing the defects of solemnity, it must be agreed, that it is sufficient in this case to remedy the failure of the testament, founded entirely upon a rigorous solemnity.

Finally, and this is the third reflection which we oppose to this objection, it is certain that the want of solemnity renders the institution void and ineffectual, in the same manner as the previous decease of the instituted heir. Now if they are obliged to admit, that when these two defects, the want of solemnity, and the caducity which it induces as its consequence, are joined together, the codicillary clause supports the testament, and prevents its falling to the ground, what reason can there be for its not repairing

repairing the caducity, when that is the only defect? What! Shall it be said, that the testator intended that this clause should have its effect, supposing the will to be impeached for want of formality, and that he did not still more strongly intend the same thing, in case the previous decease of the instituted heir should disappoint his reasonable hopes? But not to enter at present, into an examination of his intention, let us, in order to dissipate even the slightest doubts, which may yet remain in the mind concerning this objection, add to all these reasons, the precise opinions of the expositors of the law.

What says *Cujas* upon this question? What are the cases, in which he intimates that the codicillary clause ought to have effect? *Si testamentum destituatur, si injustum pronuncietur, si rumpatur, si irritum fiat, omnia quæ sunt in testamento scripta, debentur, jure fidei-commissi, ab hæredibus legitimis.* This is upon the law of 77. *S. filius matrem, ff. de legat. 2.* Does he stop at the single case of want of solemnity, or rather what case is there which he does not comprise in these very extensive terms? A testament which is abandoned, a testament which wants solemnity, a testament which is broken (*a*), a testament which is become void. Such, according to this writer, are the testaments into which the codicillary clause affords an efficacious remedy; he repeats almost the same thing upon the law, *Titia, 13. ff. de inof. testam.* he only excepts the single case of the testament being inofficious, in which case the testator being presumed to be in a state of insanity, cannot make either testament or codicil.

How do all the authors express themselves, whom *Madame de Nemours* has herself cited upon the question of caducity? *Mantica* says precisely, *ea vis est clausulæ ut successores intestati videantur rogati.*

*Perigrinus* expresses the same thing in other terms.

*Menochius*, in his 106th counsel, directly establishes the exception of the codicillary clause, in the case of caducity.

It would be infinite if we were to go through all the others, who have supported this opinion; they are almost as many as there are interpreters of the law, and we do not believe that there is any proposition more universally received in the whole system of jurisprudence. It even seems, and we shall only add this single observation, that *Paulus* intended to anticipate and remove this doubt, in the law 29. § 1. *ff. qui testam. fac. potest*: he examines the effect of these words, *hoc testamentum volo esse ratum, quacunque ratione poterit*, and he decides that the in-

(a) This expression applies to the case of a will becoming void, by the birth of a posthumous child.

tention of the testator was to have his testament executed, *etiam si intestatus decessisset*. Then every thing which can cause him to die intestate, the defect of solemnity, the previous decease, or the renunciation of the instituted heir, the birth of a posthumous child, every thing was foreseen, every thing was comprised, every thing was included in the intention of the testator, and he was deemed to have provided for all these cases by the codicillary clause.

It is added, in the second place, and with a great deal of reason, that a codicillary clause cannot supply the defect of intention; how could it subsist without such intention, since it is upon intention alone that it is founded? It is the mere favour of intention, which, contrary to the rigour of the law, produces it, supports it, renders it inviolable. It was useless to maintain so incontestible a principle by the authority of the learned and illustrious *Godefroy*.

But what consequence can be drawn from this principle against the codicillary clause? Shall it be contended, that the intention of the *Abbé d'Orleans* was not in favour of the *Princes-de Conty*? But what intention was ever more express? He requests his mother to render them his property; it is true that if he had stopped there, an unexpected event might have interrupted the course and progress of his designs; it is true that the death of the heir charged with restitution might have destroyed the *fidei-commission*; this we conceive is sufficiently proved; in vain would they have availed themselves of the force of his intention, if he had not made use of the only means allowed by the law, if he had not marked his intention to charge his legitimate heirs, with this *fidei-commission*, but he has marked it clearly by the codicillary clause. He had the power of willing it, he has willed it, and besides he has willed it in the form prescribed by the law, what is there then deficient in his intention that could entitle it to a perfect execution?

If they would still call in question the intention of the testator, without repeating here all the reasons that have been stated to you on the part of the *Prince de Conty*, and which we endeavoured yesterday to bring before you, we shall apply ourselves to the only reasoning, to which we conceive there is any difficulty in giving an answer. Suppose for a moment, that the testator intended that which *Madame de Nemours* contends to be the object of his intention, and let us see if that supposition is not entirely destitute of probability.

It is already certain, that if the order of disposition which he established could have taken place, he intended that the *Princes de Conty* should have taken his property by way of *fidei-commission*; but in case the instituted heirs should previously die, we must suppose

pose with *Madame de Nemours*, that he no longer intended that the succession should pass to the *Princes de Conty*, that is to say, that this is not the course and order of degrees prescribed by the testator; that this course and order is a real condition, and a condition so necessary, that the defect of it may render the *fidei-commissum* useless, and annihilate the whole of his disposition.

Let us at present develope this idea, and endeavour in a few words, to render it intelligible.

What is it then that the *Abbé d'Orleans* intended? That if the *Comte de St. Pol*, or *Madame de Longueville* could take the succession they should render it entire to the *Princes de Conty*; but if both the one and the other should die before him, the *Princes de Conty* should be deprived of the succession, and this at the very time when by the codicillary clause he was charging his heirs by blood with the execution of his last intentions in defect of the testamentary heirs.

It is as if the testator had said, I charge my testamentary heir to restore my effects to *Mevius*; but if my heir shall die before me, I will that my effects shall be left to my legitimate heirs.

Now what can be more absurd or inconceivable, than such an intention? The instituted heir was a medium, an obstacle, a kind of dam, which suspended and retained the course of the testator's benefits, that were ready to pour on the *fidei-commissary*, and because this medium can no longer subsist, because this obstacle is removed, because this dam is broken, the source of the testator's liberality shall all at once be dried up, he shall lose sight of the object of his tenderness, because that object is brought nearer to his view; he regarded him when at a distance, he ceases to regard him the moment that there is nothing to separate them.

Let us put this reasoning in a still clearer point of view; the order of institution, the order of the writing is the image and proof of the order of the affection and intention of the testator; this being supposed, who was the person chiefly regarded by the *Abbé d'Orleans*? The *Comte de St. Pol*: who succeeded next in the order of affection? His mother; next follow the *Princes de Conty*; and finally, in the fourth degree, the heirs by blood, whom he might still deprive of his effects, by a long course of substitutions, but whom he is supposed to have taken into consideration in the codicillary clause.

He has then preferred the *Princes de Conty* to his heirs by blood, and he has preferred them at a time when he hoped to have two heirs who were to take before them, and it is supposed that at a time when there is no person to precede them in the affection of the testator, he has excluded them, in favour of those whom he

has only contemplated after them, that is to say, in favour of his legitimate heirs. He preferred them to his heirs by blood, when they only held a third rank in the order of his disposition; he ceases to prefer them upon their attaining the first.

This then is the point to which his intention, according to the construction of *Madame de Nemours*, is reduced. *I will that the Princes de Conty shall take my succession, provided another person precedes them therein; but if no other person precedes them, I will that they shall be no longer intitled to the quality of heir, and I leave my property to my legitimate heirs.*

If such an intention cannot be probable, if all the steps that have been taken to come at this interpretation are so many impossible suppositions, if they are full of darkness, contradiction, and absurdity, what conclusion can we make, but that the intention of the testator is express, that his will is certain; and consequently that this is the very case in which the codicillary clause ought to have effect, since it was only invented in order to lend a hand to the intention that was in danger of failing by the rigour of the law.

Let us here resume the course of our principles. There are two sorts of codicils, the one addressed to the instituted heir, the other to the legitimate heir; but there is only one kind of codicillary clause, because that can have no other object but the heir by blood. Reason, the law, the expositors, all concur in establishing that this clause is essentially, and in its nature, the prayer of a dying man to his legitimate heirs. Its favour, its force, its authority is so great, that it can repair not only the defect of solemnities, but may even come in aid of the failure of the testament. There is nothing but the defect of intention which it cannot supply, but never was there an intention more clear than that which appears in the present cause. Then the codicillary clause ought to be considered as a decisive argument, removing all the difficulties which might arise from the question of caducity.

Notwithstanding the chain and connection of these propositions, two objections have yet been made, the one ancient, the other novel, which it is proper to satisfy before we conclude what relates to this part of the cause.

The first is, that codicillary clauses have no effect in our laws, because, in fact, all our testaments are nothing else than real codicils.

The second, founded on the authority of some laws, in which it is said, that if a testator, supposing himself to have only one legitimate heir, charges him with any *fidei-commissa*; these do not oblige the new heir, who may appear after his death, but they will be reduced to a moiety, which only falls upon him who is charged

by name by the testator, from which it is concluded that as the *Abbé d'Orleans*, having two heirs, the *Comte de Saint Pol*, and *Madame de Nemours*, has only charged one of them expressly with the *fidei-commission*, the other shall be discharged from it.

The first objection might be plausible, if it was proposed by the *Prince de Conty*; but it is surprising that the defender of *Madame de Nemours* should have thought it possible to adduce it as a reason on his side of the cause.

It is true that codicillary clauses are unknown, or rather that they are absurd in a codicil, and consequently, that our testaments are nothing more than real codicils. But in the first place, the question here relates to a testament made in a province governed by the general written law. This answer might suffice. But let us go further, and shew, that the consequence to be deduced from this reasoning would be directly contrary to the interests of *Madame de Nemours*.

Let us grant to those who adduce this argument every thing they require: the codicillary clause has no effect upon codicils, all our testaments are codicils, the very testament we are examining can only be regarded as a codicil; but what will be the conclusion that may be expected from all these suppositions? Surely the following, according to all the principles of law. If it is a codicil, there is no institution of an heir, the act not being susceptible of that operation. If there is no institution, then all the direct dispositions become oblique, then the institution of the *Comte de Saint Pol* and *Madame de Longueville* becomes a *fidei-commission*; if it is only regarded as a *fidei-commission*, then it is of the same nature with the disposition in favour of the *Princes de Conty*. If it is of the same nature, there is no need of recurring to the conversion of a *fidei-commissary* substitution into a direct substitution; if this conversion is useless, if the institutions and substitutions formed by the testament are all of the same kind, then by a necessary consequence, admitted by the counsel of *Madame de Nemours* themselves, the interruption of degrees cannot defeat the last substitution; then whoever is substituted to the second heir, is considered as substituted to the first, then the disposition has not failed, then the testament subsists by itself; and in effect, when it is said, that it would be absurd to admit a codicillary clause in a codicil, it is not because it is contrary to the spirit and nature of a codicil, but because it would be superfluous and redundant. If the whole effect of it is to make a codicil of a testament, why should it be added to that which is a codicil, and can be nothing else; it would be a derisory disposition for a testator to say, I will that my codicil shall avail as a codicil.

Nothing

Nothing further is necessary to confirm the truth of what we observed in the outset, that this reason is offered quite out of place, that it would have a great degree of plausibility in the mouth of the *Princes de Conty*, but in that of *Madame de Nemours*, can only serve to form an invincible argument against her.

Let us finish in a few words, every thing relative to this question, by the answer which we think ought to be given to the last objection; and which has only been proposed in two papers, that have been placed in our hands within these two days.

Let us retrace, in the first place, the nature of the laws upon which it is founded. A man who supposes himself only to have one heir, and who, notwithstanding, has two, makes a codicil by which he charges the only heir whom he is apprised of, with a *fidei-commission*; after his death there appears a second heir, it is demanded in the first place, if he can be subjected to the performance of the *fidei-commission*, as to the part and portion which belongs to him; it is next demanded, if the co-heir, whom the testator has expressly charged with a *fidei-commission*, is subject to the whole or only to a moiety.

Upon the first question, *Papinian* does not doubt but that the new heir, who is absolutely unknown to the testator, should be discharged; the second question he considers more difficult, but upon principles of equity, he is induced to adopt the opinion that the *fidei-commission* ought to be reduced to a moiety.

We do not examine at present, whether this interpretation has not more subtlety than solidity, whether it would be received amongst us, and whether there would not be a greater degree of reason in conclusions directly opposite. In a word, whether it ought not to be decided, that as the testator intended to charge with a *fidei-commission*, the heir whom he knew, it ought not to be presumed that he would be still more disposed to have charged the other whom he did not know, and that it is difficult to conceive, that he would have cut off, in favour of an unknown person, a moiety of the legacy which he gave to the *fidei-commissary*.

Without combating presumptions by presumptions, and effacing one colour by another, let us take it for granted that the interpretation of *Papinian* is the only one that is just, the only one that is equitable, the only one conformable to the principles of law. We confess that, even upon this supposition, it is not easy to divine what consequence can be deduced from it, for the decision of this cause.

There is so great a difference between the one case and the other, that it is astonishing how it should enter into the mind of

any body, to make an application of it to the testament we are now examining.

What is the reason upon which *Papinian*, and after him *Cujas*, found their determination? It is only upon the ignorance of the testator, *cum existimaret ad solam consobrinarum suam bona perventura*. It is easy to perceive the principle of this decision.

*Fidei-commissu* are only supported by the intention, which is their life and foundation. Now it cannot be supposed, that the testator had any intention in respect to a person of whom he had no knowledge, and whom consequently he could not believe to be his heir. Perhaps he would also have diminished his charges upon the succession, if he had seen that it would be divided among several persons. His intention is uncertain, and in order to assure the perfect execution of the *fidei-commission*, it ought to be certain. In a case of doubt, the heir is to be favoured; and as the mind of the testator cannot be certainly known, they come as near as possible to the spirit of nature and the law, which incline in favour of the heirs by blood.

Let us see, however, whether this principle has any application to the present case. Is that ignorance which is so decisive, or which is rather the only principle upon which *Papinian* founds his decision, to be found in this cause? Shall it be said, that the *Abbé d'Orleans* was ignorant of the number and quality of his heirs, that he erred, either in fact, by supposing that *Madame de Nemours* was not his sister, or in law, by persuading himself that his sister was not as nearly related to him, and as capable of succeeding him, as his brother.

This is not all, it not only cannot be presumed that he did not know his real heirs, it may even be demonstrated to be impossible that he could have any person in view in the codicillary clause, except *Madame de Nemours*.

Let us follow up our first ideas; the codicillary clause is a prayer addressed to the legitimate heirs, and the *Abbé d'Orleans* had only three of this quality, the *Comte de Saint Pol*, *Madame de Longueville*, and *Madame de Nemours*. He addresses himself to the two first, in the institution, he charges them by name, with the *fidei-commission* in favour of the *Princes de Conty*, he addresses himself, to the last, by the codicillary clause. Why so? Because one of the principal cases, for which that clause is added, is the caducity of the institution; that is to say, the previous decease of the two instituted heirs. Then there is one case, in which he supposes that the two first heirs will not be in a condition to listen to his prayers, and to obey his directions; and notwithstanding that he still continues to supplicate and to make himself be heard. To whom

whom then can he address himself, if he has no other object than his legitimate heirs, and two of these are supposed to be dead? Is it not evident that he must only have in contemplation the third, the only one who exists, that is to say, *Madame de Nemours*, and consequently that she is, as we have already observed, almost *nominatim* charged by the testator.

After this we shall not answer several objections similar to those we have already examined; for instance, that which is deduced from testaments that are void for passing by a child, in which it is properly decided that the codicillary clause cannot have any effect, but upon the principles which we have already established, that is to say, because it is supposed in this case, either that there was no will, or if there was one, that it was unjust. Here the will is certain, here the will is just, the power of the testator and his will go together, and equally support his disposition.

In lieu of going into all these useless questions they might have introduced two others, which would have a much greater connection with the real nature of the testament.

The one would have been, whether the *Prince de Conty* was not obliged to have waited for the death of *Madame de Nemours*, before he could institute his demand; and we should have thought upon this question, that a *fidei-commission*, of which the performance is not expressly suspended by the testator, is a present *fidei-commission*, and may be demanded immediately upon the decease of the person making it; and besides, that even if it were not demandable until after the death of *Madame de Nemours*, it would still be a present right in the *Prince de Conty*, and that he might demand the confirmation of it by all the ways capable of maintaining it, so that the delay may not prevent his discussing the question, by the examination of witnesses.

The second question is, whether *Madame de Nemours* would not at least have a right to the deduction of the fourth part, on account of the Trebellian portions; but this question would have appeared to us to be premature; it relates to the execution, and not to the validity of the title, and at present we are only inquiring into the validity.

Such, Sirs, are all the reflections which we have considered it our duty to make upon this first part of the cause, that is to say, upon that which relates to the title of the *Prince de Conty*. They are reduced to the single proposition, that the rigour of the law would have rendered the institution void, and consequently have defeated the *fidei-commission*, if the codicillary clause had not given it a favourable succour and support.

Let us now proceed to the titles of *Madame de Nemours*, let us see whether they derogate from those of the *Prince de Conty*, and whether the testament upon which he founds his title, not having failed in itself, is not at least revoked by the acts which followed it.

The first of these acts is the donation; the second, the testament of the 26th *February*, 1671.

We shall not enlarge at present upon what relates to the first, it might furnish matter for a long dissertation, which would consist in examining in what cases a donation revokes a legacy, or a *fidei-commission*, and whether there is any distinction between particular *fidei-commissions* and universal substitutions. We shall only observe in general, that it would seem very difficult to support, at the same time, an universal donation and an universal *fidei-commission*, having different objects. It is true that the donation was only of present property, and the *fidei-commission* included future; but on the other side, we see that in the donation, the *Abbé d'Orleans* stipulates for a right of return in favour of *Madame de Nemours*, after himself, and consequently, it seems that the *Princes de Conty* had ceased to be the object of his affection and his bounty.

Without enlarging upon this question, we think it ought to be decided upon the same fact of insanity, by which they impeach the testament that immediately followed. If that act is the work of a person destitute of reason, the donation has the same defect, there being only three days interval between them. If the *Abbé* was in a state of sanity at the time of making the testament, he was likewise so at the time of the donation. If he was in a state of imbecility, at the execution of the second of these acts, he was so likewise at the making of the first; and as they only offer to destroy the last act, which evidently revokes the first testament, upon the single ground of insanity, let us enter upon this great and important question, which is more difficult than all we have hitherto examined, which is truly worthy of the attention of the public, and still more worthy of the regard of justice herself.

The general capacity of doing acts is founded upon a natural law, that of making a testament is the effect of a civil law, which affords to mankind a kind of consolation for their mortality, by permitting them to revive, as it were, in the persons of their successors, and procure themselves an image and a shade of immortality in a long succession of heirs, who may be a lasting monument of the wisdom and bounty of the testator.

And as the capacity of every man is established upon both the one and the other of these laws, there are two kinds of causes which may deprive him of it; the one founded upon a natural reason, which

which is alone sufficient to annihilate or suspend the power of the testator; the other, although established likewise upon a natural reason, requires the authority of the civil law to destroy that liberty of entering into engagements and making dispositions, which the law gives to every person after a certain age.

Thus, for instance, the law depriving persons in a state of fury or imbecility of the faculty of making a testament, is a law purely natural, and does not require the aid of any positive law. Notwithstanding the silence of legislators, it will be always true that a man destitute of understanding cannot make a valid disposition. As long as reason shall subsist among men, the consent of all nations will authorize this maxim, and by a necessary consequence of this principle, it is manifest that, even before any interdiction, a madman is absolutely out of the state which is requisite to make a valid testament. It is not the authority of the magistrate, it is that of nature herself, which pronounces his interdiction; the judge does no more than declare it, but it is established, independently of his ministry, from the commencement of the insanity.

It is not the same with regard to a prodigal. Although the cause of his interdiction is founded on a natural reason, which does not suffer the destiny of a family to be placed in the hands of a man, who only possesses his property to destroy it, and who only uses it to abuse; yet as this reason does not produce an absolute incapacity, it is necessary that natural law should be confirmed by civil; and until the ministry of the judge has determined the state of the prodigal, he may still enjoy the liberty which is common to all men.

This difference, which does not require to be proved, is clearly stated in the first and second sections of the Institutes; *quibus non est permittum facere testamentum.*

A madman, says *Justinian*, from the moment he is in that condition, cannot make a testament any more than an infant; the one has lost his judgment, the other has not yet attained it; *testamentum facere non possunt impuberes, quia nullum eorum animi iudicium est; item, furiosi, quia mente carent.*

But a prodigal only loses this power, from the time when he is deprived of the administration of his effects; *prodigus cui bonorum suorum administratio interdicta est, testamentum facere non potest; sed id quod ante fecerit quam interdictio bonorum suorum ei fiat, ratum est.*

What is the natural consequence to be deduced from this first principle, the truth of which is recognised by all the doctors, who have written upon these subjects? When it is pretended that a testament is null, on account of the incapacity of the person mak-

ing it, it is necessary to distinguish between a madman and a prodigal.

With regard to a prodigal, if the testament is prior to the interdiction, his disposition cannot be impeached. It would be in vain to offer any proof that the cause of his interdiction, that is, his prodigality, his dissipation, and the disorder in his affairs existed previous to the testament, since even if all this were established, the testament would still be safe; however certain they might be, they might serve as the foundation of an interdiction, but could not operate as such in themselves.

On the contrary, when the question relates to the testament of a madman, although it was made before his interdiction, the cause of the testamentary heirs is not yet secure; and since the state of madness must necessarily precede the interdiction, which is only a declaration of it; and as the madness is in itself sufficient to destroy the testament, it is competent to offer a proof of this fact; the reason is evident; it is the fact, the madness itself, which as it were pronounces the interdiction.

In a word, prodigality, however certain it may be, does not suffice to render the prodigal incapable. Madness, if certain and evident, is a complete interdiction in itself.

Hence it arises that in regard to the one, a proof by witnesses is rejected, because the interdiction in the case of the prodigal, is more a matter of law than of fact; and as it can only be established by a judicial sentence, it can only be proved by the sentence itself; whilst on the other hand, in the case of a madman the interdiction is more a matter of fact than of law, and consequently it may be proved by all arguments, which are received to establish the truth of facts, of whatever nature they may be.

Thus, in regard to prodigals, there is only one kind of interdiction; which is that pronounced by the judge, but with regard to a madman, there is as it were a double interdiction and a double incapacity, the one natural and the other civil; and although the first is neither so solemn nor public as the second, it is nevertheless the most strong, or rather it is the only real one, since the second only follows and imitates the first; and the magistrate seems only to interpose his judgment, in order to join the authority of the law to that of nature.

The second interdiction, which we call civil, can only be proved by writing, that is by the judgment itself, which declares rather than forms it; the first, on the contrary, can rarely be proved by writing, and consequently it may and ought to be proved by witnesses.

If this first principle, drawn from the comparison we have made  
between

between a madman and a prodigal, is opposed on account of its being impossible to admit such proof, without attacking the first elements of the law and of the ordinances which do not suffer the authority of written acts to be impeached by parol evidence; we consider it to be easy to answer this objection, by a distinction equally solid with the first, and which we assume as a second principle that cannot be called in question.

There are two things to be considered in all kinds of acts, and most particularly in testaments.

The first is the substance of the act, the dispositions which it contains, and we may add its form and solemnity.

The second, is the capacity of the person executing it; in a word, we either confine our attention to the act considered in itself, or we contemplate the person who has signed it.

When there is nothing before us but the act, when there is no question but of the truth of what it contains, then it may be admitted as a general rule, that parol evidence cannot be admitted in opposition to what is contained in an authentic act, and that for two reasons; first, the common maxim, that parol evidence can never be put in competition with written, when the question relates to a matter which may be the subject of a written act; and secondly, because the proof is perfect by the act itself.

Thus for example, when they have omitted to specify upon a testament, that it was read a first and second time; dictated, &c. (*lu, relu, nommé, dicté, &c.*) it would be to no purpose to demand a liberty to prove that all this had been actually done, because public utility requires that the proof of a fact of this kind should not be sought for elsewhere, than in the testament itself.

But when they do not stop at the substance and solemnity of the act, when they call in question the power, the capacity, the condition of a testator, who can contend, that nothing but the act itself can be a legitimate proof of this? Shall it be said that when a question is made, whether a man was a major or a minor, at the time of entering into an engagement, you shall only consult the act itself which he has executed, and if he there makes a false declaration, shall he be bound by that falsehood, because it is written in an act? Shall you not rather seek in the public registers, for the proper proof of the fact in question; and if those are lost, shall not the minor be admitted to prove even by parol evidence, that he was such at the time of entering into the contract?

In a word, no two things can be more distinct and separate than the truth of the act, and the capacity of the party executing it; the one is certain, incontestible, proved by the act itself; but with regard to the other, the act supposes it, and does not prove it, unless

it shall be said that the notary is the judge thereof, and that, although he is no more than the instrument, the organ, the interpreter of the testator, he is nevertheless to decide upon his state and capacity.

But if this proposition cannot be sustained, if your judgments have permitted a proof of the incapacity of a testator, even where the notary has set down, that he was of sound understanding, what ought we to decide in the present case, where these words do not occur, and where the notary only speaks of the soundness of body, and says nothing of that of the mind? Although no consequence might be drawn from this omission, to raise a presumption of insanity, for all the reasons that have been stated to you; it serves nevertheless to remove the scruple which some authors have had, where the notary has declared that the testator was of sound mind and understanding.

But not to dwell upon a fact of this quality, let us return to the train of principles which we think ought to be established for the decision of this second part of the cause.

The testament, considered in itself, is not then a proof of the capacity of the testator, the notary is not a judge of it, and how should he, as he only sees the testator for a moment? Can he penetrate, in an instant, into the bottom of his heart and the secrets of his soul? Folly and wisdom are equally invisible, if considered in themselves; they are only discovered by words and external actions, and those actions are frequently suspended for a much longer time than is necessary for making a testament.

Let us conclude then, since the capacity of the testator is as it were an extrinsic fact, and foreign to the act itself, of which the notary cannot be the judge, that the testament alone is not sufficient to exclude a proof by witnesses; because, in a word, it is not precisely the act which is attacked, but the person of the testator, and if the testament is attacked, is it only indirectly and consequentially.

It was perhaps with reference to the proof of this capacity of the testator, that the first *Roman* laws required such scrupulous solemnities in the execution of testaments; it was not solely to render them more authentic, that they required them to have the whole *Roman* people as witnesses. It was also to render the capacity of the testator entirely certain by the testimony of all his fellow citizens, who would have stood up to oppose the act of the testator, if they had not recognised his sanity and capacity.

But after testaments became secret and domestic, and as the presence of two notaries, or of one notary and of two witnesses is sufficient with us to render them authentic, it cannot be said

that so small a number of witnesses, who do not know the testator, and who are perhaps still less known by him, shall exclude the admission of a more solemn and perfect proof.

When once the condition of the testator is justly doubtful, it is proper that a great number of witnesses, who may be heard with respect to a fact of this kind, should supply what it left short in the act itself, and that they should, after the death of the testator, do what the whole *Roman* people, in witnessing the testament, formerly did in his life, by proclaiming aloud the madness or sanity of the testator.

All the doctors have unanimously followed this opinion, and not one has been cited who has offered to combat it.

Your judgments have confirmed it upon many occasions, as they have been obliged to admit on the part of *Madame de Nemours*. But they contend, and we believe with justice, that it ought not to be taken as a settled maxim, that proof by witnesses should never be refused.

The diversity in your judgments upon this subject will be sufficient to establish the real maxim that ought to prevail in the decision of these questions. There are judgments which admit it, and that is sufficient to shew in general, that such proof is often admissible; there are others, which reject it, and consequently shew that it is not always admissible.

Let us then assume it as a certain truth, upon which perhaps we have been too diffuse, that it is in general a perversion of maxims, to contend that parol evidence ought to be rejected, on account of the common rule *contra scriptum testimonium non-scriptum testimonium non admittitur*.

Such were the principles that we had the honour to propose to you in the cause of *Bonvalet*, and it was only on account of particular circumstances, that we thought it would not be proper to allow a proof by witnesses, of the insanity of the testator.

Let us examine then the particular circumstances, and the important presumptions which in this cause are opposed to these general maxims.

We may distinguish two kinds, the one are derived from the testament itself, the other from the contracts and other acts, which precede, accompany, and follow it; but before we enter upon this examination, it will be proper to make an observation which is general and common to all these presumptions.

You are not now called upon to decide what was the real state of the *Abbé d'Orleans* when he made his testament, you are not obliged to pronounce upon the proofs alleged on the one part, or on the other, whether to prove his sanity or insanity; that is not the state

state of the cause. If you were under the necessity of pronouncing to day upon the validity of this second testament, if you could neither expect nor hope for any further elucidation of the facts which are doubtful, obscure, and equivocal in this cause, then you would not have to look for what was certain, but must satisfy yourselves with that which appeared least doubtful; for want of a clear and evident truth, it would be necessary to take up with a glimmering appearance of it; not being able to find convincing proofs, you would be reduced to the necessity of looking for conjectures, and under the impossibility of certainly discovering the true, must rest satisfied with the probable; but so far are you from being in that situation, that permission is demanded to bring proofs of an insanity, which was complete, glaring, and generally known to all who approached the *Abbé d'Orleans*.

Thus on the one side, it seems sufficient for the party requiring to be let into his proofs, if he can shew that the cause is doubtful and obscure, if he can combat facts by facts, if he can weaken the proofs, extenuate the presumptions, diminish the force and weight of the inductions and conjectures that are opposed to him.

If he can go so far as to shew, that all the arguments on the part of *Madame de Nemours* are not invincible, that the acts, the letters, the conduct of the *Abbé d'Orleans*, in a word, that all the circumstances of the cause may be interpreted in his favour, not indeed in a manner absolutely decisive, but at least capable of balancing the interpretations of *Madame de Nemours*; we cannot, without injustice, withhold from him a proof, which only tends to assure the presumptions of the one party or the other, to fortify their arguments, and to give to the truth that character and evidence which it at present wants.

On the other side, it is not sufficient for *Madame de Nemours*, to shew that her arguments have more force than those of the *Prince de Conty*, that her presumptions are stronger and her conjectures more probable. That would be sufficient, if you were obliged to decide the cause as it at present stands, but she must further shew, that her proofs are of such a nature that they exclude all proof or presumption to the contrary, that it is impossible to explain, or even to suppose, the facts adduced by her, without concluding certainly, invincibly, incontestibly, that the *Abbé d'Orleans* enjoyed a full liberty of mind; and that it would be useless to admit a proof of his pretended insanity, since such proof would not only be impossible but is already repelled, by the force and evidence of the arguments of *Madame de Nemours*.

Without doing that, she may render the cause doubtful, ob-  
scure,

icure, uncertain, but she will not render it more favourable for herself; on the contrary, it seems that she will thereby labour rather for the *Prince de Conty* than against him. This doubt, this obscurity, this uncertainty, is precisely what ought to induce you not to confirm at present, the first will in favour of the *Prince de Conty*, but merely to allow him to go into a proof by witnesses.

Such, Sirs, is the only point, to which this cause is at present reduced; such is the rule by which, we think, it will be proper to judge of the presumptions that we are now to examine. If they exclude all reasonable doubt, we may conclude at present that it will be proper to reject the proof. If they leave yet great room for doubt, if the arguments of *Madame de Nemours* herself become presumptions against the sanity of the testator, then we are clearly of opinion, that the natural effect of such doubt is to inspire a wish for enlightening it, by a proof which will be equally just and necessary.

After having made this first reflection, which applies equally to all the presumptions that we are to examine, let us enter first, into those which are borrowed from the testament itself.

This testament, you are told, bears the marks of the perfect capacity of the testator; the wisdom and favour of his disposition are invincible obstacles, insuperable barriers, to the pretensions of the *Prince de Conty*.

The wisdom is allowed; there is neither obscurity, nor singularity, nor contradiction in any of the clauses of this act; he rewards his domestics, he gives the remainder of his fortune, to the *Comte de St. Pol* his brother; could reason and wisdom themselves have made a more judicious disposition?

The favour of this disposition is not less certain, it only tends to restore things to their natural state; what can be more favourable than a return to the common dispositions of the law; the law itself, which gives the property to the nearest relations, is not more wise or favourable than this testament.

If the heirs by blood are sometimes admitted to a proof by witnesses, in opposition to a testament which deprives them of a succession destined for them by nature, it is unprecedented to extend this privilege to strangers; such are the presumptions which *Madame de Nemours* borrows from the testament, and which, by their importance, deserve to be examined with attention.

It must be agreed that the wisdom of a testament is, without doubt, a very strong presumption, of the sanity of a testator. It was upon the authority of this presumption, that the senate of *Rome* formerly confirmed a testament made by a person in a state of insanity; because there was nothing unreasonable in his disposition.

tion. They fairly presumed that it was made in a lucid interval, and they forgot the certain madness of the testator, in contemplating the good sense of the testament. It was upon a similar colour that the emperor *Leo*, the philosopher, decided in his 39th Novel, that the testament of an interdicted prodigal ought to be executed, provided it contained nothing unworthy of the character of a man of prudence.

But however favourable this presumption may be, it has not those characters which are necessary to form an invincible presumption, capable of excluding all proof to the contrary; there is no law which precisely authorizes it, and besides it is founded upon a fact which has not an essential and necessary connection with the sanity of the testator. Upon what is it founded? Upon this single reasoning, the testament is wise, therefore the person that made it is so likewise; but it always remains to examine who it was that made it, whether it is the real production of the testator, or whether it may be suspected that any other has had a hand in it. In a word, before you prove the sanity of the testator by the testament itself, you must begin by establishing that the testament was made by the person whose name it bears, and this the testament alone can never prove.

What then is the force, what is the natural effect of this presumption? So far from excluding proof, it is this presumption itself which establishes the necessity of it, since if the testament contained dispositions that were absurd, impossible, extravagant, no other proof is necessary to destroy it.

If proof is necessary, it is principally where the disposition of the testator contains nothing contrary to reason, and all the favour of this presumption is reduced to obliging the person who contests it, to prove the insanity of the testator; whereas if the testament itself rose up against its author, if it was the first witness of the weakness of his mind, it would be for the testamentary heir to prove the sanity of the testator.

This distinction is clearly marked by two precise laws, which establish the principle that we have proposed.

In the one, the disposition of the testator was palpably absurd, he commanded his heirs to throw his ashes into the sea; it was demanded, whether the heir should be obliged to accomplish this condition, to which the jurist answered, that they ought to begin with examining whether the testator was in his senses, when he imposed upon his heir a condition so contrary to the dictates of piety: but that if the heir could dissipate this suspicion by solid proofs, he ought to be admitted to the succession without being obliged to obey this absurd direction. *Hoc prius inspiciendum est ne homo, qui talem conditionem*

*conditionem posuit, neque compos mentis esset. Igitur, si perspicuis rationibus hæc suspicio amoveri potest, nullo modo legitimus heres de hereditate controversiam facit scripto heredi. L. 27. ff. de condit. institut.*

In the other, on the contrary, a father had made a sensible disposition, which his son could only impeach on the ground of insanity. The emperors, *Dioclesian* and *Maximian*, subjected him to the necessity of proving this fact; *adseverationi tuæ mentis eum compotem fuisse negantis fidem, adesse probari convenit. L. 5. cod. de codicil.*

Let us add to these reflections and authorities that, notwithstanding these reasons, it would perhaps be difficult to attack the testament of the *Abbé d'Orleans* by parol evidence, if this disposition had been olographic.

The presumption would then be entirely in favour of the sanity of the testator, we should say, as in the case of *Bonvalet*, where we found this important circumstance, that it is difficult to conceive a person who has lost his understanding, to have sufficient patience, docility, and submission, to write with his own hand a testament, containing a long train of dispositions. Although it might perhaps be dangerous to decide in general, that proof of insanity should never be admitted against an olographic testament, which contains nothing inconsistent with sense and reason, it must be at least confessed, that this proof should only be allowed very rarely, and under very particular circumstances.

But does the question here relate to an olographic testament, as in the case of *Bonvalet*, and a testament in which the testator made a kind of inventory and exact memorial of his property, to a testament bearing the manifest signs of intention, of sanity, of capacity? We have here nothing but his mere signature, it is the only part which the act itself proves that he had in it, the rest is a presumption which may be combated and frequently destroyed by other presumptions.

Thus all who have examined the force and authority of this conjecture, which is derived from the good sense of the testament, have entered into this distinction. Even those who have been cited on behalf of *Madame de Nemours*, that is to say, *Mantica* and *Boerius*, regard the good sense of the testament as a mere presumption, which, to make use of their expressions, *rejecit onus probandi in adversarium*, and the only principle which we can follow upon this subject, because it is the only one that is equally supported by reason and authority, is included in this proposition.

Either the testament contains wise and judicious dispositions, which induce a presumption of the sanity of the testator, and then it is for the party impeaching it, to prove that he was in a state of insanity at the time of making this disposition.

Or on the contrary, the testament itself induces very strong suspicions of weakness and derangement, and then it is incumbent on the instituted heir, to support his title by proving the sanity of the testator.

Without adding any thing further upon this first point, let us proceed to the favour of the instituted heir, and examine if it is more capable, in its principle, of precluding the demand of the *Prince de Conty*.

We may in the first place ask whether it is true, that you have to decide between the *Prince de Conty* on the one side, and an heir by blood, instituted in the testament of the *Abbé d'Orleans*, who unites in her person, the choice of the testator with the destination of the law, and in this double character is entitled to particular favour, on the other.

Is it the *Comte de St. Pol* who proposes this argument? He would doubtless have united these two qualities. He would have been heir by the law of nature, and also by the law of the testator. But he died a long time before the *Abbé d'Orleans*, and with him expired that favour, which was particular to himself. *Madame de Nemours* has not succeeded to that prerogative which distinguished the *Comte de St. Pol* from every other heir by blood. She was not appointed by the will of the testator, and if the last testament should operate to her advantage, it is only on account of the clause which revokes the first; she can only be considered here, as a legitimate heir who would destroy one testament by another, by shewing that the *Abbé d'Orleans* died without a testament, and consequently that the succession belongs to her.

Thus this favour towards the heir by blood, which is so much relied upon, is the same thing with the prudence of the testament; and the argument is precisely the same with that which we have just examined. It could only have a different character in the mouth of the *Comte de St. Pol*.

But suppose he had proposed it himself, and that he had proposed it with that double favour which would have been peculiar to himself; would it have been so efficacious as is contended on the part of *Madame de Nemours*?

We might say here, that it is surprising that so imperious an argument was never foreseen either by *Menochius* in his treatise on Presumptions, or by *Mantica* in his treatise on Conjectures for the interpretation of last Wills; and that it has not been found possible

sible to find out any authority, in support of what is stated as so insuperable a bar. We may even ask those who allege it, what is the reason of this silence; we may add, in order to put this difficulty in a still clearer point of view, that nothing is so common with these authors, as the general and ordinary presumption, in favour of the heirs by blood. Thus for instance, in order to examine the force of a derogatory clause, they inquire what is the quality of the heirs instituted in a testament, where this clause is not contained; and some of them go so far, as to have it implied, if the heirs by blood are appointed by the second testament.

We might adduce an infinite number of similar examples, and after this observation we might always ask, why this presumption, which is so common, so natural, so favourable, has been so generally overlooked by all the writers upon the subject?

What can they answer, without intirely rejecting the principles of reason, except that there are no two questions more different, than the will of a testator and his capacity; in the first, a personal favour towards the heir may be urged with success, and as that is greater with respect to heirs by blood than others, it is a circumstance which may be fairly adduced to demonstrate the force and efficacy of the testator's intention. In the last, on the contrary, this favour is impotent, and this circumstance is useless; because before you examine what was the will of the author of the testament, and what ought to be the just interpretation of it, you must begin by establishing that he had a will; that he was capable to will, to dispose, to ordain. Now this capacity is absolutely independent of the name and quality of those who appear to have been the objects of his disposition. When the only question is as to the degree of will, it may easily be presumed that it was stronger in favour of the heirs by blood than of strangers. But when you are inquiring into the existence of a will, then the favour towards the heirs cannot form any insuperable presumption, because it is evident, that though you may supply in favour of the heirs by blood, a defect of expression or solemnity, nothing can ever repair, even with respect to them, an absolute defect, an entire absence of will.

But let us go further, and judge of the truth of this maxim, by its consequences.

If it was once received into practice, that you ought to decide upon the sanity or insanity of a testator, upon a principle of favour towards the heirs whom he appears to have chosen, what inconvenience, what abuse would not the public have reason to apprehend in future, respecting the testaments of persons of doubtful capacity? Will it be difficult to lend the aid of another's will to a

man whom the excess of disease, the approach of death, or a settled insanity have deprived of the use of his own? Will there be wanting means to compose with art, a wise and judicious disposition, to which the testator, either from surprise or weakness, has contributed nothing but his signature? And if any one of the legitimate heirs is instituted in this testament, in vain will the laws have decided, that a person destitute of understanding is incapable of dictating an inviolable law to his posterity; in vain will natural reason have instructed all men, that insanity is a fact which can hardly ever be proved except by witnesses; to reason and to law, they will oppose the objection, that the testament is wise, and that there is an heir by blood, the principle of favour to whom shall support the whole of the disposition.

Let us even admit that this argument might be considerable, if there was only one testament.

But the case here is very different, the testator has made a former testament, in which he had instituted heirs, not less favourable than in the last; the *Comte de St. Pol* was as much appointed in that as in the second, *Madame de Longueville* was next to him, and finally, the *Princes de Conty*.

The principle of favour then is equal on the one side and on the other. If *Madame de Nemours* pretends, that the last testament ought to be supported merely on account of the name of the *Comte de St. Pol*, the *Prince de Conty* may answer, that that name is at the head of the first testament, and that the favour is augmented by the name of *Madame de Longueville*, also heir by blood and mother of the testator. If it is said, that the heirs indeed were equally favourable, but that they had more interest in the subsistence of the last testament, because by that the *Comte de St. Pol* was not charged with any substitution; it is on the contrary precisely for that reason, that the first testament is the more favourable of the two.

The first effect of this substitution is to appoint *Madame de Longueville*, and to join, as we have said, the principle of personal favour towards her, to that for the *Comte de St. Pol*.

The second is to transmit the property to the *Princes de Conty*; and might not the testator, who saw that *Madame de Nemours* had no children, and that even if she should have any, they would not bear his name, naturally wish that his property should belong to Princes, whose illustrious name would so well accord with the splendour and dignity of his own?

If then the second testament is more favourable than the first, with regard to the interest of the heirs by blood; the first is more favourable than the second, by the wishes and inclinations of the

testator ; and in this conflict of opposite favour, shall it be allowed that the favour of the heir is so great, as to be absolutely triumphant over that of the testator ? And under what circumstances ? At a time, when you are not inquiring in a case of doubt, which testament ought to be preferred, but are only to decide whether it shall be permitted to remove this doubt, to dissipate these clouds, to throw light upon a cause which is obscure, doubtful, and uncertain.

In short, without going into any longer dissertations, this question seems to be precisely decided by the last law, *ff. de injusto rupto*. A testator had made a testament by which he had instituted strangers, as his heirs. He fell into a state of insanity, and broke the tables of his testament, *tabulas (testamenti) incidit* ; the heirs by blood maintained that the testament was *de jure* revoked, the instant the testator himself had lacerated it ; the instituted heirs contended that the testator had fallen into a state of insanity, and made this laceration in one of the paroxysms of his fury ; the jurist decided, that if the fact was so, the testament was not revoked.

You see then, Sirs, that the presumptions which result from the act itself, may very well impose upon the *Prince de Conty*, the necessity of making the proof which he demands, but can never debar him from the right of doing so.

Let us examine, however, whether the other presumptions, which are as it were exterior to the testament itself, are incontestible proofs of the sanity of the *Abbé d'Orleans*, and let us always remember the important reflection with which we set out, that in order to give these presumptions the character of certainty which is necessary, they are not only to be such as are probable, but they must, at the same time, be sufficient to exclude all reasonable and legitimate doubt.

In order to examine them more distinctly, permit us to make a supposition, which may throw considerable light upon this last part of the cause.

Having considered the inductions drawn from the testament itself, let us suppose, for a moment, that this testament now stood alone, detached from the other acts which accompany it, destitute of their assistance, and without any other support than its own good sense and favour. And let us suppose, that under these circumstances, the *Prince de Conty* had offered to prove, both by writings and witnesses, the imbecility and weakness of the testator's mind, would the decision of the cause in that case be very difficult ?

We observed at the outset, that it would be proper to distinguish three periods in the life of the *Abbé d'Orleans*, a first period of certain and undisputed sanity, which terminated a short time after his

emancipation; a second period of insanity proved, admitted, perpetual, ending only with his life, and this second period, by the confession of *Madame de Nemours* herself, beginning about the month of *October*, 1671; a third period, full of darkness and obscurity, interposed between the other two; it is this interval between sanity and madness, which *Madame de Nemours* would add to the period of sanity, and the *Prince de Conty*, to that of madness.

And after having distinguished these three periods, we shall observe, that whether we consider what preceded this doubtful interval, or direct our attention to what followed it, it will be difficult not to conceive violent presumptions capable of authorizing, and even in some degree of anticipating a proof by witnesses.

And what would these presumptions be?

We should represent to you at first, a man who, according to the language of *Madame de Nemours* herself, had received from nature a simple mind, low inclinations, a particular humour, a sordid avarice, a levity, an inconstancy, an instability, which could only be satisfied by continual journies, equally useless to himself, and inconsistent with the dignity of his birth. A man reducing himself by a vile contemptible interest to the state of his servants, who only bore the name of *Longueville*, in order to dishonour it in every place where he was carried by his inconstancy, and who, doing justice upon himself, relinquished that great name of which he was unable to support the dignity, in order to assume the unknown name of *Meru*; a man who entered into his *Noviciate* with the *Jesuits*, and who relinquished it almost immediately afterwards; who engaged in holy orders, against the opinion of and in opposition to his mother, who thought him incapable of so sacred a function.

Let us continue the portraiture of his character without adding a single trait that does not proceed from the hand of *Madame de Nemours* herself, either in her defences, or in the pieces she has adduced. Let us join then to these marks of a natural weakness of mind in *M. de Longueville*, what you have been told respecting his first testament, that he did not know whether his succession would belong, after his death, to his relations or his friends. This point appeared so considerable to those who proposed it, that they are not content with mentioning it in their pleadings, but have also included it in their printed papers. This is not all, for how would they have you consider the first testament? As a suggested testament, which could not be the production of a mind so simple as that of the *Abbé d'Orleans*. Sometimes it is *Mademoiselle des Vertus*, sometimes it is the *Sieur Trouillart*, who caused him to make it; but it was never the *Abbé d'Orleans* who made it himself.

If

If you believe the defender of *Madame de Nemours*, you must distinguish two different parts in this testament, the preamble and the dispositions. The preamble, full of ignorance and deranged understanding, as the testator declares that his principal motive was to prevent the suits which his succession might occasion *between his relations and his friends*; the dispositions, which are the work of an enlightened jurist, perfectly well acquainted with the nature of substitutions, and in this partition of the testament, whatever is full, not only of error but extravagance, is ascribed to the *Abbé d'Orleans*; and that part which is a work of consummate prudence and good sense, is regarded as the effect of extrinsic suggestion.

To proceed, how have they justified before you, the disgraceful savings of the *Abbé d'Orleans*? The absurdity and indignity of all his journies; the obscurities and degradations that appear in his letters? There is no answer upon which they have so much relied, as a comparison between the period of his first and of his second testament. Is this to justify the *Abbé d'Orleans*, at one of these periods, or rather to accuse him in both, if not of a complete insanity, at least of a great weakness of mind, which, in a man of this quality, is not very far from imbecility?

Let us continue to mark the character of the *Abbé d'Orleans*, as it has been traced on the part of *Madame de Nemours* herself.

Scarcely was the *Abbé d'Orleans* emancipated, when an affair of importance to him was agitated, the payment of his mother's portion; at a consultation of the relations, they give him power to transact with her upon certain conditions; and at the very time they are making these preparations, when they are presenting a request to the parliament in his name, for the completion of this object, we see him start off, upon a sudden, on an unmeaning journey? We do not dwell upon his avarice which appears throughout. After having staid nine days at *Orleans*, twelve at *Tours*, and about as long at *Saumur*, without design, and without utility; after having run over some provinces situated on the *Loire*, he takes the resolution of returning to *Paris*, in the carriage of *Angers*; he takes the ordinary rout, he arrives at *Gué de Loré*, a day's journey from *Paris*, there he finds a valet of the *Comte de St. Pol*; and we see him immediately returning upon his steps, with so much precipitation, that they could hardly find three horses for him and the two domestics who followed him; the rest of his family continue their route, and arrive at *Paris*; and during this time he returns to *Orleans*, he there stays thirty-eight days together in a common inn, living upon 40 sols a-day, and if he leaves

it, it is for the purpose of embarking, on the 29th of *December*, on the *Loire*.

What important affair obliged him to expose himself to the rigours of winter, and the peril of navigation, at so inconvenient a season? The desire of seeing the city of *Tours*, which he had already seen, where he had staid 12 days, and which he had only left the 23d of *September*, about two months before? He stays there 10 days, and returns at last to *Paris*, on the 15th of *January*.

We do not dwell on all the circumstances of these journies, but how can they explain that sudden and unexpected change, which induced him to quit the route for *Paris* to return to *Orleans*, to pass there 38 whole days, to go afterwards to *Tours*? Was it his business, or curiosity? But hitherto they have neither been able to discover the one, or to render the other probable.

Can any other cause then be imagined for this change, than a derangement of mind in the *Abbé d'Orleans*, or a precaution of his family, who avoided as much as they could letting him appear in *Paris* without necessity? And because they must wait two months for his majority, (a period of which you will observe in the sequel, that they took advantage as soon as it arrived,) there is reason to presume that his family found he was returning too soon, and left him at liberty to trace back his former steps, in order to get through the time, until age, rather than reason, would render him capable of entering into contracts.

If we do not suppose one or the other of these reasons, the fact of *Gué de Loré* appears inexplicable; it is useless to stop and examine, which is the more probable. It might, perhaps, be difficult to prove that the cause of this unexpected return was a real madness, a frenzy, a wildness of mind which nobody could controul; because there is little probability, that if things had come to that extremity, so illustrious a family would have left the *Abbé* for 38 days at *Orleans* without his principal officers, as is proved by the accounts. But if this first reason is not sufficiently established, we can imagine no other than the second; and this valet of the *Comte de St. Pol*, whom the *Abbé d'Orleans* met at *Gué de Loré*, and at the sight of whom he disappeared, makes us very reasonably presume, that he brought some order of the family, which was the occasion of the prompt departure of the *Abbé d'Orleans*.

Let it not be said in answer to so important a fact, that there is a parallel circumstance in the journey of the former period; for besides that the answer is not advantageous to *Madame de Nemours*, as we have already said, we do not find any such example in all the accounts of that period. We see indeed, that the *Abbé d'Orleans*,  
in

in running over a province, returns many times to the same city; but his having taken the resolution of returning to *Paris*, having followed for 60 leagues, the ordinary route in a public carriage, to within one day's journey of *Paris*, and then, all at once, changing his design, setting off at the sight of a domestic of the *Comte de St. Pol*, in an equipage so little suited to his quality of priest and *Duke de Longueville*, hiring horses at one place, and chairs at another, this, once more, is a thing of which we have no example in the whole course of his former journies.

Represent to yourselves then, Sirs, a man of this character, in every thing that precedes the time which we have called a doubtful interval, between sanity and insanity, but join to it every thing which followed that same interval, and what do you then perceive? Two things equally evident. The one is the madness, the imbecility, the fury of the *Abbé d'Orleans*. The other, the uncertainty of the time when it commenced.

The first cannot be at all doubted, and is the second less certain?

Nothing can fix the commencement of the insanity, if we look at the cause, without reference to the written documents.

Every thing which *Madame de Nemours* alleges to ascertain it, renders it still more uncertain.

She makes use of the memorial presented by *Madame de Longueville*, she alleges the authority of the relations; let us examine whether either the one or the other of these proofs is sufficient. Let us take the very terms of the memorial of *Madame de Longueville*; she states to the king, that the *Abbé d'Orleans*, her son, seven or eight months after his tutelage was complete, and his attaining his majority, having taken different journies into distant countries which had altered his health, he was not in a condition to administer his affairs.

We cannot help observing here, the uncertainty, the embarrassment, the obscurity of these expressions, which seem at first as favourable to the *Prince de Conty* as *Madame de Nemours*; for if the madness commenced seven or eight months after the tutelage was finished, the testament supported by *Madame de Nemours* falls within the fatal period which is indicated by this memorial. The tutelage was finished by the emancipation, which was on the 22d of *July*, 1670; the testament is of the 26th of *February*, 1671, it is then within the seven months stated in the memorial.

If on the contrary, we only begin to compute from the day of the majority, the *Abbé d'Orleans* was not really in a state of insanity, until the month of *August* or beginning of *September*, 1671.

These two dates are mutually contradictory and destructive of each other.

But let us even suppose, which indeed is the more probable, that *Madame de Longueville* intended to refer to the last, then *Madame de Nemours*, who borrows her authority, will not agree with her; and consequently this authority will only serve to render the commencement of the insanity still more uncertain.

At what time does *Madame de Nemours* contend that the *Abbé d'Orleans* fell into a state of insanity? It was, according to her, in the month of *October*, 1671, that upon going from *Strasburgh*, to *Sarrebourg*, an unexpected accident, a sudden fright, extinguished for ever the light of his reason. At what time, on the contrary, does *Madame de Longueville* fix it, according to the explication which *Madame de Nemours* gives to her words? seven or eight months after the 12th of *January*, 1670, that is to say, the beginning of *September* at latest. Suppose the eight months to be complete, the time would end on the 12th of *September*, and consequently one of the letters, which *Madame de Nemours* adduces to prove the sanity of the *Abbé d'Orleans*, was written during the time of his insanity, that is, on the 18th of *September*.

There is nothing then more uncertain in this cause than the essential point, that is to say, the commencement of the insanity.

The report of the relations furnishes a still weaker conjecture upon this subject.

It is true, as you are told, that they make use of the expression *present infirmities*, but they have not taken notice that the expression is used at two different times, in the month of *January*, and in the month of *March*. If the word *present* is taken strictly, and we admit the fine spun inference which they offer to draw from it, it would follow that the relations have contradicted themselves, as they make use of the same term at two different times; and if the word *present* in the report given in *March*, excluded all the time that was past, they could not have made use of it in the month of *January* preceding. But it is clear that this term does not imply any exclusion of the past, as we cannot doubt the insanity of the *Abbé d'Orleans*, from the time that he was confined by the order of the king, which time goes back so far as the month of *October*, 1671, and consequently, this expression is not sufficient to fix and precisely determine the time of the commencement of the insanity.

It is added that there are some of the relations who say in confirmation of their opinion, that the *Abbé d'Orleans* committed some irregular actions in *Germany*, then he had not committed any before, a false conclusion similar to the former, a weak and trifling presumption.

But

But not only is every thing wanting, which can certainly fix the commencement of the infamy, we may add, that natural reason sufficiently shews that we cannot justly fix it at the time, when the *Abbé d'Orleans* was put in a state of confinement.

It is uncertain how far it will go back, but it is certain, even now, or at least it is more than probable, that it must go further back than that.

Who can believe that upon the first indication of folly, they would have proceeded at once to such an extremity, with regard to a person of the name and birth of the *Abbé d'Orleans*?

Nothing but an impossibility, of concealing this melancholy spectacle from the eyes of the public, or a want of prudence and good sense, could oblige a family to take the painful resolution of proclaiming at once its grief, and its shame.

Can the one or the other of these ever be ascribed to so illustrious a family, as that of the *Abbé d'Orleans*? Shall it be said, that means were wanting to defer so painful a disclosure, that they could not do that, which every day is done by private individuals, in the most obscure families? Could they not by a secret and domestic judgment, have confined him for a time, in one of their country mansions?

Shall it be contended that persons as much elevated above the generality of mankind, by the extent of their understanding, as by the grandeur of their birth, would not have thought of taking so reasonable a precaution, as waiting for a delay, which could not be otherwise than salutary; that they would have wanted prudence or counsel, upon an occasion when the sentiments of nature would supply the place of prudence, and where natural tenderness alone is superior to the wisest counsels.

If neither the power nor the will were wanting upon this occasion, to the illustrious relations of the *Abbé d'Orleans*; can the public doubt, but they would have deferred as long as it was possible to throw an indignity upon him, the disgrace of which would in some degree recoil upon themselves, and that nothing but strict necessity, and the despair of ever effectuating a cure, would have induced them after every delay, to recur at last to the authority of the king, to avow the misfortunes which had happened to them, and to obtain from him a letter *de Cachet*, for the confinement of the *Abbé d'Orleans*? And let it not be said, that this was done, without exciting any notoriety (*eclat*). Can any thing be more doleful for persons of this rank, than to be obliged to apprise the king himself of their calamity? Could such an order be carried into execution without the public being informed of it; and could they flatter themselves that a whole monastery would

witness in silence the madness and imbecility of a person of this rank; the most formal interdiction is less notorious than such a remedy; one who is under an interdiction often retains a personal liberty; they do not even confine all who are in the condition of imbecility. This severity is only used against such as are in a state of fury.

Let us combine then all these circumstances; let us recal then every thing which has preceded that doubtful interval, between sanity and insanity; the character of the *Abbé's* mind, his journeys, his extravagant conduct, let us join what followed it, and above all the important remark, that we have nothing as yet to fix the commencement of the insanity, that on the contrary every thing seems to concur in support of the presumption, that it commenced long before its disclosure to the public by the detention of the *Abbé d'Orleans*, and after that is it possible to doubt, under all the circumstances, if nothing appeared but the testament itself, that a proof by witnesses ought to be allowed?

If any doubt could be entertained of that, it must at the same time be decided, that such proof can never be received; that whatever presumption may be alleged, the testament alone will be its own defence, and destroy before hand whatever may seem adapted to oppose its execution.

But if this presumption is equally absurd and untenable; if the public has a substantial interest, to oppose the supposition of testaments; if the law can never lend its power to a madman, or give the character of a legislator to an idiot, it must be also agreed, that there never could be a stronger ground for the admission of proof, than under the circumstances to which this cause is reduced, where we must see, (which cannot be too often repeated, because it is the decisive point in the cause,) on the one hand, the indisputable existence of insanity, and on the other the absolute impossibility of fixing the commencement of it by any other proof than the depositions of witnesses.

It remains then only to examine, whether what accompanies this testament, can change the state of the cause and supply its deficiencies, that is to say, can incontestibly prove that the insanity had not commenced at the time when the testament was made.

We shall reduce these circumstances to three principal heads, the solemn acts passed by the *Abbé d'Orleans*, his personal conduct, the judgment and approbation of his family.

We may in the first place make two general observations, upon all these circumstances.

First, it is a self-evident truth, that sanity or insanity are two qualities

lities of the mind, equally invisible with the mind itself, and as we do not know the minds of other men, except by their words, or their exterior actions, neither can we discover in any other manner, the dispositions of the same mind.

But amongst the actions, which are as it were the natural signs of the affection of the soul, there are two kinds, the one so personal, so attached, so inherent, so closely united to the person, that it is impossible to suppose them to be his without recognizing his sanity and capacity.

Thus, for instance, let a magistrate have exactly fulfilled all the duties of justice; let him have exercised all the functions of his station publicly, wisely, constantly, can it be doubted that in such a case he has sufficient judgment and understanding to make a testamentary disposition, and could any parol evidence be allowed in answer to so strong and insuperable a presumption?

It would be the same with any other public function, exercised at the time of making the testament. The nature of these functions does not permit the action of the person who fulfills them, to be supplied by the ministry of another.

But there are others, of a directly opposite kind, which may be the act of another's will, and in which the person doing them may be merely passive.

Thus, for instance, in the case of a contract, it may be often contended that the party contributed nothing but his signature, the rest may have been supplied by the counsel, the aid, the ministry of another; in a word, there is nothing in such an act considered merely in itself, which is necessarily and certainly produced by the mere will of the persons executing the instrument.

The second reflection which is only a consequence of the first, is, that there is a great difference between contracts and testaments; the law supposes the one to be so appropriate to the persons executing them, that the defect of his will can never in any manner be supplied, whereas the others do not require an equal degree of discretion, of understanding, or even of intention.

On the part of *Madame de Nemours*, they have denied this distinction between the capacity which is necessary to make a contract, and that which the law requires for a testament. It is regarded not only as a novel distinction, but as one which is contrary to all the principles of law.

But so far is it from being novel or unjust, that we think it may be said to be as ancient as the system of jurisprudence itself, and that without it, it would be impossible to sustain several of the most inviolable laws.

We shall not attempt at present to prove it by a long enumeration

tion of all the cases, in which it is clearly established; we shall only mention two, which are known to every body, and demonstrated in an invincible manner.

No body is ignorant that even pupils before the age of 14, may make a valid contract, provided it is with the assent of their tutor. We do not say, that the tutor can oblige himself in their name, we say, (and it is a principle known to all, who have only read the *Institutes of Justinian*;) the pupils might oblige themselves with the assent of their tutor, yet they could not make a testament.

But not to travel out of the *French* jurisprudence, can any body doubt, that contracts made by minors are good in themselves, that they produce a legitimate obligation, and that until they are destroyed by letters of rescission, they are to be executed as acts passed by persons of full age? They may engage their property by all kinds of contracts; the laws of the church, and the state, regard them as capable of effectually contracting the most important, the most solemn, and the most inviolable of all engagements, such as marriage, and religious profession. Yet at the time that it is permitted to them to dispose not only of their goods and their fortune, but also of their person and condition, the same law declares them incapable of disposing of their effects by testament.

Let us add to this first example, another proof of the same distinction, which is not less certain or less convincing; a person may engage by the ministry of a procurator, and when the procurator is general he so completely adopts the credit of the person in whom he confides, that, without knowing it, without expressly intending it, he enters into all kinds of obligations; but can any body contend that it is possible to make a testament by procurator? And whatever confidence a testator may repose in the probity, and understanding of his counsel, could he subscribe to a law not made by himself?

The testament, if you please, shall be wise, reasonable, full of justice and equity; the testator shall even have approved it before hand, by permitting his counsel to make it; the disposition is null, because a testament ought to be not only a judicious act, it ought essentially and necessarily to be the production of the judgment and reason of the testator himself.

This is not then one of those subtle distinctions repugnant to natural reason, and only supported by the mere authority of positive law.

We might say, that although it is written in every law, it is a law previously ordained a law by reason itself, and therefore it is universally received whenever there is any idea of jurisprudence.

But

But what is the natural difference, which produces this distinction between contracts and testaments? We conceive there is no great difficulty in resolving this question.

It is essential to human society, that there should be contracts. It is not necessary that there should be testaments; never was there a community subsisting without the aid of some engagement. There were many which for a long time refused their citizens the authority of making testaments. The foundations of civil society, of commerce, of police, of government, would be overturned, if it was rendered difficult to contract engagements; on the contrary, the society, the commerce, the government of states, might subsist without testaments.

The faculty of contracting is conformable to natural law, to the law of nations, to civil law.

The liberty of making testaments is an invention of the law of nations, authorized by civil law, but appears contrary to the law of nature, which, by death, deprives a man of all the rights that he could exercise over his property.

Contracts are always favoured, testaments are often the reverse, and never was there any jurisprudence, in which that proposition was more true than the law of *France*.

Such are the natural characters, which distinguish contracts from testaments, shall we then be surprised if the laws have permitted mankind to dispose of their property, more easily by a contract than a testament?

In a contract the slightest capacity is sufficient, because it is conformable to common right, and besides some reliance may be had, in the integrity of a person with whom it is made; the party may take counsel and sign without precisely knowing the extent of his engagement, by reason of the confidence which he places in the probity, the understanding and experience of those whom he consults.

But in a testament, it is necessary that this understanding, this experience, this capacity, should belong to the person who makes it. It is not indeed forbidden to a testator to use the assistance of counsel; but such counsel only regards the form of the act, and not the substance. It is for the testator to think, to deliberate, to examine, to consult himself, to interrogate himself, in one word, *TO WILL*: the lawyer only gives him his advice, in order to lend to his thoughts the expressions of the laws, and to join the exterior form to the matter and substance of the act, which ought to be produced by the sole will of the testator.

After having made these general reflections upon contracts, and other actions, by which the sanity or insanity of a testator may  
be

be proved, let us examine what is the inference that may be drawn from the different acts which were executed by the *Abbé d'Orleans*.

Recollect, if you please, all the circumstances of time and manner, in which these instruments were executed.

#### THE TIME.

1. The majority of the *Abbé d'Orleans*, which he attained on the 12th of *January* 1671; the first act is of the 16th, on the return from that journey upon which the incident of *Gué de Loré* took place.

2. The whole interval of time in which he executed 21 acts, from the 15th of *January*, to the 6th of *March*, is only two months and ten days. He seems to have only returned for the purpose of executing them. He had scarcely arrived when he signed the first; he had scarcely signed the last, when he suddenly departed.

#### THE MANNER.

We may consider them at first, in general, and afterwards examine them in particular. When we consider them in general, the first glance will be sufficient to shew, that they all tend to two different objects.

The one to regulate whatever might relate to *Madame de Longueville*.

The other entirely to strip the *Abbé d'Orleans*.

The first of these designs was executed by the transaction of the 16th of *January*, and the contracts for the annuities accompanied it, in which we see the *Abbé* giving away 4000 livres, and relinquishing several estates for the payment of *Madame de Longueville*.

It may be also said, that it was executed by the transaction with the *Prince de Condé*, which only regards the payment of the arrears of the portion.

Finally, it was executed by the donation to the *Comte de St. Pol*, in which there are three important clauses, that relate solely to the interest of *Madame de Longueville*.

The first, is the obligation imposed on the donatary, to execute all the acts which the *Abbé* had passed with his mother, for the payment of her portion.

The second, the obligation of confirming the discharge which he had given her for the furniture, and jewels contained in the inventory.

The third, the obligation to discharge her from an account of the tutelage.

The

The second design, to wit, that of stripping the *Abbé d'Orleans* of all his property, appears manifestly :

1. In the universal donation.
2. In the particular donations, to some of the domestics.
3. In the testament.
4. In the appointments.
5. In the procurations, for the administration of the effects reserved.

It is true, that it is said in the procurations that they should be revoked at the pleasure of the *Abbé d'Orleans*, but that is of common right as in the same manner is the obligation to render an account : and it must be always remembered as the result of those acts, which passed from the 23d to the 26th of *February* ; that in three days time, a person of full age possessing effects, to the value of three millions of livres, no longer retains any property, that there is no longer any thing considerable of which he can dispose ; and that he strips himself even of the administration of the usufruct reserved to him.

It is contended that there is nothing extraordinary in this circumstance ; that we see similar examples every day in inferior families, and that it is not surprising, that the elder branches, in taking upon themselves an ecclesiastical condition, renounce their property in favour of the younger.

But, in the first place, without examining whether there are so many examples of this generosity as they would persuade you, will they find any example of the particular circumstances occurring in this cause ?

The heir of an illustrious family renounces not the possession of some considerable estates, as a principality or a duchy, but all his effects, reserving only a sum of sixty thousand livres, and a mere usufruct. He, as it were, pronounces an interdiction upon himself, and if he can dispose of any thing, it is only of what is to accrue after his death. This is not all. At what time does he make so considerable a donation ? Is it at an advanced state of life ? He is hardly of age, when he hastens to strip himself of every thing.

By what is this immense donation followed ?

By a testament in favour of the donatary himself. And wherefore is this testament made ? It is not in favour of the testator, and for his consolation, as the laws express it, since he had already made one, more conformable to the inclinations which he would naturally have, in which the *Comte de St. Pol* was instituted. It is entirely in favour and for the interest of the sole universal legatee, who has no other advantage in this change, than a discharge

charge from the substitutions, and a hope of successions, which might afterwards fall to the *Abbé d'Orleans*.

After having stated the two principal views which naturally present themselves to all who examine these acts in general, let us enter into the detail, and combine all the circumstances which have been offered to your attention by the one party or the other.

1. The transaction with *Madame de Longueville* (a).

Observe, if you please, upon this act, that it is impossible to presume that the *Abbé d'Orleans* could even have read the long dispositions which it contains. He arrived at Paris on the 15th of *January* in the evening—he signed this act the following morning.

Let it not be said that this act was completely prepared before the departure of the *Abbé d'Orleans*, and that there was even a consultation of relations by which he was authorized to pass it. The state of things was much changed after that; it was then proposed that the estates should be valued by proper surveyors: in the sequel, the valuation was made by the parties themselves; thus, it was not the same act which before had been resolved upon. It was an act entirely new, which demanded a long meditation, and at last they were reduced to say, that it was not surprising that the *Abbé d'Orleans* had signed the act on the faith of his counsel, as it is nothing more than is done by the most sensible people every day. But if that is so, the act can no longer be said to be of any consequence, since it does not incontestibly prove the sanity of the person signing it.

It is not necessary, for the admission of the proof demanded, to demonstrate that all these acts prove the insanity of the *Abbé d'Orleans*; it is sufficient to shew, that they are not certain indications of the sanity and freedom of his mind.

2. The grants of annuities, which follow this act, have not more force or authority than the act itself, of which they are only the consequence and execution.

3. The sale of the estate of *Nesle*, made by the *Abbé d'Orleans* to the *Prince de Condé*, has nothing more personal than the acts preceding, nothing which cannot be supplied by the ministry of another. You must remember the important circumstance, from which it may be presumed, that the *Abbé d'Orleans* contributed nothing but his signature. The project of the act was completely prepared before the arrival of the *Abbé d'Orleans*. The procuration of the *Prince de Condé* to sign it, is of the 5th of *January*, and is at the foot of the project, in which no change was afterwards made, and

(a) Transaction in the civil law means a compromise.

although the signature was deferred until the 31st. of *January*, the fact will always remain, that it was completely prepared, independent of the will of the *Abbé d'Orleans*.

4. The donation to the *Comte de St. Pol* combines the two principal features of all these acts, that is to say, the design of giving a complete discharge to *Madame de Longueville*, and that of entirely stripping the *Abbé d'Orleans* of his property.

They adduce several arguments to efface the colours which cover this donation, but as these equally regard the other acts, we shall defer answering them until we have gone through the particular circumstances of the acts which follow.

5. The life-annuities require nothing more than a mere signature.

6. The same observation applies to the appointments to the governments.

7. We have already examined the testament, but we cannot forbear adding here, that the projects which accompany it only render it more suspicious.

Of these projects, one is in the hand-writing of the *Abbé d'Orleans*, the other in that of *Porquier*: they both contain a memorandum of legacies to different persons. There are three words added to the last in the hand-writing of the *Abbé d'Orleans*, by which he gives to *Dalmont* his carriage with the appurtenances.

None of these legacies, except that to *Porquier*, agree in amount with those written in the testament. It is even difficult to conceive why these projects of codicils are inclosed in the same paper with the testament.

It is said to be because they might serve to ratify it, but why were they not followed in making it? for it is almost impossible that they could be subsequent to the testament.

But to dismiss all kinds of useless inquiry respecting a fact of this kind, let it be supposed, that these projects without date were prior to the testament, or subsequent to it. Supposing them to be prior, the intention of the *Abbé d'Orleans* was only to make a codicil confirmatory of the testament of 1668; for you will recollect, that one of these projects is intitled, *project of a codicil*, which the *Abbé d'Orleans* wishes to make in confirmation of his testament. Now, if the second was not yet made, these words can only be applied to the first; and if that is so, the project would indicate an intention contrary to the last testament, which is so far from confirming the act, that it destroys, and almost entirely annihilates it.

Let it be assumed that these projects were subsequent to the last testament—it must then be supposed that they were made within

two or three days after. The testament is made on the 26th of *February*; it was deposited in the hands of *Porquier*, with the projects which accompany it, before the departure of the *Abbé d'Orleans*. Now it is agreed on all hands that that took place seven days after the testament; then it is in this interval that he must have made these codicils or projects of codicils; and what greater proof can be desired, either of the uncertainty of his will, or of his being ignorant of the latter testament, which he had only signed a few days before?

What explanation can be given of this circumstance? But let us go on with the circumstances which relate to the other acts.

8. The procurations given, whether to *Madame de Longueville* or to *Porquier*, are so far from being inexplicable, without supposing a state of sanity, that they seem still more to confirm the suspicions of the contrary, since thereby the family place themselves beyond the reach of apprehension that he might abuse the administration of the revenues which were left to him.

Finally, the reimbursement of the *Marquis de Bouveron*,—an act which required nothing more than his signature.

Such are the general and particular reflections which may be made upon the circumstances of these acts considered in themselves.

Let us see, however, what force they can have in the exclusion of parol testimony.

In the first place, they are not those actions which are so entirely personal to the party doing them, that they cannot be supplied by another. It was only requisite that the *Abbé d'Orleans* should retain sufficient liberty or docility to sign them; nothing more was requisite for rendering them complete.

Secondly, all these acts, except the donation and testament, are only common contracts, for which the law does not require the same degree of will or the same capacity as for testaments.

Thirdly, these contracts were passed by a man, who, if not in a state of actual imbecility, was at least very near to that condition of fury and insanity, in which he passed the remainder of his days, an insanity once more, of which the commencement is uncertain, and which may go back to the very time of these acts. Is a period of seven or eight months, or even a year, too long a time for examining the quality of derangement in a person of the rank of the *Abbé d'Orleans*, in the hopes of a cure? And if it is agreed, that they ought to defer his confinement for at least that interval, then the greatest part of the acts will fall within this time, and the weakness of the presumption will be evident.

In one word, if the insanity is once proved; nothing can be  
more

more easy than to shew how these acts might have been passed. These two facts have nothing incompatible—is it impossible for a man to have signed such acts, and to have been at the same time in a state of imbecility? On the contrary, the signature of these acts may be supposed, without excluding the fact of insanity, and consequently this is not an invincible presumption.

Finally, do these contracts exclude all kind of doubt? Is the interpretation of the *Prince de Conty*, in supposing that the family had it in view to take advantage of the remnant of docility, in order to terminate a part of the affairs of the house of *Longueville*, and to place him afterwards in a state of real and substantial interdiction; is this interpretation, once more, not equally probable, when compared with the character of the *Abbé d'Orleans*, as the supposition of that imaginary generosity to which *Madame de Nemours* would ascribe the donation and the acts accompanying it?

Suppose for a moment that the family of the *Abbé d'Orleans* wished to delay having recourse to the mournful remedy of interdiction: there is nothing unlikely in this supposition with respect to any kind of family, but we may say, that the splendour of the illustrious house in which we suppose that this design may have existed, gives it that high degree of probability which almost bears the character of certainty.

Let us suppose still farther that in this design they wish nevertheless to take precautions against the person whom they consider to be in a state of imbecility, that they wish to tie his hands so as to put him out of a condition of hurting himself or others. What would they do in this supposition, which is only a consequence of the former? Would they not begin at first by making him lose the property of his effects by an authentic donation? But because it would not be just to reduce him to simple maintenance (which could only be done by a solemn interdiction), would they not reserve a considerable usufruct proportioned to the dignity of his birth?

Would they not afterwards induce him to make a testament, giving recompences to his domestics in order to attach them to his service at a time when he would be no longer in a condition to give them any marks of his affection?

Would it not be a sequel of the same family counsel to make him sign procurations which might give them the management of the usufruct that was left?

And finally, might they not give him a kind of inspector and domestic curator, without whom he could not even audit the expense of his house? Such are all the precautions which prudence might inspire in such a case, as we suppose, in order to maintain,

at the same time, the honour and the interests of the family of the *Abbé d'Orleans*.

What they would have done in such a case, if it had occurred to them, we find has actually been done in the case before us. Then we may reasonably conclude, that the family had such thoughts; and can we even doubt of it, when we see that the plan of these acts was so completely framed with a view to a state of insanity, that when that state became completely notorious, it was not necessary to make any alteration? It subsists in every part, and the family, upon being convened, are of opinion, that *Madame de Longueville* and *Porquier* should continue to act by virtue of the procurations of the *Abbé d'Orleans*, although they could have no difficulty in knowing that those procurations were void, at least at the time of the consultation, on account of the imbecility of the person who had given them.

Why should they not chuse to do that tacitly at a time when some hopes were entertained of being able to conceal the situation of the *Abbé d'Orleans*, which they did expressly when they could no longer prevent his insanity being notorious?

What is said in answer to these natural presumptions? It is said, in the first place, that if the family had had the design which is imputed to them, it would have been useless to have gone through so many acts with the *Abbé d'Orleans*. They might have begun with the donation, and have afterwards treated more securely with the *Comte de St. Pol*.

But they do not take notice, that this succession of acts was necessary for the accomplishment of the object which they appear to have had in view at that time.

The *Comte de St. Pol* was a minor; he could not give a valid discharge to his mother, nor contract any solid and irrevocable engagement with her. Even supposing him to have been a major, he could not have discharged her from the obligation of rendering an account. It was necessary that the donation should contain an assurance of all these acts and discharges by imposing upon the donatory, the essential and inviolable condition of confirming all these acts, and approving all these discharges.

But, besides, may it not be said, that if we once suppose the single fact, the probability of which is indisputable, that the family wished to conceal, as long as they could, the weakness of the *Abbé d'Orleans*, it will not be difficult to conceive why he should sign all these acts?

The new acts were either useful or necessary, and advantageous to his family, and it was requisite that he should sign them before he was solemnly interdicted.

But what consequence can be deduced from this with regard to an act purely voluntary, and which the law does not permit, except for the consolation of the testator, and not for the interest of his family?—The whole, then, comes to this, whether we may suppose this single fact, that the family deferred for seven or eight months to publish the misfortune that had happened to the *Abbé d'Orleans*?

Once more, this single supposition may be the general development of all the difficulties that are presented to us.

But if all these acts, or rather all the presumptions arising from these acts may be destroyed by a fact so easy to suppose, and also so easy to prove, who can believe that such presumptions are sufficiently strong to authorise the rejection of parol testimony?

It is said, in the second place, that if the *Abbé d'Orleans* was really in a state of imbecility, it would be superfluous to leave him an annual revenue of 6000 livres. It is still less easy to reconcile such a supposition, with a reservation of a gross sum of 60,000 livres, of a moiety of the *Hotel de Longueville*, of a great quantity of furniture, and, finally, of the power to dispose by testament of the two years' revenue arising after his decease.

But, in the first place, as to what regards the *Hotel de Longueville*, and the furniture there, can it appear strange that they should reserve to the eldest member of the house *de Longueville* the habitation which belonged to him in the residence of his father?

And as to the power of disposing of certain portions of his effects, it might be reserved, as we have already said, for the purpose of assuring the recompence which might be wished to be given to his domestics.

They add, that it is inconceivable that any other than the donor himself should have stipulated for the right of return, in favour of *Madame de Nemours*.

But it is sufficient to prevent this presumption from being insuperable, if we shew that it may admit of explanation, and this has been done on the part of the *Prince de Conty*, by observing, that they may have taken this precaution for the purpose of preventing of *Madame de Nemours* coming forward at any time to impeach the authority of these acts.

Finally, as a last and general argument applicable to all the acts, you have been told of the improbability that such persons as *Madame de Longueville* and the *Prince de Condé* would have chosen to treat with a person in a state of imbecility; and that it is still more absurd and unjust to suppose that they would have taken an improper advantage of such imbecility; that, in fine, the public have an interest in preventing parol testimony being admitted in

opposition to such weighty proofs, as if that should be once allowed, no testament could ever be secure.

It is sufficient to resume the distinction, which we have proposed between the contracts and the testaments, in order to answer all these objections.

1. All these contracts may be good, either because nobody impeaches them or can impeach them, or because they are for the most part advantageous to the *Abbé d'Orleans*,—and the benefit which his family might receive from them might be sufficient to render them obligatory upon him until the time of his being actually placed in a state of interdiction.

2. It is not necessary to accuse the memory of a princess whose virtue was known, and revered by all France, in order to maintain the argument that all these acts may have been done with her participation, and that still the *Abbé d'Orleans* was not in a situation to make a testament.

Shall it be said that a father, that a tutor, that a husband, render themselves guilty of a criminal suggestion when the persons who are subject to their authority sign, under the faith of their understanding and discretion, acts of which themselves are not acquainted with the force or consequence?

It is true, that as a general supposition, acts of the quality of those which are now adduced, are powerful presumptions in favour of the sanity of a testator; but we are here very far from the case of this general supposition. We are not inquiring into the testament of a man who died in the possession of his state—this is the first point of difference.

The acts which are adduced were upon the eve of a notorious and indisputable insanity, which is a second difference.

Finally, all these acts may be explained so as to form a presumption which, if not necessary, at least is probable, of the weakness of the testator.

If the public has an interest that parol testimony shall not, upon slight grounds, be admitted, the same interest requires that it shall not on slight grounds be rejected. The effects and consequences are in either case nearly equal.

But, after all, was such a question never presented before? Is it such a new thing to admit a proof by witnesses, notwithstanding the authority of contracts?

You have, Sirs, two illustrious instances of it.

There is no case more strong than the sentence which you gave in the cause of *Pajet*, in which the evidence of insanity was carried back to a period many years before the interdiction, and that not for the purpose of destroying a testament, but to impeach the validity

validity

lidity of contracts, although the creditors could allege in their favour both their good faith and their ignorance.

If much proof has been received, where the question has related to the destruction of contracts themselves, can it be refused in such a case as this ?

Let us pass, however, to the second presumption deduced from the conduct of the *Abbé d'Orleans*.

1. We must cut off that part which is deduced from *Madame de Longueville* permitting him to celebrate the mass. There is no proof of this fact ; it only appears that he was furnished with a chalice for this service ; but what can be concluded from that, except that the mass was said before him ?

2. He has, indeed, audited accounts, but all these accounts were revised, from the 1st of *March* to the 15th of *July*, in the presence of *Dalmont*, as is proved by the discharge of *Pernis*. When it is more than probable, that *Dalmont* was set over him as an inspector ; no other reasonable explanation can be given of it ; and if such is the fact, it is a proof that, from the 1st of *March*, two days after the testament, he was not deemed capable of auditing an account.

3. He signed bills of exchange and orders, but amongst those bills of exchange, there is one of a very extraordinary form.

4. He wrote several letters, but only to *Porquier*. It is admitted that these letters are full of repetitions of a niggardly attention, of an unbecoming avarice ; but they are not absolutely destitute of sense. It would be necessary to enter into a very long detail, if we were to examine whether all the facts, which are mentioned in those letters, indicate a perfect knowledge of the state of his affairs ; but this much is certain, that the argument of the letters is very equivocal, since he wrote one in the month of *November*, after he was in a state of confinement, which is at least as sensible as any of the others.

Besides, one of the letters, adduced by *Madame de Nemours*, falls within the period of the insanity, if we are to give credit to *Madame de Longueville*.

Finally, as to the third presumption, the judgment of the family—the donation which was always supposed to be valid, the orders, the bills of exchange, have always had the approbation of the family.

But, 1st, as to the orders ; if the fact respecting *Dalmont* is true, it is not very astonishing that they were approved, as it would be very well known in what manner they were passed.

2. Nobody attacked the donation, nor could attack it with effect.

How can all these approbations operate to the prejudice of a third person.

Upon the form of the sentence of the court below, it is sufficient to observe,

1. That the ordonnance requires the allegation of a precise fact, but not of the proofs of that fact. Here the fact is the insanity—the proofs of it are the circumstances to which each witness may depose. It is always necessary to distinguish between a fact which is single and particular, and a general fact which extends over several others.

2. It is in this manner that your judgments have interpreted the ordonnance.

The case of *Pajet*, 1681; the case of *Boffu*, 1675, &c. &c.

The insanity is evident; the only object is to prove the commencement of it.

4. The argument of *Madame de Nemours* proves too much: if it was necessary to allege these circumstances, in order that she might have an opportunity of proving the contrary; it would follow that nothing could be proved but what was particularly alleged. Now this consequence would be absurd; then nothing can be concluded from this reasoning.

Let us, finally, add two general reasons:

First, the doubt upon the facts is a motive for permitting the party to make proof of them.

Secondly, the inconvenience of refusing it is manifest, and, on the contrary, there is no inconvenience in admitting it.

## SECOND PLEADING.

In the Case of the Prince de Conty and the Duchefs de Nemours,

*Pronounced in feveral Audiences, the laft on the 14th of March 1698.*

Upon the appeal of *Madame de Nemours*, from the definitive fentence of the *Requêtes du Palais*, in favour of the *Prince de Conty*.

- I. *Whether the queftions decided in 1696 could be revived; and fufpofing the matter to be entire, whether the fame decifion ought not to prevail?*
- II. *Whether the great number of afts, figned by the Abbé d'Orleans, about the time of his making a fecond teftament, were a proof of his sanity, or of the intention of his relations to place him in a ftate of interdiction, having knowledge of his infanity?*
- III. *Whether his infanity at that time was fufficiently proved by witneffes?*

## FIRST AUDIENCE.

WHATEVER confequence the name of the parties, the number of the queftions, the vaft extent of the facts, may have given to this caufe, we think it may be affirmed, that nothing renders it more fingular and important than the nature and quality of the principal queftion, which is this day fubmitted to your judgment.

You have to pronounce, not upon one of thofe queftions of ftate, which relate to the birth or condition of parties, (exterior qualities written in public registers, preferved in authentic monuments, and of which the principal proof is derived from the authority of the law itfelf,) but upon one of thofe doubtful and difficult queftions, of which the only fubject is an invifible quality, that frequently conceals itfelf from the moft enlightened

Wit,

witnesses, an interior disposition, of which acts and writings are only an obscure and imperfect image; in a word, when you are to decide upon the state of the mind, much more than upon that of the body.

If this question appears difficult, when considered in general, what will it be when we examine it, in the case before us, when the person whose state is the principal subject of contest, can neither justify his accused reason, nor furnish us himself with the proofs of his insanity.

The person is wanting, while we are examining the quality, which of all others is most peculiarly personal.

It is not a question of present sanity or insanity, that is the subject of this cause; it is a sanity or insanity which is past, and you have not only to decide upon an invisible quality, but also on a quality which no longer exists.

And in what manner to decide? In a conflict of acts (*a*), contrary to each other, in a combat of witnesses, mutually attacking and destroying each other. Nor is this all, not only are acts balanced by acts, not only are witnesses combated by witnesses, but this combat takes place in every act, this contrariety occurs in every witness, contrasted with himself; such is the uncertainty of the proofs, or the ability of the pleaders, that there is in this cause, no act, no witness, that does not furnish alternately, arms to each of the parties. You have frequently seen, in the course of a long pleading, the same voice which seemed one day to declare in favour of sanity, regarded on the next as an equally strong attestation of madness, and in the midst of this equality of advantages, where each party seems to have proved the fact that he has advanced; truth becomes obscured, darkness is increased instead of being dissipated, and every thing which remains to the spectators of so obstinate a combat, is doubt, obscurity, and uncertainty.

Finally, as if it was little to decide so difficult and extended a question of fact, there are added to it the most subtle questions of law; and after having opposed acts to acts, witnesses to witnesses, they introduce a similar combat of laws and expositors, and the law becomes not less doubtful than the fact.

Such, Sirs, is the important subject of your deliberation, calculated to perplex us by its difficulty, to overwhelm us by its grandeur, and even to deter us by its immensity, if we only consulted our own forces, and were not supported by the great and painful attention that the court has given to this long affair; if we did not know, that it was equally informed with ourselves as to all the

(a) The word *acts* in this place, as in general throughout these pleadings, means written instruments,

detail of facts ; if we were not persuaded that our ministry was reduced, to combining and recording the different facts, and to bringing before your eyes, as with one stroke of the pencil, the lively and precise images of the principal circumstances, which are to form the matter for your judgment.

To do this with the order that the vastness of the subject demands, we shall begin by distinguishing three periods or epochs in the life of the *Abbé d'Orleans*.

In the first, a state of sanity is certain and admitted.

In the second period it becomes doubtful ; one of the parties attacks and combats it, the other sustains it, and this period comprehends every thing which passed from the month of *July*, 1670, to the month of *October*, in the year following ; at which time the madness of the *Abbé d'Orleans* obliged his family to have him put into confinement.

Lastly, in the third period, we have the same certainty as in the first, but in the one, it is a state of sanity, in the other a state of insanity acknowledged by both the parties ; thus the extremes of the three periods, which we distinguish at the outset of this cause, are equally luminous ; the middle alone is obscure and overwhelmed with darkness. It is this obscurity and darkness which we must this day entirely dissipate, in order to add this doubtful and equivocal period, either to the certain period of sanity or to the certain period of insanity.

These three periods are considerable, not only in respect to the state of the *Abbé d'Orleans*, but also in respect of the acts which form one of the most important parts of this cause.

In the first period, we find the first testament, that is to say, the title, the foundation of the demands of the *Prince de Conty*, and the subject of all the questions of law, which have arisen in the cause.

In the second, we discover the second testament, the donation, and all the acts which accompany it ; that is to say, one of the principal proofs, either of the strength or weakness of the *Abbé's* understanding.

Finally, in the last period, we observe an infinity of acts, which on the one side are contended to be a confirmation, of those which were done in the second period ; and invincible obstacles to all who shall offer in the sequel to attack those same acts.

But without dwelling longer upon the advantages of this distinction, which will be sufficiently obvious in the whole progress of the cause, let us proceed to the explication of the facts, and begin with those which relate to the first period, that is to say, every thing

thing which passed from the birth of the *Abbé d'Orleans*, to the month of *July*, 1670, when his sanity first becomes the object of suspicion.

If we were speaking to judges who are less informed, we might begin with mentioning the state of the family of the *Abbé d'Orleans*, the two marriages of the *Duke de Longueville*, his father, both of them equally illustrious by the honour which he had of renewing the ancient alliances of his house, with the august blood of our kings; we should observe, that *Madame de Nemours* owes her birth to the first of these marriages, that the second was followed by that of two children, *John Louis Charles d'Orleans*, born in 1646, whose state is now the object of your judgment; and *Charles Paris d'Orleans*, *Comte de St. Pol*, born in 1648; we should afterwards trace the portrait and characters of these two brothers, characters so different, that the one seemed born to obey, the other to command; the one condemned by nature to obscurity and retirement; the other destined by the elevation of his genius, even more than by his birth, to fill the most eminent situations.

But all these facts are perfectly known to you; we have already stated them at the time of the interlocutory sentence, and we are loaded with such a multitude of necessary circumstances, that we ought at once to retrench all those which serve rather for ornament than decision.

We shall content ourselves then with mentioning, that the *Abbé d'Orleans* conceived from his infancy the desire of entirely devoting himself to ecclesiastical functions. After an education suitable to the dignity of his birth, his first step, at an age when he ought to have shone forth to the world, was to enter upon his noviciate with the *Jesuits*, in order entirely to renounce all secular engagements; whether his health did not permit him to support the simple and painful life of that condition, or whether from disgust or inconstancy, it is certain that he did not continue in it long, but he left it without losing the spirit of his first vocation, which led him to an ecclesiastical condition. He retained the habit, and finally received the character.

He joined to this natural inclination, a violent passion for taking journeys, not only from a motive of curiosity, which is common to all men, but with a kind of inconstancy and disquietude peculiar to himself, and which led him frequently to change his place, without any other design than that of changing it.

We learn from the accounts of his expence, that he spent almost the whole of the years 1667, 1668, 1669, in going from city to city, from province to province, followed by a small number

of attendants, returning frequently to the same places he had just quitted, living with a frugality and parsimony little proportioned to the splendour of his name, and frequently even ashamed of bearing it, and affecting to take that of *Meru*, in order to have the liberty of travelling as a private individual, content with indulging, in every place, his unquiet and laborious idleness.

*Champagne, Burgundy, the Lyonnais, Provence, Italy*, were the provinces and countries which he ran through in his long courses, but without stopping to give you an exact journal, and a regular itinerary of his travels, let us confine ourselves to the principal instruments which he has executed, and the acts which alone can be of consequence in this cause.

Three of his journies are marked by acts which equally distinguish them.

[*The Advocate General here took a view of the donations of Neuchâtel, of the first testament and of the emancipation similar to that contained in the former pleading; and afterwards proceeded as follows.*]

Scarcely had this public proof, this solemn testimony, been given of his sanity, when, according to the counsel of the *Prince de Conty*, he obliged his family to repent of it, by the sad but infallible presages which he gave at *Saint Maur*, of the approaching loss of his reason.

It is then precisely at this point, that the first period of the *Abbé d'Orleans* terminates: we have hitherto walked in the light, we have observed the journies of the *Abbé d'Orleans*, we have remarked the striking acts which have distinguished them. Hitherto, every thing is certain and agreed upon between the parties, but now all becomes doubtful and uncertain; we enter upon a region of darkness, where we can only catch a glimpse of truth, through the thick veil with which it is covered, until you shall have dissipated the clouds which surround it.

In the second period as in the first, we find journies and written instruments, but journies and instruments so equivocal, that on the one side they are regarded as invincible proofs of sanity, and on the other they are made use of as an evident demonstration of the contrary.

All the facts which relate to them, are naturally divided into three classes, or three different parts.

Those which precede the last testament of the *Abbé d'Orleans*, those which accompany it, those which follow it.

Those which precede it are almost necessary; those which accompany it are absolutely essential; those which follow it are useful;

useful; let us apply ourselves to this order, and begin with the circumstances which precede the time of the last testament.

We have told you that the counsel of the *Prince de Conty* insists that it was at *St. Maur*, that they observed the sanity of the *Abbé d'Orleans* gradually diminish and his imbecility increase, by a progress equally sensible and lamentable. We shall lay before you, in the sequel of this cause, the proofs by which they contend they have established this fact, and those by which *Madame de Nemours* opposes it. Let us at present only follow the steps of the *Abbé d'Orleans*, as they are known by solemn acts, and other written evidence.

After having passed about three months at *St. Maur*, he comes to *Paris*. He stays there till the end of *August*; he sets out on the 30th of *August*, to take the journey of the river *Loire*, a journey which is of great importance in this dispute, a journey of which the subject, the motive and the end have become one of the questions of the cause, a journey, in short, which has produced that multitude of witnesses, who have occasioned, in every city, the same division, the same opposition, the same combat between the sanity and insanity of the *Abbé d'Orleans*, which has taken place to-day, in the tribunal of justice.

Whilst the *Abbé d'Orleans* is engaged upon this journey, his relations deliberate upon one of the most important affairs of his family, upon the payment of the large sums which were due to *Madame de Longueville*; they permit the *Abbé d'Orleans*, and the *Comte de St. Pol*, to give up a certain estate to her, according to a valuation to be afterwards made. The opinion of the relations is confirmed by a sentence of the 2d of *September*, 1670; but this plan was not executed until after the majority of the *Abbé d'Orleans*, and his return to *Paris*; thus, there is nothing to prevent us following him in his route, and running over the principal provinces, which were the witnesses either of the strength or the weakness of his mind.

He set out in a hired carriage, accompanied by an *almoner*, a *gentleman*, two *valets de chambre*; he arrived at *Orleans*, he takes up his abode at a petty inn there, called the *Plough*; he continues there nine days, he pursues his journies, goes to *Blois*, stays twelve days at *Tours*, the same time at *Samur*, makes a deviation to see the *Chateau de Richlieu*, resumes again the course of the river *Loire*, stays some time at *Angers*, descends as far as *Nantes*, where he makes a stay of three weeks, leaves it on the 12th of *November*, returns to *Angers*, and the rigour of the season obliging him to finish his journies, he takes the resolution of returning into the

bosom of his family. He comes by the common stage, and arrives at *Gué de Loric*, one day's journey from *Paris*, he there finds a valet of the *Comte de St. Pol*, and all at once he changes his design; either voluntarily or by constraint, he abandons his first project, he resumes the route of *Orleans*, he hires three horses at one place, and three chairs at another, and followed by two of his domestics, whilst the others continue their course to *Paris*; he returns upon his steps, and by a cross road arrives the same evening at *Orleans*.

Such, Sirs, is the grand fact of *Gué de Loric*, of which all the circumstances have been observed upon with so much art, in the opposite pleadings of this cause—is it necessary that we should here retrace the colours which have been given on the one part, and on the other, to this important fact? they were too lively to be so soon effaced; on the one side you are told that there was nothing extraordinary in this change of route and design; the former journies of the *Abbé d'Orleans* furnish a thousand similar instances of inconstancy. We see him frequently returning to the same places, leave a city as if he was never to be there again, return a short time afterwards, and what is there in this, which is not common to all who travel for the mere pleasure of travelling? On the other side you have been often told, sometimes that this sudden change was a real proof of the insanity of the *Abbé d'Orleans*, incapable of adhering regularly to one design: led away by caprice, by levity, by sudden impressions, he follows at random the fallies of a deranged imagination. He begins a journey and does not complete it. He sets out to sleep at *Paris*, and he goes to sleep at *Orleans*, and the disorder of his journey is a faithful portrait of the derangement of his mind. At other times they have attributed this event to the superior orders of the family of the *Abbé d'Orleans*, who would not as yet permit him to appear at *Paris*. They represent him as one of those feeble and timid minds, which having thrown off the yoke of reason, respect no other yoke than that of force and fear, and being no longer able to govern themselves, necessarily become the slaves of others.

We do not as yet examine which of those colours is more conformable to truth, we merely refer to them, that you may see the importance of the fact, and after this slight digression, we resume with the *Abbé d'Orleans*, the route of the cities on the river *Loire*, which he went to see a second time.

The stay at *Orleans* was longer this second time, than the first. He passed 39 or 40 days there, and at the end of that stay, he calls his *almoner* to write this important letter: this new piece of evidence which,

which, *Madame de Nemours* insists, is in itself sufficient to decide this cause in her favor.

The *Sieur Metayer*, almoner of the *Abbé d'Orleans*, who had followed him in this last journey, and had quitted him at *Gué de Loré* to return to *Paris*, came to him again at *Orleans*, in the beginning of *December*, is the person who is charged with writing this letter.

He writes to the *Sieur de Sainte Beuve*, doctor of the *Sorbonne*, and informs him that the *Abbé d'Orleans*, at the eve of his departure for *Tours* being detained by some business, could not write to him himself, but had charged him to do so, requesting him to have the same attachment to his service which he had hitherto shown, and to attend to a project concerning a treaty which the *Abbé* was making with the *Comte de St. Pol*, his brother; that *Porquier* would lay the treaty before him and they should settle it together; he adds, that in order to shew the *Sieur de St. Beuve*, how agreeable his past services were to the *Abbé d'Orleans*, and how much he desired the continuation of them, he had granted him a pension of 1000 livres, the brevet of which would be given him by *Dalmont*.

Not satisfied with having ordered his almoner to write this letter, the *Abbé d'Orleans* adds three lines with his own hand, approving the contents; observe the terms in which his approbation is conceived.

*Every thing which M. Metayer has told you of my intentions is true. Adieu, without adieu. Be diligent that I may say to you with joy in viam pacis. Every thing good attend you. Your servant, J. L. C. d'Orleans, Priest. (n)*

This letter is dated the 28th *September* 1670, it is accompanied by a brevet, for the pension written and signed by the *Abbé d'Orleans*, and they were both taken by *Dalmont*, who set out the day following, the 29th of *December*.

The same day the *Abbé d'Orleans* embarked on the river *Loire*, to return to *Tours*. He staid there six days, and finally on the 10th of *January*, two days before his majority, he set out from *Tours*, in a public conveyance, and arrived on the 15th in the evening at *Paris*.

His arrival is the last of the facts, which precede the time of the testament, and the first of those which regard the time of the testament itself. But before we enter upon the explication of these facts, we must add to the circumstances which preceded the time of the testament, the important fact of some orders, signed by the  
*Abbé*

(n) Toutes que M. Métayer vous mande de mes intentions, est vrai. Adieu, sans adieu; diligentes tout, afin qu'avec joie je puisse dire: in viam pacis. Tout a vous, votre serviteur, J. L. C. d'Orleans, Prêtre.

*Abbé d'Orleans*, for the expence of his family, and of some bills allowed either by him or *Madame de Longueville*, for articles used in the celebration of the masfs, with which he was furnished in the month of *July 1670*.

You have heard the inference which is drawn from these facts, they are said to amount to a written proof of the *Abbé d'Orleans* having celebrated masfs, at the very time when the *Prince de Conty* alleges, that he was in a state of complete and absolute madness.

Let us now proceed to the explication of circumstances of fact, which relate to the time of the testament.

We include in this term, every thing which passed from the 15th of *January 1671*, the day of the *Abbé's* arrival, to the 5th of *March* following, the day of his departure from *Paris*.

It is in this interval of time, that the principal acts are comprised, which were at first made use of, to induce you to reject a proof of insanity, and which are now relied upon, as establishing a proof of the sanity of the *Abbé d'Orleans*.

We see at first a great number of acts which relate to the domestic administration of his affairs, signed orders, allowances of bills and accounts, and amongst these bills, there are some which mention a chalice and books, purchased for the use of the *Abbé d'Orleans*.

But we afterwards observe those more important acts, which have been mentioned to you so often, both by the one party and the other; of which you are so well informed, and which it will be sufficient slightly to run over, rather to recal, than to present an idea of them.

[Here follows a view of the several written instruments, and the facts mentioned in the former pleading, down to the time of the interdiction.]

Soon afterwards Heaven struck the house of *Longueville* with a blow more sensible than the former.

The only hope of this illustrious house, the last offspring of this race so fertile of heroes, died with his arms in his hand, and *France* regarded his death as a public calamity.

This unexpected accident obliged the family to assemble a second time, to regulate the effects which had reverted to the *Abbé d'Orleans*, by virtue of the clause in the donation to the *Comte de St. Pol*.

They committed these, as well as the remainder of the property, to the care of *Madame de Longueville*, whom the king appointed curatrix. The donation of *February 1671* was regarded in this assembly as a title that ought to be carried into execution. *Madame de Longueville* performed fealty and homage, for the property comprised in the donation, as the *Comte de St. Pol* had done before. The

king made the same remission of the rights of relief, which he had done the *Comte de St. Pol*; and in short the donation was fully and completely carried into execution by the family, which important fact is contended to amount to an estoppel (*fin d' une recevoir*) to claim of the *Prince de Conty*.

*Madame de Longueville* died in the year 1679; the office of curator was divided after her death, between the *Prince de Condé* and *Madame de Nemours*.

They examined the ancient accompts of *Porquier*, and approved of all the orders and allowances of accompts signed by the *Abbé d'Orleans*.

At last, after twenty-three years of a life more sad than death, the *Abbé d'Orleans* ended his days, and with him was extinguished for ever the exalted name of *Longueville*.

Soon after his decease the widow of *Porquier* produces the testament with the projects which accompany it, and which are opened at the office of the *Civil Lieutenant*. *Madame de Nemours* entered into possession of all the property as heir by blood; the *Prince de Conty* forms a demand against her, by virtue of the first testament. He demands possession of the property of which the *Abbé* had power to dispose; *Madame de Nemours* alleges in opposition to his demand, that his title is void, and also that it is revoked by the last testament. They agitate several questions of law, which are long, important, and difficult; at length the *Prince de Conty*, to remove the obstacle of the last testament, alleges the fact of insanity, and demands a liberty to prove that at the time of that testament, and for above six months before, the *Abbé d'Orleans* was notoriously out of his senses, and in a state of derangement known to all who approached him. After a long investigation, the *Court of the Requêtes du Palais*, the judges of this celebrated difference, ordained that the *Prince de Conty* should make proofs of the facts contained in his *requêtes*, without prejudice to *Madame de Nemours* giving proofs to the contrary if she thought it expedient.

The appeal from this sentence was brought before you, the cause was pleaded during twenty-two audiences, and you confirmed the sentence.

Never was sentence more fully executed. Seventy-six witnesses on one side, eighty-five on the other, gave opposite evidence upon the state of the *Abbé d'Orleans*.

The cause was brought a second time before the original court; it was then pleaded for near six months. *Madame de Nemours* took an exception to *M. de Machauk*, who had taken the inquest; her exception was not allowed; she appeals from the sentence which admits *M. de Machault* to continue a judge, and pending that appeal, they proceed to deliberation, they deliberate for eleven mornings,

mornings, and finally pronounce a definitive sentence, decreeing the first testament in favour of the *Prince de Conty* to be carried into execution; and because the judgment imports that it shall be carried into execution, notwithstanding the appeal, upon giving security, the *Prince de Conty* offers a security, which the court admits as sufficient.

*Madame de Nemours* has also presented an appeal against this judgment, equally attacking all the three sentences of the *Requêtes du Palais*.

Such, Sirs, are all the circumstances of fact and procedure, which form the subject of the most extensive cause that was ever submitted to your tribunal. Happy should we be if we could flatter ourselves with having given you a just idea of it, and also if we could lay before you, in a few words, all the reasons of the one party and the other, without diminishing any thing of their force and weight by the brevity and succinctness with which we shall be obliged to repeat them. But if we cannot approach to that perfection which we can only discover at a distance, and describe with difficulty, we shall console ourselves at least with a persuasion that, as the penetration and exactness of those who have spoken before us have left nothing to desire on behalf of the parties, the continual application, the painful and laborious attention, which were given to them by the court, will enable you to supply all the defects arising either from the weakness of our talent, or the vast extent of the subject.

[*The arguments of the respective parties are next detailed at length.*]

It is thus by apparent colours, and by arguments bearing the characters of truth, that the one party and the other seem alternately to make reason and justice enter into their interests, and equally confirm what we have observed in the commencement of this cause—that in the midst of so many opposite probabilities, truth becomes obscured, and the light disappears until your judgment shall recal it to revive in all its lustre. We wish it were possible to advance the moment which the public have so long expected; but the vast extent of the subject obliges us to defer still further the explication of our reflections upon so important a cause, and we shall not offer them until we have stated the facts which result from the respective proofs, by reading the depositions of the witnesses on the one side and the other.

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## SECOND AUDIENCE.

We began the explication of this cause by giving you an exact account of the essential circumstances of fact, and the principal arguments of the parties. We now proceed to lay before you the

proofs of the history of the life of the *Abbé d'Orleans*, which are to augment still further the obscurity and uncertainty that prevail in the whole of this contest, and to represent *M. de Longueville* in that doubtful state between reason and madness, in which one set of witnesses depict him as a man of unquestionable sanity, and another, on the contrary, as a man in a state of public and notorious idiotism. But that the proofs may be more manifest and assured, we shall divide every thing that we have proposed to discuss in this audience into two parts.

We shall first contemplate the proof with respect to the quality of the witnesses, and examine the general and particular exceptions that are opposed to them.

We shall afterwards consider it with respect to the nature, the force, and the weight of their depositions. In the first point, our view will be directed to the persons. In the second, we shall confine ourselves to the facts, and this last part will be almost reduced to reading the depositions of the principal witnesses, without blending therewith any of those ingenious commentaries which are frequently more adapted to excite our admiration of the genius of the interpreter than to elucidate the text and letter of the deposition; and we wish it was possible for us to make the acts and witnesses always speak for themselves, without adding any thing of our own in a cause of this importance.

Let us enter, then, into the examination of the exceptions to the witnesses. We do not examine at present the truth of what has been urged, that even setting aside all the witnesses excepted against by *Madame de Nemours*, there is still sufficient in the inquest of the *Prime de Conty* to form a complete proof. While they urge the argument they do not give up the witness excepted against; and how could they give them up, when, in all the other parts of the cause, they have referred to them as essential and decisive of the contest.

We may, then, for the present, pass by this first observation; and there is nothing to dispense with our examining the exceptions; on the contrary, every thing obliges us to do so. Let us begin with those which *Madame de Nemours* has proposed against the witnesses of the *Prince de Conty*.

There are two kinds of exceptions, the one general, and founded upon the rules of law, the other particular, and deduced from some important facts. We do not comprise under this name of general exceptions the suspicions which they have endeavoured to throw upon the respective inquests. We shall not speak of those until we come to the parallel of the two testimonial proofs. We only examine at present the general exceptions which are furnished by

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the law, and which are reduced to the two principal grounds of age and poverty.

And because there is a vast career before us, and the mere reading of the depositions of the witnesses will occupy a very considerable time, permit us, Sirs, without entering into long dissertations, to lay before you plainly and simply the general principles which the sentiments of our best practisers, and the authority of your judgments have established upon this subject.

The first principle is, that there is no ordonnance which fixes the number and quality of exceptions; therefore, upon these occasions, they may successfully use the authority of written reason, (a) as it is expounded by our doctors, and tempered by usage and practice.

The second principle, founded upon the authority of that which, after the example of the greatest magistrates who have ever appeared in this assembly, we have just called written reason, is, that the power of giving evidence is a kind of natural liberty granted to all to whom the laws do not expressly refuse it.

Let us examine, then, what relates to the exception of age, according to these two principles, and let us see what is prescribed upon this general exception by the civil law and by usage.

In the *Roman* law, there was only one distinction upon this subject, which was between the persons who had or had not attained the age of puberty; because, at the age of fourteen, persons were capable of making testaments, and of executing all kinds of contracts by themselves, and consequently, of being witnesses of the actions, the engagements, or the last dispositions of others.

Amongst us, as the age of disposing of property by testament is much more advanced, there is a distinction between two kinds of witnesses.

The one are called *instrumental* witnesses, that is, those who attest the truth and faith of written acts. Parties may chuse these as they please; but, because their functions approach to those of notaries, and as they divide with them the confidence of the law, it is not sufficient for them to have attained the age of puberty, but it is requisite that they shall be of sufficient age to make a testament. The capacity of the witness ought to follow and imitate that of the testator; a maxim which is too familiar to require any proof.

The others are witnesses of the ordinary actions of life, fortuitous witnesses presented by chance, and who cannot be chosen by the person producing them, witnesses which the law has been obliged to admit with more facility than the others, to prevent the proof of facts being rendered impossible; and these may be of two kinds, persons of the age of puberty, and persons under it,

(a) *Viz.* the *Roman* law.

From the moment of attaining the age of puberty, it would be impossible to find any law, or ordonnance, or judgment, or writer, who excludes them from giving testimony, and therefore none has been cited.

Before the age of puberty, the case is more difficult; the ordonnance permits the judges to receive them even in criminal proceedings, where the favour of absolution, or the importance of proof ought to render it more difficult, with a reservation of afterwards examining the nature and quality of their depositions.

Hence results an invincible argument, that there can be no difficulty with regard to those who are of the age of puberty; and therefore this doubt has never been seriously proposed.

Upon what then have they doubted? Upon a question which might arise in this cause—*an pubes factus possit testari de eo quod vidit in pupillari atate?* The gloss of the civil law upon the § 6.—*Testes INSTIT de testamentis ordin,* has decided in the affirmative. *Mascardus*, one of our most excellent practisers, decides in the same manner.

For ourselves, we are of opinion, that it ought to be restrained to those who approach the age of puberty. This is the opinion of *Jean André*, a famous interpreter of the canon law. Thus, witnesses are either instrumental or not. In the first case, the age of 20 is necessary; in the second, that of puberty is sufficient; and a witness who has attained that age may depose to what he has seen shortly before his attaining it.

But this question is at present immaterial. Only two witnesses were under the age of puberty at the time to which they depose, and their testimony is not of sufficient importance to detain us longer in the discussion of it.

Let us proceed to the general exception of poverty, and examine it as it applies to the law and to the fact.

1. How is it to be considered in point of law?

The law 3 ff. *de testibus*, places poverty as amongst the qualities which the judge ought to examine in the person of witnesses; but it joins, at the same time, the character of the witness, his manners, his conduct. It says, at first, that the judge ought to consider *an egens sit*. He does not stop there, but adds, *ut lucri causa quid facile admittat*. Poverty, then, is not sufficient; it must be a poverty which, with all the circumstances that accompany it, makes it easy to presume, that the witness is capable of all kinds of crimes, provided the hope of gain be held out to him, *ut lucri causa quid facile admittat*. Thus we see, that the gloss says expressly, that persons in a state of poverty are often admitted, *quia*

*non tam ex facultatibus quam ex fide testis idoneus estimatur et inspicitur cujus propositi sit.*

What was stated to you of the property that was requisite with the Romans to exclude the exception of poverty, does not relate to witnesses but to accusers, who were not allowed to institute an accusation unless they had at least 50,000 sesterces.

But because, in general, it is difficult to make this inquiry as to the manners, the character, the reputation of a witness, where the parties do not allege any precise fact, and confine themselves to the general exception founded upon poverty; our doctors and our usage restrain this exception to the single case of mendicity, which forms a strong presumption of the venality of a witness. This is the doctrine of *Mascardus*: if a man goes from door to door, *ostiatim*. This is the opinion of *Le Brun*, in the book intitled *Procès civil et criminel*: we often find more probity and fidelity in poverty than in affluence.

Let us proceed to the particular facts.

1. There is no proof of the misconduct, the doubtful character, the venality of any witness.

2. No proof of mendicity.

3. What proof is there even of poverty? A certificate that they were not in the rolls of capitation; but this is a very equivocal proof. Persons are often omitted through influence or negligence, or a feigned poverty.

And, lastly, this exception would only remove the testimony of six or seven witnesses, whose depositions are not considerable.

Let us enter at present into the details of particular exceptions.

These have been properly divided into four classes: decrets (*a*), law-suits, animosities for favours refused, a strong attachment for the *Prince de Conty*.

## FIRST CLASS OF EXCEPTIONS.

### *Decrets.*

These are alleged against *Martineau*, *Du Perron*, *Le Geai de Chateaufort*, *Jouanne*, and his wife *Fouilleuse*, five of the witnesses.

*Martineau*.—The exception against him must be disallowed. The decret was purged in 1688. The sentence only pronounced a compensation of expences. The matter in dispute was only a trifling quarrel.

(a) Warrants for apprehension on a criminal charge.

*Le Geai de Chateaufort.*—It is pretended that there is an equivocation in the name ; but this is very immaterial, for the witness is of slight importance.

*Jouanne and his wife.*—Five decrets have been adduced : we have examined them all. There is an assignation to be heard, a personal adjournment, an order for an arrest. But what do we find on the other side, upon one of the decrets ?—a sentence which purges it, and condemns *Jouanne* in three livres reparation.

Upon another, a sentence given in favour of the wife, and condemning the opposite party ; upon the three others, compromises which liquidate the damage and costs at very moderate sums.

As to the foundation of these processes, it was merely a quarrel between two neighbouring inn-keepers, each of them wishing to get the custom of persons passing by. The accusations were very trifling ; but it is said the public are not satisfied, and our ministry is appealed to.

And do they not know the precise disposition of the article 19, of title 25, of the ordonnance of 1670, which enjoins, indeed, the king's procurator to proceed against those who are charged with capital crimes, or others subject to corporal punishment, notwithstanding any compromise between the parties ; but, at the same time, directs that, with regard to all others, the compromise should be executed without any prosecution.

Now what was the matter in the case in question ? Some blows that passed between the servants of two inns, on account of some guests, which the one wished to have to the prejudice of the other. Nothing could be more susceptible of accommodation between the parties.

*Fouilleuse.*—This is an important exception, because the deposition is important ; and, besides, the decret is not purged : but it must be considered in point of law, and in point of fact.

As a general principle, it is not true that the ordonnance has decided that a decret, in all cases, without distinction, is a sufficient exception.

The ordonnance, in truth, does not permit this fact to be alleged as an exception, without supporting it, and producing the decrets ; but it leaves it to the prudence of the judge to examine the circumstances which accompany the decret, in order, afterwards, to decide whether the exception is available or not.

Now what is the distinction which ought to be followed on these occasions ?

Either the accusation is in its nature grave ; and then the presumption is against the accused, until he has purged the decret.

He

He cannot before be considered as a man *integre fame, et vite inculpate*.

Or, on the contrary, the nature of the accusation is slight, and could not produce any punishment capable of imposing the slightest stigma; and, in this case, it would be unjust for the decret to have more effect than the sentence itself.

In regard to the fact, two things are to be considered :

One, the nature of the accusation : they would represent it as a rape (a); but in the plaint which is before us, and contains a detail little suitable to the dignity of this audience, it only amounts to a mere debauch, preceded, as it is alleged, by promises of marriage; but that is a usual colour.

Conjugium vocat; hoc prætexit nomine culpam. *Virg. Æn. lib. iv.*

It is not the relations of the girl, but herself, and she alone who complains—so there is no appearance of rape.

But what dissipates any suspicion is, that we do not see that there has been any pursuit from the time of issuing the decret to the present,—an entire and profound silence.

2. The particular circumstances of this affair.

*First Circumstance.* The decret was never executed; and let us not suffer any ambiguity upon the signification of it. It is very well known a decret for taking a person in custody is not in itself a matter of notoriety, it is nothing unless it is executed, or a proclamation is made for the person, and an inventory taken of his effects. Here there are none of these proceedings; if there had been, they would have been produced—therefore *Fouilleuse* had no legitimate and judicial knowledge of this decret; how then could he purge himself from it?

*Second Circumstance.* The marriage of the girl, since the decret, which has indirectly extinguished the accusation; she had more interest in not prosecuting than he had in not being prosecuted; and how could *Fouilleuse* himself have purged the decret without dishonouring her, and troubling an accordant marriage? What can be imputed to him under such circumstances?

*Third Circumstance.* What would have been the termination of such a suit? *Fouilleuse* would have entered an appeal—he would have been condemned to have paid some trifling sum of money to a charity, and some damages. Such condemnations do not induce any brand of infamy—he would have remained *integre fame*. Can the decret, then, have more effect than a condemnation?

(a) According to the law of France, the term rape was applied not only to violence, but also to seduction, and even to inveigling a person into an improper marriage.

## SECOND CLASS OF EXCEPTIONS.

*Law-suits, or Causes thereof.*

This is an exception which is good in general; but it ought not to be abused. It is necessary that it should be a serious, real contest, capable of exciting hatred and animosity, and not a law-suit which is only so in name—an affected one, at least in its duration; for the purpose of forming a matter of exception.

Against whom is this kind of exception taken?

1. Against *Desgourreaux*.—But this is a suit which might be agreeable to *Madame de Nemours*, as it tended to confirm the second testament, by which she impeaches the title of the *Prince de Conty*; a suit which did not prevent the officers from keeping up a correspondence with him, and writing to him the day after your confirmation of the former sentence, to come to Paris, and appear as a witness for *Madame de Nemours*.

2. Against *Foillard*.—This exception is more plausible. He will have the same cause of suit as the *Prince de Conty* in support of the first testament, in which he is a legatee of an annuity of twelve hundred livres; whereas he is only entitled to a sum of 4800 livres in the whole, under the latter; and, besides, he is named a testamentary executor.

As to the quality of executor, that is a charge, or at most no honour, which he has not accepted. There is no appearance of his accepting it; but, on the other hand, it is a circumstance which proves the probity of the witness, and the confidence which was placed in him.

As to the difference of the legacies, *Madame de Nemours* has no interest in opposing the argument which would apply against several witnesses in her own inquest; but the difference is not considerable to a person advanced in years. Some would take the annuity, others the legacy, according to the state of their family.

We are not to include here any thing concerning the arrears of an annuity, which he has independent of the two testaments.

Add his known probity.

3. Against *Dafflon, le Leu, Mademoiselle le Bastier*, three domestics of *Madame de Longueville*, to whom she has given life annuities by her testament.

What is this suit? An assignation both to the *Prince de Conty* and *Madame de Nemours*, as heirs, personally, and by way of hypothecation, upon the effects, for the payment of the annuity.

What opposition can there be to this demand? It is agreed before

fore you that *Madame de Nemours* was liable for her part; and can it be disputed that she was liable by way of hypothecation for the whole?

This assignation was made on the 19th of *August*, 1694, it is referred to the court of *Requêtes du Palais*, and there no opposition is made to it. In the mean time the cause proceeds between the *Prince de Conty* and *Madame de Nemours*. The sentence, which allows a proof by witnesses, is confirmed the 10th of *January*, 1696; and no defence is made against the demand of these three persons, until the 19th of *January*, the day on which the *Prince de Conty* begins his examination.

And what is the defence? It is reduced to these words. *Not receivable and unfounded*. Does she offer to pay her part? Does she contend that it is already paid? Nothing of the kind. But *Madame de Nemours*, it is said, has been obliged to pay the whole? What is the consequence of that? A recourse against the *Prince de Conty*, and not an exception against the witnesses.

### THIRD CLASS OF EXCEPTIONS.

#### *Animosities for favours refused.*

This exception is proposed against three of the witnesses, *Grappin*, *Desgourreaux*, *Tiffier*.

With respect to *Grappin*, they have given in evidence a letter, by which he requests the wardrobe of the *Abbé d'Orleans*, and a gratification.

But does it appear that they were refused to him? By no means, and besides what would be the consequences?

Could not a *valet de chambre* request a recompence for his services, from the heir of the *Abbé d'Orleans*, without rendering himself incapable of declaring what he knew respecting the state of his master.

*Desgourreaux*. He requested a gratification in lieu of an equipage. He requested *Guillein* to present a petition. He wrote on the 10th *April*, 1695, to ask for the payment of his salary, and he states himself to be very sorry, that *Madame de Nemours* was so long in determining, and that he wished to know what charge there was against him, having nothing to reproach himself with.

We may make the same observations upon this exception as upon the preceding; it would be difficult on such account to find fault with an ancient domestic; does it appear that the request was refused? On the contrary, you see that they endeavour to conciliate him, by letters written immediately after you confirmed the sentence, admitting the proof.

*Father Tiffier.* A distinction must be made between the letters, which are admitted, and the placets, which are disavowed.

In the letters he requests nothing for himself, but merely the payment of one year's salary, which was due to his brother; a chalice and some books for the *Abbey of St. George's*. There is one in which he says, that he wishes his request may succeed, so as to spare him the chagrin, which the sequel of this affair might cause him; terms which have no reference to the pretended menaces, which he is supposed to have thrown out.

It is true that in the placets, which it is pretended were joined to the letters, he requests the continuation of a pension of 500 livres, which *Madame de Longueville* caused to be given him during the life of the *Abbé d'Orleans*, but besides that these placets are neither acknowledged nor signed, can it be supposed that a priest, that the member of a religious society, honoured with most of the considerable employments of his order, that an old man of 78, about to appear before the supreme tribunal of the sovereign judge, would, out of revenge for such a refusal, commit a perjury in the face of justice, and render himself guilty of the blackest falsehood that ever was committed, as he is not content with attesting the insanity of the *Abbé d'Orleans*, but he must add an infinity of circumstances, which would be an assemblage and multitude of crimes combined in one.

Let us finish what regards those three witnesses, by three reflections common to them all.

1. They are witnesses who are almost absolutely necessary. It would require very strong arguments to reject them.

2. By deferring to grant the favours which were requested, they might be reduced to the impossibility of deposing against *Madame de Nemours*, for it might be expected either that they would not depose at all, for fear of losing the fruit of their services, or at least that, if they did depose, their depositions might be rendered useless by ascribing them to the refusal of these favours.

3. If we attend to probability, in observing the favours which were demanded on one side, and deferred on the other, and seeing the witness in suspense until after his deposition, will it not be most natural to conclude, that it was not the refusal of the favour which induced the deposition, since the favour was not as yet refused, but on the contrary, that it was the deposition which induced the refusal?

Let us proceed to examine, the

## FOURTH CLASS OF EXCEPTIONS.

*Attachment to the Prince de Conty.*

This last exception relates to *M.* and *Madame de Billy*. We are of opinion it ought not to have been proposed,

It is pretended that they are officers of the *Prince de Conty*, because they are keepers of the *Chateau de Trie*; which belongs to him.

The testament of *Madame de Longueville* dissipates this colour.

She gives to *de Billy* and his wife, a habitation in the *Chateau de Trie*, with the appointments amounting to 400 livres a-year, and in case her heirs should dispossess them, which she does not think likely, and requests them not to do, she directs the same sum to be paid to them during their lives.

They are not then officers of the *Prince de Conty*, but legatees of *Madame de Longueville*.

They do not even enjoy the habitation, but reside upon a neighbouring estate.

All the right of the *Prince de Conty* would consist in taking away from them this habitation. He might do so in legal strictness, but there are ties of honour and propriety in the requests of *Madame de Longueville*, which, amongst persons of this rank, may have all the effect of obligation and command.

It is added with respect to *Madame de Billy*, that she has assumed the quality of lady of honour to *Madame de Longueville*, but in fact, she performed the functions of that situation, and how does she express herself respecting it? She says, that she served *Madame de Longueville* in quality of lady of honour. Such exceptions are too vague to weaken depositions of this importance.

We have not taken notice of the fact of the *Chalice*, purchased by *Foillard*, nor of the gift which *Desgourreaux* received from *Abbé d'Orleans*, at the time when they now represent him to have been in a state of imbecility; because these are contradictions of their testimony, of which we shall have to speak in the sequel, rather than in examining the exceptions.

Such are the exceptions then which are taken on the part of *Madame de Nemours*. They are reduced to some suspicions against *Foillard*, on account of some difference between the legacies in his favour, and the two testaments; and to disallowing the two witnesses, who were under the age of puberty, together with *le Gené de Chateaufort*.

Let us now pass to the easy and summary examination of the exceptions which the counsel of the *Prince de Conty* have proposed against the witnesses of the opposite side.

Let us first attend to what they have said, concerning the deposition of the most illustrious witness, in the inquest of *Madame de Nemours*. It is unnecessary to add the name of the late *M. le Nain, Maitre des Requêtes*.

We avow, and the public will do us the justice to be persuaded, that we grieve to feel ourselves reduced to the painful necessity of examining the general suspicions by which they would offer to weaken the authority of a witness so worthy of our veneration.

It seems as if we were obliged to examine a reproach against virtue itself; virtue which a long life has consummated, and which a precious death that appeared premature, though at the age of 80, has consecrated to immortality.

Why is it not permitted to us, instead of entering into a discussion of this exception, to render to the illustrious person who is now no more, the tribute so justly merited of a solemn effusion of praise, which, coming from us, would be considered rather as an effusion of the heart, than as a production of the mind. We should represent him to you in the temple of justice, where his ardent zeal for truth, and his immoveable firmness in well doing, have frequently given consolation to innocence, and caused iniquity to tremble. We should shew him unto you at the foot of the altar, joining the example of a perfect christian to the accomplished model of a righteous magistrate. We should follow him in the splendid obscurity of his retreat, where we should see him nearer to heaven than to earth, receiving the benedictions which the scripture (a) has promised to the upright man, and in a happy old age, beholding the children of his grand-children, more loaded with merits than with years, sleep the sleep of the just, and living even after his death, not only in the remembrance of him which will subsist for ever, but still more, in the worthy heirs of his name, his fortunes and his virtues.

But whatever gratification we might have in rendering this public homage to his memory, we are obliged to confine ourselves within much narrower limits; let us renounce what might flatter the sentiments of our hearts, and not lose sight of the principal object, which we are this day to contemplate. Let us examine the indirect exceptions, which have been proposed in the most delicate manner, but which still have been proposed against *M. le Nain*.

We are not speaking here of the interpretation which has been given to his deposition. We are now only considering the qua-

(a) *Ecce sic benedictur homo qui timet Dominum, & videt filios filiorum suorum.*

lities of the witnesses, and not the inferences which are to be drawn from their testimony.

What is it then that is stated to you? that from the confidence with which *Madame de Longueville* honoured *M. le Nain*, that from the place which he held in the councils of *Neufchatel*, he ought to be regarded as one of the principal authors of the acts which were signed by the *Abbe d'Orleans*. That his fidelity, being engaged by the counsels which he had given, did not allow him to express himself in his deposition clearly, and in a manner, which might impeach the acts, that were equally just and necessary.

We know that a judge cannot depose against the sentence which he has himself given; a notary against the act which he has received; an advocate against the transaction which he has advised.

But what proofs are there, that *M. le Nain* is to be considered as the author of the instruments which were executed by the *Abbe d'Orleans*? It is known in general, that *Madame de Longueville* frequently consulted *M. le Nain*, which was a mark of the discernment and elevation of mind, that belonged to that great *Princess*. But can we conclude from this fact, that he took such a part in the instruments, that he could not depose against them, without indirectly destroying his own productions?

Can we look for a greater proof than his deposition itself, that his fidelity was not engaged by these instruments? Would he have deposed in this affair, if it was true that the confidence of *Madame de Longueville* had rendered him the only arbiter of the conduct of the *Abbe d'Orleans*, upon this occasion? If we were inquiring respecting any other person, we should examine first, what he ought to have done, and next, what he had done; but let us be permitted to reverse this order, with respect to the great magistrate, concerning whom we have the honour to address you. Let us say, *M. le Nain* has done it, therefore he might do it, therefore he ought to do it. In this sentiment we believe that all the public will accord with us, and therefore we conclude what relates to the quality of this witness; intending hereafter to give our opinion at length upon the nature of his deposition.

The remainder does not require a long examination.

*David* is not exceptionable; it is pretended that the *Prince de Conty* having removed him from the place of secretary, in 1685, he retained his resentment in 1696.

But that is hardly probable.

*Pervis* is a witness, who appears almost necessary.

But there are two great obstacles to the admission of his testimony.

1. He is a legatee of 8000 livres, by the last testament, and has nothing by the first.

2. He is a domestic of *Madame de Nemours*, a warden of one of her *Chateaux*. The witness must then be disallowed.

*'The remainder of this audience was employed in reading the depositions of the witnesses.*

### THIRD AUDIENCE.

AFTER having recited the facts and the arguments of the parties in the first audience, after having laid before you the two contrary histories of the life of the *Abbé d'Orleans*, by the depositions of the witnesses which were read in the second audience, a crowd of questions now present themselves before us, which are to be the matter of our examination, and the important subject of your deliberation.

Permit us, Sirs, that we may not be intimidated by their number and extent, to contemplate them separately, and in order to make a proper distribution, to divide this cause into two parts, with reference to the two testaments which form all the difficulty of it.

Let us examine, in the first place, the first testament in itself; let us see if it is true, as you have been told, that independantly of the acts which follow it, it includes in itself the cause of its ruin and the principle of its destruction.

Let us compare it afterwards with the other acts, and particularly with the donation, and the subsequent testament, by which it is said to be defeated. In a word, let us resume the plan and rule, which we pursued upon the interlocutory proceeding for the examination of this great cause. Has the first testament become void in itself? That is the first question—Is it revoked? That is the second. We should be happy if the decision was as short, and as easy as the proposition.

The whole examination respecting the caducity of the first testament is reduced to two principal points, both equally important and decisive.

The first, is whether the question is still open? Whether it is not prejudicated clearly, certainly, irrevocably, by the authority of your sentence?

The second, is reduced to examining whether, if every thing was yet entire, it could be contended with any appearance of truth, that

that the first testament is a title which is void, ineffectual, and destructive of itself.

In order to discuss the first point, and to decide how far the question is concluded by your sentence, permit me to represent the state of the contest, which was brought before you in 1695, and 1696.

*Madame de Nemours* was appellant from a preliminary sentence, admitting the *Prince de Conty* to make the proof, which he had demanded by a precise request, and she renewed upon that appeal the two principal arguments, which formed the whole of her defence in the principal cause; she maintained at first, that the *Prince de Conty* had no title, because the testament, which he alleged in his favour, was annihilated by the previous decease of the instituted heir; she added that this testament, inefficacious in itself, was revoked by a subsequent testament; and that such being the case, the rules of justice could not admit the *Prince de Conty*, to make a proof superfluous, illusory, contrary to his own interests; since even if he should prove the insanity of the *Abbé d'Orleans*, at the time of the last testament, the only inference which could be deduced from such a proof, would be that the *Abbé d'Orleans* was dead without a testament, as the first was of no effect, and the second was made by a person in a state of incapacity, and consequently that the law of blood and nature would have given the succession to *Madame de Nemours*, his only legitimate heir.

Upon the foundation of these two principal arguments, *Madame de Nemours* presented her appeal; it was pleaded during twenty audiences, of which a considerable part was employed in stating the legal objections to the first testament. Our ministry obliged us to take the conclusion, in a cause so celebrated and so difficult. What was the first point to which we directed our attention? it was the explication of the real state of the contest we represented, that the original sentence could not be regarded as an innocent temperament with respect to the questions of law, that it had not indeed pronounced a distinct judgment upon these questions; but that it had decided them tacitly, since the *Prince de Conty* would not have been admitted to the proof which he demanded, except by deciding that he had a solid interest and a certain quality, and that that interest and that quality having no other foundation than the testament of 1668, the original judges had regarded that act as a title equally inviolable and legitimate. We even made use of a comparison which is very common in the order of justice, and we observed that the question of the first testament was decided in the same manner, that the court ordinarily decides upon questions

of prescription or estoppel: when it is judged that a prescription is not sufficiently established, the court frequently contents itself with admitting the action without giving any express judgment as to the prescription; but will it be said, that the court has not judged definitively upon the prescription by their admitting the action to which it is opposed? Suppose, for instance, that *Madame de Nemours* had opposed a prescription to the *Prince de Conty's* demand of being admitted to proof. If the court had, notwithstanding, permitted the proof to be made, could it afterwards be contended that the prescription, without having been specially reserved, could be admitted as the foundation of a fresh dispute.

This, Sir, is what we had the honor to represent to you at the time of the former pleading, in order to apprize you of the importance of the sentence which you were then to pronounce.

We entered afterwards into an examination of the questions of law, which occupied at least one half of the long address, which the extent of the subject obliged us to make; you pronounced that celebrated judgment by which you freely and simply confirmed the original sentence, without even adding the ordinary clause, that it should be without prejudice to the rights of the parties.

It is not for us to offer to carry our views and reflections further; we, together with the rest of the public, respect that mystery which forms so essential a part of the religion of your judgments: you alone can know, whether, in the deliberation which immediately followed upon our conclusions, you took into consideration the questions of law, and whether you intended to decide conclusively upon them.

As for ourselves, who only propose our reflections with trembling, and who can only derive our information from the exterior declarations of your judgment, we are persuaded that its disposition necessarily implies a decision upon the validity of the first testament.

Two reasons, which we will mention in a single word, equally persuade us of it.

The one, that it would appear contrary to justice, to have admitted the *Prince de Conty* to a proof in which he would have no interest if the first testament no longer subsisted, without having previously examined not only the appearance but the validity of his right, and without being persuaded that that right being certain in itself did not require any proof by witnesses, except to destroy the only obstacle which could be opposed to it. Could it be possible that with any hesitation respecting this title, a proof would be admitted of so difficult a nature; that entertaining a doubt of the validity of the first testament, you would have permitted the

*Prince*

*Prince de Conty* to attack the second; and that the law being uncertain, you would, without a confident assurance respecting that, have passed to an examination of the fact?

For in short, Sirs, and this is the second reason which persuades us of the real prejudication of your sentence—Was the fact, of which you admitted the proof, of any consequence, could it be in any degree relevant to the decisions of the questions of law? The point in question was, whether the previous decease of the instituted heir had rendered the first testament void, and in order to come to a judgment upon that mere question of law, if it was ordained that the *Prince de Conty* might prove that the testator was in a state of insanity at the time of making the second. Can any thing be more divisible, more distinct, more independant, than these two questions? The first is absolutely preliminary to the second, and the second is entirely useless in the decision of the first. It was not then with reference to the question of law, that you admitted the proof, it was only with reference to the question of fact, and this last question could never have been examined, or discussed, or decided, without having formed a judgment upon the first: without that the parties would have been engaged in useless prolongations, in immense expence; and when they had satisfied your sentence, when one of the parties had examined eighty-five witnesses and the other seventy-six, it would have been said, it is not upon the circumstances of fact, but upon the points of law that the cause ought to be decided; thus the permission which you had granted would be useless, dangerous, contrary to equity and to justice.

Such, notwithstanding, is the sense which they would put upon your judgment, and which they do not support by any other reason than the mere name and general quality of an interlocutory sentence. It is true, that in general, an interlocutory reserves the rights of the parties entire, but that is upon the question to which the interlocutory sentence relates, and not upon the questions preliminary to it.

To express ourselves more clearly, you had to decide upon two questions, the one of law, which consisted in determining whether the first sentence was valid; the other of fact, in which it was to be decided whether the second was competent to revoke it. Was it upon the first question that you passed the interlocutory sentence? was it to decide this question of law that you allowed the examination of 160 witnesses? The mere proposition is absurd: upon what then did the interlocutory sentence turn? upon the question of fact, that is reserved and remains entire, but the first is decided, as it was absolutely preliminary to the second.

We might dispense with entering anew upon the discussion of the questions of law, upon which we probably occupied too great a portion of your time upon the former pleading; but as we shall always distrust even evidence itself, until it is confirmed by the authority of your judgments, we shall shortly recapitulate what we have already stated more at length upon these questions; we shall examine the new arguments which are said to be now brought forward, and we shall endeavour very summarily to shew that even if the subject was entire it would be still proper to decide in favour of the validity of the first testament.

[After a recapitulation of the former arguments in support of the title under the first will, he proceeded as follows:]

Against so many reasons fortified by the unanimous sentiment of the doctors, without its having been found possible, since the cause was before discussed, to discover even one who entertains the contrary opinion, except in the case of passing over a child, which is the only vice in the substance considered by some as not admitting of reparation by the codicillary clause: Against all these principles we say an objection has been made which is pretended to be absolutely new, although we had indirectly refuted it upon the former hearing.

And see in what this objection consists. It is so subtle, and, we may add, so contrary to all natural ideas, that we are not afraid of requesting a renewal of your attention in bringing it particularly before you.

We must necessarily suppose the case to which the law applies before we repeat the terms of it. A person in contemplation of death, makes a disposition which only amounts to a codicil, in which he charges his presumptive heir with a *fidei-commissum*. He dies, his heir repudiates the succession, which passes to the heir of the second degree. It is asked whether this heir takes its subject to the *fidei-commissum*? If, without going further, we were to ask the generality of mankind their opinion upon this question, we do not doubt but they would all answer, that if there were no particular circumstances, it ought to be decided that the charge of the *fidei-commissum* was communicated and extended to the second degree. But it is said, the law decides the contrary, and in fact it has the appearance of so deciding. These are the terms of it:—

“ *Illud certe indubitate dicitur, si quis intestatus decedens, ab eo qui primo gradu ei succedere potuit fidei-commissum reliquerit, si illo repudiante, ad sequentem gradum devolutu sit successio, cum fidei-commissum non debere, et ita imperator noster rescripsit. L. 1. § 9. ff. de legat. 3.*

But how is that law applicable to the present cause? you have been told that at the time of the testament, which it is said could only

only affect the moveables and the acquisitions, *Madame de Longueville* was the presumptive heir and in the first degree. Now it was she whom the *Abbé d'Orleans* charged *nominatim* with the *fidei-commissio*; then this charge does not pass to *Madame de Nemours*, who afterwards becomes heir of the first degree.

But in the first place they have not taken notice, that when the law speaks of the first and the second degree, it speaks of them not with reference to the time of the testament, which amounts to nothing in fixing the proximity of the heirs, but with reference to the time of the death. Then as *Madame de Nemours* was not only the nearest but the only heir at the time of the death, she ought to be charged with the *fidei-commissio* even by the very terms of this law.

But without resting satisfied with this first answer, let us observe in the second place, that we must not overlook the learned, the judicious, and the just commentary, which the *President Faber* has made upon this law. He has examined it in the fifteenth chapter of the fourth book of his *Conjectures*, and he demonstrates irresistibly, that we must reject the negation of this law.

There are two principal reasons for his opinion.

1. The jurist *Ulpian* would contradict himself, and that in one and the same law. For in the § 7 \*, he establishes the principle, that the heir in the second degree may be charged with the *fidei-commissio* in the same manner as the first, and in the § 9, which is that whereof the terms have been stated to you, he would decide that the heir in the second degree would not be charged, as if it was not always to be presumed when there are no circumstances to the contrary, that the testator intended to that which was in his power, and that he could never have it in his contemplation to make the *fidei-commissio* depend upon the uncertain event of the acceptance of the inheritance by the heir of the first degree. That would not be the only contradiction with which *Ulpian* would be charged. He decides in the law 61 *de legat* †. That if only one of the legitimate heirs was charged with the *fidei-commissio*, his replication would not prevent the *fidei-commissio* being due from his co-heir to whom that part would accrue, *et hic quasi substitutus cum suo onere consequetur ad crescentem partem icne.*

\* Nec tantum proximi bonorum possessoris, verum inferioris quoque *fidei-commissarii* possimus.

† Si Titio & Mævio heredibus institutis, qui quadringenta relinquebat, a Titio discenta legaverit, & quisquis heres esset, centum, neque Mævius hereditatem adierit trecenta Titius debebit. § 2. Julianus quidem ait, si alter ex legitimis heredibus repudiasset portionem, cum essent ab eo *fidei-commissa* relicta, coheredem ejus non esse cogendum *fidei-commissa* præstare portionem enim ad coheredem sine onere pertinere, sed per rescriptum Severi, quo *fidei-commissa* ab instituto relicta, a substitutis debentur, & hic quasi substitutus cum suo onere consequetur ad crescentem portionem.

Now if the co-heir whom the testator had not charged, is notwithstanding bound, why should the heir of the second degree be exempt, since the testator according to *Ulpian* might have charged the second degree in the same manner as the first? Does not even the comparison of the substituted heir agree perfectly with the heir of the second degree, when the heir of the first degree renounces the succession?

2. In the paragraph which is adduced on the part of *Madame de Nemours*, the jurist adds, that the emperor had so decided. Now on the one hand it is certain that this absurd decision is no where to be found; and we find on the contrary in law 61, which we have just cited, an opposite decision, for *Ulpian*, in obliging one co-heir to perform the *fidei-commission* which was imposed upon another, says, that that cannot admit of any difficulty since the rescript of the emperor. See then what is the rescript which is mentioned in the law that we are examining, a rescript very famous in the writings of the jurists upon this subject, by which *Severus* and *Antonine* decided that the co-heirs and substitutes succeeded to the charges in the same manner as to the effects; a provision which was extended soon afterwards to legitimate successions.

Such are the grand and solid foundations of the opinion of *Faber*, an opinion which appeared so just to *Denys Godefroy*, that he is content with referring the reader to that learned interpreter, as intimating where he is to seek for the true interpretation of this law.

But it is not necessary to make any retrenchment from the law. Let us say with the gloss, with *Bartolus*, with all the *Italian* expositors, that it ought to have effect in one single case, that is where *nominatim relictum est*, so that *unicus heres videatur operatus*, in which case the *fidei-commission* is merely personal.

But is that the case here? They have confounded two different clauses, the clause of institution, and the codicillary clause. It is true, that in the clause of institution, *Madame de Longueville* is charged by name; but it is not by that clause that we hold the legitimate successors to be charged with the *fidei-commission*, it is by the codicillary clause which charges the legitimate heirs in general.

Let us go further, and endeavour to shew, that it is so far from true, that *Madame de Nemours* is not comprised in the codicillary clause as legitimate heir, that it is almost impossible to refer that clause to any other person, and that she is charged with the *fidei-commission* almost by name.

Let us pursue our original ideas: the codicillary clause is a prayer addressed to the legitimate heirs. The *Abbé d'Orleans* had only three of that description, the *Comte de St. Pol*, *Madame de Longueville*,  
*Madame*

*Madame de Nemours.* He addresses the two first in the institution. He charges them by name with the *fidei-commission*, in favour of the *Princes de Conty*. He addresses himself to the last in the codicillary clause. Why? Because one of the principal causes for which that clause is subjoined, is that of the caducity of the institution; that is to say, the previous decease of the two instituted heirs. Then there is a case in which he supposes that the two first heirs will not to be in a condition to hear his prayers and obey his words, and notwithstanding he continues to pray, and to make his voice be heard. To whom then can he address himself? If it is true, that his object is his legitimate heirs, and that two of them are supposed to be dead, is it not evident that he can only regard the third heir, the only one who exists; that is to say, *Madame de Nemours*; and that consequently, as we have already said, she is almost by name charged by the testator.

But if this testament cannot be regarded as having failed of its effect, as it is supported by the codicillary clause, is it then revoked by the donation, or by the subsequent testament? This is the second part of the cause.

The donation forms a question of law, but one which is useless; the testament, a question of fact, but essential.

We say, that the donation forms an useless question of law, for to what is it reduced? To decide whether, according to the rules of law, an universal donation of present effects revokes an antecedent testament.

Two grounds have been stated. The incompatibility of the titles, but that is a proposition contrary to sound jurisprudence; the donation diminishes the profit of the succession, but it does not affect the substance of the institution; but besides, here is a conditional donation, the right of reversion always continued a property in the donor; could that have been opposed to the *Comte de Saint Pol*?

Second ground, change of intention, that might form a difficulty, not that it is true, that the property having been given without any charge to the *Comte de St. Pol*, it would not be again subject to the charge in reverting to the donor; but principally on account of the clause inserted in the donation, and which reserves the right of retinue to *Madame de Nemours* after the *Abbé d'Orleans*, a very strong presumption, to which, as it seems, nothing could be opposed except the strictness of the law; but such a presumption notwithstanding does not in itself destroy a testament. For instance, could this point be opposed to *Madame de Longueville* the instituted heir? Now from the instant that the institution is admitted to subsist, the *fidei-commission* which is attached to it subsists also. She

could not take the effects without the charge of restitution; she could only receive them to render them according to the disposition.

But once more, after having reduced this question to its real difficulty; let us say as we have said upon the former occasion, that before we examine what was the will of the *Abbé d'Orleans*, we must be assured that he had a will; now this is the very question in dispute, since the time of the donation is three days before that of the testament, and when it is contended that the *Abbé d'Orleans* was in a state of insanity.

And in order to evince still further the inutility of this question, let us say in one word, either the donor was in a state of sanity, and then why look for conjectures of his intention; and whether he did or did not mean to revoke the first testament by the donation? Can his intention be doubtful if his sanity was certain? Is it not written in his testament, which followed the donation? Or on the contrary, he was in a state of insanity; and in that case how could he change his intention, not having any to change? We shall examine in a moment the acts by which it is pretended the donation was confirmed. Let us rest the point upon this single reason, the fact is always decisive. If he was sane, the second testament proves that he intended to revoke the first. If he was insane, he could not revoke it either by the donation or the second testament.

At length we are arrived at the decisive point, and the real knot, at the essential question, we might almost say the only question of this long contest. Hitherto we have treated of several questions, which might appear more proper to satisfy the inclination or the prejudices of the parties, than to enlighten the religion of the judges; and carrying our exactness even to a scruple, we have deemed it not allowable to retrench any part of the cause by a kind of premature judgment and anticipated censure. We have preferred exposing ourselves to the imputation of saying things which might be useless and superfluous, rather than to the reproach of having omitted any which were useful and necessary; and we are persuaded it was our duty to represent at first this cause, as it appeared in the mouths of the parties, before we endeavoured to exhibit it as it ought to appear in the sanctuary of justice. But after having satisfied in this respect every thing which the delicacy of our ministry could require from us, we enter at present upon the more important and difficult part of our obligations, which consists in endeavouring to discover the light of truth from amongst the clouds of darkness that encompass it, and to place it before your eyes not covered with those extrinsic ornaments which frequently only embellish in order to disguise; but on the contrary, divested of all exterior

exterior advantages, reduced to that natural state of purity, of simplicity, of sincerity, in which it ought to present itself to the eyes of justice.

But what is this important truth which we are in pursuit of? You know, Sirs, that all the difficulty of this cause is reduced to examining, whether the *Abbé d'Orleans* was in a state of capacity or incapacity at the time of making his last testament? Such is the only object which we are this day to contemplate, and such at the same time is the deplorable lot, such the melancholy destiny of the house of *Lorraine*, so illustrious in its origin, so glorious in its progress, so splendid in its decline, that all which remains of its past grandeur, is, the single question whether the last heir of so exalted a name fell six months sooner, or six months later, into a state of insanity? Thus terminate the fortune and elevation of so many heroes. Their successor dies an idiot, we have not, even after his death, the consolation of being allowed to doubt the truth of his insanity. The calamity is certain, the date of it alone is doubtful. Six months are all the subject of this celebrated contest which is passing before you, and the magnitude of which only serves to proclaim still more loudly, the emptiness of grandeur, and the inconstancy of fortune.

- But before we enter into the examination of this question of fact, so important and so difficult, we think it is absolutely necessary to establish, in a few words, the general principles by which we may judge of the merit, of the force, and, above all, the preference of the opposite proofs. And that we may do this with order, let us first endeavour to find out what is in general that incapacity of the mind, which should render a testament invalid; let us then examine how this incapacity ought to be proved. To these two points, the arrangement of the general principles which ought to prevail, in this last part of the cause, is reduced.

What then, if it is possible to define it, is that state of incapacity which retrenches a testator from the number of citizens, and almost effaces him from that of men? let us not address ourselves to the ancient philosophers for a solution of this question: they might probably answer, that all men are in a state of actual and perpetual insanity, except that sage which every sect boasts of possessing, but which none of them can point out to others; they would, without hesitation, place amongst the insane, all who are either agitated by their own passions, or slaves to those of others; and changing the common ideas of men, they would render sanity still more difficult to prove than madness. Let us rather consult those who have tempered the excess of philosophy by experience in the affairs of the world, or by the principles of jurisprudence.

- What says that great man, who was, at the same time, an orator, a philosopher, and a jurist? (and to comprise more than all this,) what does the opinion of *Cicero* teach upon this subject?

Two different states divide all men, if you except the really sage (a). The one are deprived entirely of the use of reason, the others make a bad use of it, but there is not sufficient reason for declaring them to be in a state of folly; the one are destitute of the light of reason, the others have a feeble ray, which conducts them to a precipice; the former are dead, the latter ill; these still preserve an image, and a shadow of wisdom, which is sufficient for filling in an ordinary manner the common duties of society, they are deprived of a real sanity of mind, but can lead a common usual kind of life; the others have even lost that natural sentiment, which binds mankind together by the reciprocal performance of certain duties. Let us apply ourselves to this last character, which is the most sensible of all, and to which the application is the most easy.

A sane person, in the sense of the law, is one who can lead a common and ordinary life; an insane person is one who cannot even attain the mediocrity of these general duties. *Mediocritatem officiorum tueri et vitæ cultum communem et usitatum.*

But amongst those whom their weakness places below the last degree of men of common understanding, the jurists distinguish two kinds.

The one only suffers a simple privation of reason; the weakness of their organs, the agitation, the levity, the almost continual inconstancy of their minds, place their reason in a kind of suspension and perpetual interdiction, and cause them to have the denomination of *mente capti*, in the laws, and in the writings of the jurists.

In the others, the alienation of mind is less a natural weakness, than a real malady, frequently obscure in its cause, but violent in its effects, and which, like a wild beast, seeks continually to break the chains that bind it, and it is this malady which properly bears the name of fury.

The former, says *Baldus*, have an obscure and concealed fury, the latter have a striking and manifest insanity.

The last are in a state of drunkenness, of transport, of frenzy. The first approach rather to the state of insanity, an extreme decrepitude, their reason, like that of an infant or a dotard, is imperfect or worn out, but they are both equally incapable of mak-

(a) The word *sage*, being used in the *French* language to express both the elevation of wisdom, and a common state of sanity, has an effect in this discussion, which cannot easily be retained in translation.

ing a testament, because in the one reason is almost extinct, and in the other it is tied and bound by the violence of their complaint.

If these two states agree in this point, they are nevertheless distinguished by separate characters.

The state of fury is more violent, but it sometimes admits the hopes of cure.

The state of mere insanity is more tranquil, but it is almost always incurable.

The one is susceptible of paroxysms and intervals, it rises all at once, it diminishes in the same manner.

The other has not intermissions so marked, because the cause which produces it, that is to say, the weakness and debility of the organs, is nearly equal and uniform.

Finally, a declared fury is so obvious and evident, that it would be superfluous to distinguish the degrees of it, with reference to the incapacity of the testator, because it is certain that all furious persons, as long as their fury continues, are absolutely incapable of making a testamentary disposition.

On the contrary, mere weakness of mind is more susceptible of degrees, and of considerable differences; the incapacity increases and diminishes, in proportion to these degrees, and these differences: but who can fix them in general, who can mark precisely the frontiers, the almost imperceptible limits, which separate insanity from sanity, who can number the degrees, by which reason declines and falls into annihilation?

This would be to prescribe the limits of that which is illimitable, to give rules to folly, to be bewildered with order, to be lost with wisdom. The doubtful and uncertain point, at which reason disappears, and where incapacity becomes evident and manifest; can only be fixed by the particular circumstance of each individual case.

All that can be said in general is, that this incapacity ought never to be examined with more attention, than in deciding not upon a mere contract, but upon that act, which of all others demands at once the greatest degree both of capacity and will, that is, a testament.

The law which substitutes a testator in its place, which invests him with the power and character of a real legislature, which grants him the right to change, to discompose, to abrogate the natural and favourable order of legitimate successions, requires at the same time from him, both a capacity proportionate to the importance of his ministry, and a plenitude, and if we may so express ourselves, of a superabundance of will, and therefore, it renders

ders him capable of all kinds of contracts, previously to impressing him with capacity, necessary for making a testament.

Every body knows that persons under the age of puberty, but approaching to that age, may contract, with the authority of their tutors; but who ever conceived that the presence and authority of their tutor could render them capable of making a testament?

Minors contract amongst us, with the hopes of restitution, but they make a valid contract (a): this is not all, the laws of the church and the state give them the power of engaging themselves, by the most solemn and indissoluble ties; and at the same time that the law permits them to dispose not only of their fortune, but of their state, and their liberty, whether by marriage or religious profession; the same law declares them incapable of giving their effects by testament.

In the intention of legislatures, the progress of the will follows, and imitates that of the capacity (b). A person may engage himself by attorney; he may, by a general procuration, so far throw himself upon the fidelity of the person whom he entrusts, that without designing it, without even knowing it, he may enter into all kinds of obligations; but who will say that he can make a testament by attorney? However special the procuration may be, whatever may be the probity of the person entrusted with it, however wise the disposition, the testament will be always null, because it is not sufficient that a testament should be a judicious act, it must be the appropriate act, the personal act, the single act of the testator: he may take the assistance of counsel; the law does not prevent it; but he must always be himself the arbiter of his intentions. It is for him alone to pronounce, to decide, to will: never can his will be supplied by the ministry of another; if the jurist gives his advice to the testator, it is only as to the form and not as to the essence of the act; if he speaks, it is only to lend to the thoughts of the testator the necessary succour of legitimate expressions.

And what is the reason of the two differences between a contract and a testament? it is founded upon the most pure sources of sound jurisprudence. We shall only point at them in passing, that we may enter upon that which more nearly concerns the real state of the cause.

It is essential to human society that there should be contracts; it is not necessary that there should be testaments; there are many flourishing states, which have long refused to their citizens the

(a) Minority could not, according to the law of *France*, be alleged, as a matter of defence, and was only relievable by an action commenced within a limited time, for the rescission of the contract.

(b) These illustrations are not supported by the *English* law.

right of making a testament. Was there ever any which deprived them of the faculty of contracting all engagements?

The faculty of engaging is conformable to every kind of law, the law of nature introduces it, the law of nations augments it, the civil law perfects it.

The faculty of disposing by testament is the nature of civil law, or at most of the law of nations; but it is contrary to the law of nature, by which death deprives a man of every right over his property.

In a contract, each of the contractors has an inspector, or rather a censor, in the person with whom he contracts; and even if he should be deceived, his heirs may frequently have redress against his engagement.

In a testament the testator himself is his own censor, his own judge, his only inspector, his will is inviolable, he is the sole arbiter of his dispositions.

The entering into contracts is favourable, and almost always accords with the law; testaments are often odious, and every testator begins with thinking himself more wise than the law itself; in fact he ought to be so, when he has the right to abrogate it.

After this is it astonishing, if the laws have granted a liberty of entering into a contract at an earlier period than that of making a testament, if they have willed that contracts shall be more favoured, more common, more easy to make than testaments, if they are content with a moderate capacity for the one, whilst they require a great one for the other; lastly, if the contract can be supplied by a substitute, whilst a testament never can.

Let us rest then upon these two important maxims, which are the result and substance of the general observations we have made concerning insanity.

The first, that every man who cannot discharge the most common duties of society, even those which the last degree of reasonable men are accustomed to fulfil, ought to be judged still more incapable of making a testament.

The second, that this incapacity is more important, in deciding upon the validity of a testament, than merely in determining upon the force and nature of a contract.

But how is this incapacity to be proved? That is the second general point that we have proposed to examine.

All men are born in a state of sanity. That is the common disposition of nature: reason is the lot of man; it is that which distinguishes him from other animals. A man without reason is little more than an organized body, who only retains the shade and figure of a man. His state is a kind of prodigy, and monster in nature.

Hence

Hence arises that common and general presumption, that every man is in a state of sanity; that insanity ought to be proved, but that a proof of sanity is not necessary. Hence that certain consequence so often insisted upon on the part of *Madame de Nemours*, that an allegation of sanity is much more favourable than an allegation of insanity, and that, as in a case of doubt, the suffrages of the judges ought to incline to the side of innocence, because the presumption of criminality is odious; so in a conflict of proofs they should determine in favour of sanity, because a presumption of insanity is an act of rashness.

From this first principle, which it would be easy to prove by a great number of authorities, we proceed to the second, which is a consequence of it, and which has not less the marks of perfect evidence.

This principle is, that nothing is in general more difficult than to prove the fact of insanity, particularly in a man whom death has put beyond the circle of accusing or justifying himself in the sight of justice. It is not only to combat a natural presumption; it is also to render an invisible and interior quality sensible and visible; the eyes cannot be the first judges of it. It refuses, as it were, the judgment of the senses. We do not contemplate it in itself, we see nothing but copies, portraits frequently obscure and imperfect, which are traced in the visible actions. The judges themselves do not see these actions, they learn them from the recital of witnesses; and who can be assured of the fidelity of those? perchance they work after copies, which they frequently disfigure in endeavouring to imitate.

If we look for something more certain in written instruments, we cannot be long in our examination without finding a conflict of presumptions that render them obscure, equivocal, uncertain; and yet it is by these proofs, uncertain in themselves, that we are to arrive at certainty.

But let us examine their nature more particularly. Let us begin by looking for the characters, with which written evidence ought to be accompanied, in order to be as perfect as they are solemn.

Let us distinguish between two very different kinds of acts, the confusion of which occasions one of the greatest difficulties in this cause.

Acts of the first kind are so personal, so attached, so inherent to the will of the person making them, they bear so evident a character of his action, of his judgment, that they can never be regarded as the work of any foreign hand.

Such are the public functions of magistracy exercised with wisdom, and preserved in the sacred repositories of the oracles of justice.

Such

Such are also the interrogatories of those who are accused of a crime, or suspected of insanity, and who appear in the presence of their judge destitute of all succour, alone, without any other support, than that of their innocence or their sense, in the hand of their own counsel, as the scripture says.

Such is often (in order to come nearer to the circumstance of this cause) an olographic testament, full of wisdom and prudence without suspicion of suggestion or fraud. Is not this, Sirs, what you have judged according to **our conclusions** in the case of *Bouvalet*, where this great circumstance distinguished with so much advantage the testament from that which we are now examining?

But there are acts of a second kind, in which we see nothing evidently appropriate and personal to the party executing them, except his mere signature; acts which are no proofs either of sanity or insanity, and which can only furnish an indirect presumption by a conclusion that is probable, but not infallible.

Let us developpe this idea still further, and endeavour to place it in its clearest point of view.

In every act which has no other mark of the capacity and will of a man than his signature, we ought to distinguish two things.

The one is the substance of the act, the agreement which it contains, the affair which is concluded by it, in the language of the jurists, *negotium quod geritur*.

The other is the capacity, the state, the disposition of the person who executes it.

The first of these, that is to say, the clauses, the stipulations, the nature of the act, is proved by the act itself. To this may be added every thing which regards the exterior solemnity; all this is established, proved, demonstrated by the contract itself. The law does not require any other proof; and, not only does not require but rejects it; and this is the real case to which the act applies, *contra scriptum testimonium, non scriptum testimonium non admittitur*.

But it is not the same with regard to the state of the person who executes the contract. The act supposes his capacity, and does not directly prove it. It is not for that purpose that it is executed, those who participate in it do not contemplate the proof of that fact, those who contract do not doubt of it. The notary, an authentic witness of their engagement, is not appointed by the law to be the judge of their capacity. It is sufficient that they should not appear to him incapable; and this maxim is so certain, that although in testaments usage has introduced the ordinary clause, which states that the testator *was of sound mind and understanding*, this clause is never regarded as a written proof of sanity. Your sentences have frequently decided that notwithstanding this clause the fact of insanity might

might be proved without a process of falsification against the act. And why? because, in this point, the notary exceeds his power. He is indeed an instrumental witness, honoured, as it were, with all the confidence of the law, depositary of the public faith; but all these good qualities are only given him to render a faithful testimony of what is executed between the parties, and not of their capacity and sanity. And if this principle prevails, even in regard to those acts in which the notaries make an express mention of the sanity of the testator, how shall it be with respect to other acts where this expression does not occur, and where it is absolutely unknown? And what shall be said in regard to contracts where the notaries never examine the capacity of the parties when they are not evidence in regard to testaments themselves, where they examine, where they attest, where they certify it?

We do not mean to conclude from all these reflections, that an act is an immaterial argument to prove the sanity of the person signing it; we think, on the contrary, that it forms a strong and powerful presumption in its favour—but of what nature? This is what remains for us to examine.

All the force of a presumption consists in drawing from a known fact a consequence more or less probable, which conducts the mind to the knowledge of an unknown fact.

Let us apply this proposition so as to render it still more evident. It is to be examined, whether a person, who has signed an act, enjoyed a perfect freedom of mind?

What is the known fact?—his signature of the act. What is the unknown fact to which they would arrive by the consequence deduced from the fact which is known?—the assurance of his sanity. And how are these two facts connected together, except by an argument merely founded upon probability? That is to say, that it is ordinarily to be presumed, that an act arises from the will of the person executing it, and that when the act is reasonable, the will which consented to it was the will of a reasonable man.

But is this presumption infallible? This, we conceive, will not be alleged. For if the probability, which serves as the foundation of it, can never be fallacious, it must follow, that no proof of insanity can ever be offered against such an act; that every man who has signed a judicious contract, has consecrated, as it were, his understanding by such act, so that it can never afterwards be called in question.

But without being satisfied with this general reasoning, although decisive, is it not evident that it is very possible for a man to sign an act without willing it—without being capable of willing it—  
without

without even knowing it? Does not experience furnish us with an infinity of certain and incontestable facts which destroy this probability, notwithstanding the strength of presumption in its favour? In short, when it is even supposed that a man knew he signed an act, and that he intended to sign it, what consequence can be drawn from it, except that at that moment he was not absolutely insensible, that some ray of reason might have intervened, that he has done a sensible action? But is the doing one sensible action a sufficient proof of sanity? And shall that single action destroy the proof of a contrary habit? This reasoning can never be answered by the mere evidence of the act itself.

Nothing, then, can overturn this important principle of the distinction of two kinds of acts; the one personal in their very substance, the other only in their signature; the one, in which a man finds no counsel but in his own reason, no resource but in himself, and which are consequently a direct and immediate proof of the sanity of his understanding; the other, in which an exterior counsel may frequently hold the place of understanding, or an exterior impression assume the attributes of will, and which only form an indirect presumption of capacity; a presumption neither infallible, since it is contradicted by experience, nor invincible, since it is every day destroyed by the authority of your judgments.

Let us now proceed to the second kind of proofs; that is, proofs by witnesses; and let us endeavour to discover the general principles by which we may judge of their force and solidity.

We shall at first make one general reflection upon this kind of proof, which seems a natural consequence of what we have already observed concerning proofs by writing.

If it is true, as nobody can doubt, that it is very rare to find written acts which constitute a direct and immediate proof of sanity; if there is but a small number of those personal acts which bear the sensible and luminous image of the mind and will of the person who has executed them; if all other acts only form a mere presumption, and a proof which is as imperfect as it is indirect, what remains but to conclude that sanity or insanity are not facts attested by facts in writing, and, consequently, that they can only be naturally and ordinarily proved by the deposition of witnesses?

Not only is insanity or sanity a fact, but it is an habitual fact, a disposition, a permanent affection of the mind; and as habits are only acquired by reiterated acts, they are hardly ever proved, except by a long succession, a continuity, a multiplicity of actions, of which it is impossible to have any other proof than the testimony of those who have been attentive observers of them.

Let us add, that this proof is often more strong than that which

is derived from acts in writing, because witnesses can state actions more considerable in their duration, more important in their nature, more decisive in their circumstances, than the mere signature of an act however judicious.

Let a witness, for instance, attest that he has seen a judge, his colleague, discharge with accuracy all the functions of magistracy, give his judgment, and make his report, with the greatest possible wisdom and maturity—would not such a fact be much more considerable than twenty rapid momentary signatures, frequently conducted by the hand of another? And, not to go out of the present cause, is there any one of the written acts adduced to prove the sanity of the *Abbé d'Orleans*, which *Madame de Nemours* would not give up to be allowed the single proof of having celebrated masks, which, nevertheless, could not be proved in all its circumstances, except by the deposition of witnesses?

It was not then this state of capacity or incapacity that *Cujas* intended to speak of when he said, that, in questions relative to the state of persons, written acts are more efficacious proofs than the deposition of witnesses. Upon what subject was *Cujas* treating in this passage? Of birth, filiation, legitimacy, liberty, all questions of state, in which a proof by writing is prescribed, and determined by the law itself, because the discussion relates less to a matter of fact than to a presumption of law.

But although the question of insanity is a real question of state, it is, nevertheless, very different from those which commonly bear that name. It is a mere fact, of which the proof depends, like that of all other facts, upon the deposition of witnesses; the form of it is not prescribed by the law: it would be absurd to require the attestation of it by formal acts and authentic instruments. Folly is, as it were, an innocent offence, an irregularity exempt from punishment, a disorder purely physical; and, as in case of real crimes which infringe the laws of morality, and trouble the order of civil society, we seek no other proof than the testimony of other men; it seems, also, that in that derangement of mind which violates the rights of nature, and is degrading to reason, we cannot desire any proof more natural and convincing than that which results from the unanimous suffrages of witnesses, who are the earliest judges upon this kind of contests.

After this general reflection upon the necessity of proof by witnesses, we may consider it either with respect to its exterior and circumstances, or its interior and substance.

We call the exterior of the proof every thing which regards the number, the quality, and the dignity of the witnesses.

On the contrary, we call the interior of the proof the facts, the circum-

circumstances, the judgments, which are included in the depositions of the witnesses.

Let us begin with the exterior, and examine the principles, which relate to the quality and number of the witnesses.

We do not stop here to take notice of the weight, which the dignity and probity of the witnesses may give to their depositions, which is a point that cannot be disputed, provided all the other circumstances concur with the quality of the witness, and that his testimony is not a mere vague and general deposition, but particular, circumstantial, supported and approved by the facts which it includes.

The number of the witnesses demands a little more examination, and furnishes matter for two questions in this cause.

The first, which does not require a long discussion, consists in settling, whether a superiority in the number of witnesses is sufficient to form a considerable and almost decisive advantage; a question which ought only to be treated in one of those tribunals, where they reckon up their doctors on the one side and on the other; where the industry of the party consists in citing a great number of authorities, and that of the judges is limited to counting them; but which ought not even to have been proposed in the most august senate of the world, where the opinions of the doctors, and the suffrages of the witnesses, are not counted but weighed. *Non enim, says the law, ad multitudinem respici oportet, sed ad sinceram testimoniorum fidem et testimonia quibus totius lux veritatis adhibet.* L. 21. § 3. ff. de testibus.

Besides, if the witnesses had confined themselves to the general fact of sanity or insanity, if they had said on the one side, *the Abbé d'Orleans appeared to us to have lost his reason*, and on the other, *he appeared to us a man of understanding*; some advantage might be derived from the plurality of the witnesses; but they have all entered into an explication of particular facts, and it is in the comparison of those facts, rather than in that of the number of witnesses, that the examination of the proof ought to consist.

The second question, much more important than the first, relates to the particular facts, and consists in adjusting whether those facts which are only attested by a single witness, may nevertheless enter into the number of circumstances, which constitute the general proof of sanity or insanity.

Without entering into long dissertations, let us attend to the distinction which is established by the unanimous suffrage of all the expositors; their authorities are collected by *Mascardus*, in his treatise *de Probationibus*; and this subject appears to have been

very fully investigated by *Felinus*, one of the most illustrious commentators on the decretals.

The matter to be proved, is either a certain, single, determinate fact, and then we must apply the common maxim, *unus testis nullus testis*, because this being an essential fact, it is necessary that the depositions of two witnesses should concur in establishing the truth of it.

Or on the contrary, the question relates to a general fact, a habit, a multiplicity of actions, from which only one consequence can be drawn, and then it would be both impossible to require two witnesses upon each fact, and unjust to reject the depositions of single witnesses, respecting individual facts.

We say in the first place, that it would be often impossible to require from a party, that each fact should be proved by two witnesses. For insanity or sanity are conspicuous in all places, and at all times, and yet the same persons cannot always be present at this multitude of actions; but if it were absolutely required, that they should all have seen the same action, it must then be supposed that a person, whose state should become the subject of contest, would be always surrounded by a croud of witnesses, faithful and assiduous spectators of his conduct, who might at some future time speak to the same circumstances of sanity or insanity.

But not only is this supposition absurd and impossible, we add that it would be unjust to reject the depositions of single witnesses, upon individual facts.

"The general fact is, the only one of which you have ordained the proof, and you know that in this cause, although *Madame de Nemours* contended that it was necessary to allege particular facts of insanity, you paid no regard to this argument, but purely and simply confirmed the sentence, which admitted the proof of the general fact of insanity; the particular facts are infinite, how would it be possible to allege them all in an interlocutory proceeding? the witnesses are left at liberty to chuse them, and to propose them as so many proofs of the general fact; but this general fact is always the subject matter of the proof, and the principal object of judicial enquiry; it is sufficient that all the witnesses should say, that the person, whose state is contested, appeared to them to be sane or insane: it is not necessary that they should all agree in the reasons which they assign for their judgment: they are conformable and accordant as to the principal fact, they only differ in respect to particular circumstances, they go to the same point, by different routes, and those who are separated in the means, are united

united in the end. It is the same, as if two experts concur in declaring an instrument to be false, but found their opinion upon different observations, when they are examined separately; does there not result from their unanimous judgment, although founded upon different motives, a proof as strong as any which can be given, depending upon the science of experts? In the same manner, witnesses give their testimony respecting the state of a man; one witness brings forward one fact, another adduces another; they all equally pronounce a conformable judgment upon the strength or weakness of his mind. Can it be pretended that the proof is not perfect, because each circumstance is not attested by two witnesses? do we not know what takes place every day in questions of state, especially those which regard filiation and legitimacy, that it is very rare to find two witnesses, who bring forward precisely the same fact? One establishes one presumption, another furnishes another conjecture, and it is from the assemblage of all these presumptions and conjectures, that the proof is formed: an infinity of atoms compose one body, and although each in particular seems to have no extension, they form altogether an extended substance; many rays of light, which separately have not any sensible lustre, produce when united a splendid radiance, so many particular facts form one general fact.

Let us finally add, that in these cases, as we have been told on the part of *Madame de Nemours*, the witnesses enter as it were into a participation of the functions of the judges, whose judgment they sometimes anticipate; and as it is not necessary that the same facts should determine all the judges, and although some of them are influenced by one fact, and others by another, it is still said that they are all of one opinion, when they all agree in favour either of sanity or insanity; so witnesses ought to be regarded as unanimous, when, from different particular facts, they all draw the same conclusion as to the general fact.

The writers, and particularly *Muscardus*, after having stated some of these reasons, draw this inference—*Non tamen de necessitate requiritur quod sint testes sed satis erit ut saltem singulares sint, quia et tunc recte probabunt furorem.*

Let us, however, acknowledge that in criminal matters, our usage has restrained this opinion within more narrow limits, and that when the question turns upon the general fact of usury or extortion, although regard is paid to witnesses who depose to particular facts, it is required that there shall be a certain number, to form a proof from their united depositions, and that ten witnesses together only avail as one. But besides that this principle was never introduced into civil causes, it would be useless in this case, where

there are on the one side and on the other, not only 10 and 20 witnesses, but 76 on the one side, and 85 on the other, and consequently much more than would be sufficient, to form a proof even of particular facts.

Let us now penetrate into the interior of the proof, and endeavour to include in three or four general principles, every thing which regards the nature of the facts, and their different favour, in the parallel which may be made of the opposite inquests.

The first principle, as we have already slightly mentioned, is, that there are two kinds of facts.

The first is a general fact of sanity or insanity, and this fact alone is not sufficient; the witness must explain the reason of it, or rather of the opinion which he has formed of the state of the testator. *Non creditur testi nisi reddat rationem dicti sui.* This is the common axiom of all the writers. In case of a visible fact, where he might say, *I have seen it*, he is believed upon his oath; but in the examination of an invisible quality, where he can only say, *I believe it*, he ought to assign a reason for his judgment, and as an expert cannot be attended to, if he merely says, *I deem such a writing to be false*, without stating his reasons, so a witness upon the fact of insanity is not intitled to credit, if he does not submit both his judgment and the reason of it, to the intelligence and superior authority of the judge.

The second principle which respects the particular facts, that should appear in the depositions of witnesses, is, that notwithstanding the general presumption, which is always in favour of sanity, those who allege insanity have one great advantage over those who assert the contrary.

The latter can in general only prove negative facts, for to constitute a positive fact of sanity, it is necessary that it should not only incontestibly shew, that the person who is the author of it, could not do it without being in possession of his reason at the particular moment; it must be also shewn that he could not perform such an action, without being in a state of sanity, both in the time preceding, and in that which follows it. Without that it may very well prove a rapid and transitory moment, but not a fixed and constant habit. On the other hand, most of the facts of insanity are positive; a single action may sometimes suffice for a perfect proof of folly, because there are some actions, which bear so marked a character, of illusion, of derangement, of alienation of mind, that it is impossible for a man in his senses to commit them. Such is the unfortunate condition of men, that they may in a single moment give convincing proofs of their folly; whilst a whole course of life is hardly sufficient to establish a firm, certain, and evident opinion

opinion of their sanity. In a word, a person in a state of insanity may perform sensible actions. Then such actions do not prove that a testator is not in that state. A sensible person cannot commit a striking and distinguished act of folly. Then one such action absolutely excludes the presumption of a sound understanding.

Then if there is an opposition in the proofs, if a great number of witnesses appear on the one side for sanity, and on the other for insanity; if the conflict becomes entirely doubtful, by what rule can it be discovered? This is the last maxim which remains to be examined.

Two rules, both of them certain, and which seem nevertheless to favour the two opposite parties, occasion all the difficulty which arises in establishing this maxim.

On the one side it is certain, that negative witnesses ought never to be compared with positive. Two positive witnesses, say all the writers, ought to outweigh a thousand negative ones.

On the other side it is not less certain, that witnesses who depose to sanity, are much more favourable than those who allege insanity. Two witnesses of sanity, say the same writers, are preferable to a thousand witnesses of insanity.

How are we to reconcile these two principles, which appear to be equally certain, and at the same time seem distinctly opposite?

We think, that without having recourse to the subtilities of some interpreters; without examining whether insanity is more a privation of sanity, than sanity is a privation of insanity; or whether insanity is only a negative state, or on the contrary, a real and positive disposition; without entering into these dissertations, which are more adapted to the schools, than to the majesty of this audience, it is sufficient to attend to a single distinction, which appears to us to be so manifestly founded on reason and natural equity, that the mere statement of it will serve as its proof.

The witnesses who have been examined on the one side or on the other, either confine themselves to the general fact of insanity or sanity, or on the other hand, they have stated particular facts, which ought necessarily to serve as a proof of the general fact.

If their depositions are general, if they are satisfied with saying, that the testator appeared to them to be in a state of sanity, or that he appeared to be in a state of imbecility; then the favour of sanity ought to prevail, and that for two reasons, the one that in case of doubt, the balance ought always to turn on the side of reason, as on the side of innocence. The other, that the two proofs are in this case equally imperfect, and because neither the

one or the other of the parties has proved what he has alleged, we rest upon the general and natural presumption of sanity.

But if the depositions are circumstantial, if the witnesses have entered into a detail of the proofs of their judgment, then it is no longer upon a principle of favour, upon the general fact, that the cause ought to be decided; but upon a comparison of the particular facts, in which the one have the advantage of being positive, and the others, on the contrary, are for the most part only negative; and this distinction is clearly marked by the authors themselves, who say, that two witnesses of sanity ought to outweigh a thousand of insanity. *Quod precipue veram esset*, (these are the words of *Mascardus*): *quando illi pauciores deponerent in specie pluris autem in genere.*

What is then the case, according to this author, in which the favour of sanity ought to outweigh the number of witnesses to the contrary? It is, when the witnesses in favour of sanity give a reason for their judgment, enter into a detail of facts; *deponunt in specie*; and on the contrary, the witnesses of insanity only state the general fact, *plures autem in genere.*

In case this conflict and contraction appear even in the particular facts, proposed on the one side and on the other, all the maxims which have been urged on the part of *Madame de Nemours* ought to have their application. It is in this conjunct case, that all the prerogatives which she alleges become so many decisive arguments, and that in case of doubt, the favour of the heir by blood, of a defendant, of a person in possession, of one whose pretensions accord with written instruments, ought without difficulty to be preferred to a stranger, to a demander, to a party not in possession, and to one who indirectly combats the instruments, by accusing their author of insanity.

We have perhaps dwelt too long upon these preliminary reflections. But we thought that our ministry absolutely obliged us to investigate them, both because this part of the cause was the most neglected by the parties, and because it is absolutely necessary to agree at first upon certain rules and measures, by which we may decide upon the weight and importance of the opposite proofs.

Let us now enter into the detail of these proofs, in which little more will remain than to recapitulate the facts, and afterwards to apply the principles which we have hitherto endeavoured to establish.

Let us begin by the proof founded upon the written acts; this is the first in the order of time, and it has the advantage of being appealed to by both the parties.

We

We might say at once with sufficient probability, that this examination is become useless and superfluous, after the former solemn judgment which you have pronounced upon this contest. We might represent to you, that all these acts do not form an invincible presumption in favour of the sanity of the *Abbé d'Orleans*, since, notwithstanding all these acts, you have admitted and ordained a proof by witnesses. It is true that they have adduced two or three new acts, but these are of slight importance, and contain only a mere signature, without any other indication, any evident mark of the will and reason of the person who signed them.

Shall we venture to go still further, and without violating the profound respect which is due to the secrecy of your judgments, may we enter into the sanctuary of justice, and endeavour to penetrate as far as we can into the motive of the sentence which you have pronounced? Shall we be permitted to propose our feeble conjectures, and to say to you, with that diffidence and reserve which ought to belong to us, that the most apparent reason of your judgment is the principle which we have stated, and in which we are confirmed by your judgment, "that written acts are no direct proof of sanity, except when they are entirely personal, and appropriate to the party executing them, and that otherwise they only form a presumption, liable to be contested and even destroyed by a contrary proof"? Now you have deemed that all these acts have no character, which evidently shews them to be the work of the person executing them; that on the contrary, it might be presumed that his family had more share in them than himself, and that at least the fact being doubtful, and depending upon the state of the *Abbé d'Orleans*, nothing but a proof by witnesses could enlighten this doubt, and remove this difficulty.

But although you have not considered the acts as forming a decisive presumption, you have not judged that they can form no presumption at all, and you only intended to join to that presumption, the assistance of a greater proof: thus we are obliged once more to discuss these acts, in order to examine precisely the extent of the presumption resulting from them.

They are distinguished into three classes, with reference to the three different periods of making them.

The first precede the testament.

The second accompany it.

The last follow it.

Let us begin by examining the first, that is to say, those which were made before the return of the *Abbé d'Orleans* to Paris, and, which is the same thing, up to the time of his majority.

What

What do we find in this first period? Two *arrêts*, some acts of administration, such as receipts and directions for the common expence of his family, and lastly two letters, the one of *Madame de Longueville*, and the other of *Metayer*.

The *arrêts* do not require any explication. It is sufficient to observe their date.

The first was pronounced on the 22d of *July*; it confirms what had been agreed upon by the relations, it admits the letters of emancipation, which the king granted to the *Abbé d'Orleans*, and the *Comte de St. Pol*.

It is usefess to dwell upon examining the inferences deduced from this sentence. It is not comprised in the time to which the court has decided the proof to be confined; it can only be made use of to defeat some anterior facts, which have been mentioned by three or four witnesses, on the part of the *Prince de Conty*. But without anticipating at present what we are to observe in the sequel, concerning the proof by witnesses, we only remark at present, that the single consequence which can be deduced from the sentence of emancipation, is that the facts which previously occurred, were not regarded by the relations as indubitable signs of a formed insanity, but as equivocal actions, which might receive a favourable interpretation, since they did not prevent them from consenting to the emancipation.

The second *arrêt* is of the 2d of *September*, 1670; it permits the *Abbé d'Orleans*, and the *Comte de St. Pol*, to relinquish certain estates, for the purpose of paying *Madame de Longueville*.

But, besides that this *arrêt* is precisely at the commencement, and within the six first days of the time to which you have confined the proof by witnesses, who does not see that it was a mere formality, a matter of style, in which the *Abbé d'Orleans* could take very little part? And in fact he paid so little attention to the consequences of this affair, that without waiting for the conclusion of it, he had set out on the 30th of *August*, upon the journey of the river *Loire*.

The acts of administration are very few in number, one or two receipts, and as many directions, which only require a very moderate capacity: we shall examine this kind of acts more particularly in the sequel of the cause.

There are then, properly speaking, only two pieces in this first period which are of any importance, the one is the letter of *Madame de Longueville* to the *Curé de Coulomiers*; the other the letter of *Metayer* to *St. Beuve*; but as the latter has a necessary connection with the donation, we shall include it in the explication of that act, and at present only speak of the former.

You recollect, Sirs, the fact which is the subject of the letter of *Madame de Longueville*, and the very terms of it, which have been read to you several times, have acquainted you with its real spirit.

The *Abbé d'Orleans* celebrated in the parish of *St. Maur* the marriage of the daughter of his nurse with a man of the diocese of *Meaux*. The *Curé* of *Couloniers* had given him permission for the purpose. The bishop of *Meaux* had consented on account of the man being his diocesan. Therefore, as was very truly observed on the part of *Madame de Nemours*, nothing was wanting to the exterior solemnity of this marriage. But, notwithstanding this, from motives which are unknown to us, *Madame de Longueville* was troubled, alarmed, and had scruples respecting this marriage. She wrote on the 13th of *August* to the *Curé* of *Couloniers*, informing him of a conversation, which she had had with the archbishop of *Paris*, whom *Madame de Nemours* represents as her adviser; she states to him that the archbishop of *Paris* had assured her, that he had not given permission to those whom the *Abbé d'Orleans* had married; she requests him to investigate this affair with prudence and secrecy, so as to remedy and rectify it, if it should be found necessary. She particularly intimates to him, that this fact should teach him, that it was not proper too readily to grant permissions to marry out of his parish, adding, that it would not be proper to give any such to her son.

Who can help believing, that this letter is a written proof of the inquietude, of the distrust, of the continual fear, which *Madame de Longueville* entertained, respecting the ecclesiastical functions of the *Abbé d'Orleans*, and that, even before the time at which the proof of the *Prince de Conty* ought to commence? We see her doubting of the validity of this marriage, instigating the *Curé* to apply a suitable remedy, exhorting him not to grant similar permissions in future, enjoining him never to grant any to her son. She supposes then that he was surprised in respect to the celebration of this marriage; she did not think him in a proper state to administer this sacrament, she requires the *Curé* to inform himself of the truth of the fact; and as her tenderness and prudence were equal to her piety and zeal, she recommended him to maintain a secrecy and silence upon the subject. Who can combine all these circumstances, without forming a very disadvantageous opinion of the state of the *Abbé d'Orleans*? It is, however, this same letter which *Madame de Nemours* would appropriate, by a conclusion which she draws from it in favour of a state of sanity.

And what is this conclusion? It is reduced to this negative argument. In this letter we observe *Madame de Longueville*-entirely occupied

occupied with the care of preventing the *Abbé d'Orleans* from administering the sacrament of marriage; but at the same time she suffers him to say mass. Then she thought him capable of performing this latter ministry, although the former appeared to her to be above his age and capacity.

We shall examine presently, what was the conduct, or the forbearance of *Madame de Longueville*, respecting the important circumstance of the mass; but in the mean time this letter does not contain any proof of it. What! because *Madame de Longueville* does not approve of her son having celebrated a marriage; must you from that, (for that is the whole amount of the letter) from that alone, conclude that she approved and authorized his celebration of the mass? The argument only requires to be stated.

But, say they, the celebration of the marriage is itself a proof, in writing, of the sanity of the *Abbé d'Orleans*.

We will not reply, that this fact took place on the 27th of *April*, consequently anterior by four months to the period of the proof; we will go further, and ask why *Madame de Longueville* testifies so much inquietude, if this act bears the character of wisdom in its author? Why make those secret enquiries, with which she charges the *Curé of Coulomiers*? Why prohibit him from granting similar permissions to the *Abbé d'Orleans*?

For, in fine, she could only be disturbed respecting this marriage, because it was not celebrated in the legal and canonical forms, and in that case it does not prove the capacity of the minister, or, on the contrary, all these essential forms were properly observed, as is contended by *Madame de Nemours*, and then it is manifest, that the scruples of *Madame de Longueville* could have no other object than the state of the *Abbé d'Orleans*. What then is the object of the defenders of *Madame de Nemours*, when they take so much pains to prove that nothing was wanting to the solemnity of this marriage, since the only consequence that can be drawn from this observation, is that all the difficulties of *Madame de Longueville* referred to the person who celebrated it?

We do not think it necessary to say any thing more respecting this letter, or to shew that it ought to be regarded as a proof of the weakness of mind, that had begun to shew itself in the *Abbé d'Orleans*.

Let us now come to the more important acts, that is to say, those which nearly accompany the last testament.

Let us examine all the circumstances of them, the time, the place, the persons passing them; their number, their nature, and lastly, the presumptions arising from them.

At what time are they executed? In the first moment of his majority, all included in the space of seven weeks.

What

What preceded and what followed them? They are included between the two facts, which are equally striking and essential in this cause.—The first is the fact of *Gué de Loré*, and what is in truth the faithful and simple recital of this adventure, which makes so conspicuous a figure in the pleadings of this cause?

The *Abbé d'Orleans* returns towards *Paris* two months before his majority. He takes a hired carriage at *Angers*. All his domestics accompany him. He arrives at *Gué de Loré*, that is at one day's journey from *Paris*. He there meets a valet of the *Comte de Saint Pol*, who gives him a letter, for we may add this parol proof to the proof by writing. At the reading of this letter, surprised and frightened, he sends his almoner to *Paris*, with some of his people, to endeavour to appease his family, and obtain his pardon. He sets off instantly, he hires in a hurry three horses at one place, three chairs at another, arrives at *Orleans* the same evening, and stays there thirty-nine successive days in an obscure inn. He only leaves it to return to *Tours*, where he had as little to do as at *Orleans*, and does not come back till he has completed his majority; and on the day after his arrival, and even in the morning, he signs one of the most important acts, which is adduced as a proof of his reason.

What has been said to excuse, to cover, to give a colour to this extraordinary adventure? It is pretended, that in the former journeys of the *Abbé*, there are instances of levity; and that at most, this event would prove his wise and respectful submission to the orders of his family.

But, had this return no other cause, than a natural inconstancy, a change of inclination, a kind of libertinage of mind? Why then return as far as *Gué de Loré*, if he had no thoughts of coming back to *Paris*? Why approach within one day's journey? Why come in a public conveyance, in which the places were taken all the way to *Paris*? Why change this design all at once, at the sight of a valet, at reading a letter from a brother, over whom nature had given him the rights and authority of an elder? Why trouble and distress himself, not daring to shew himself at *Paris*, why repose more confidence in his almoner's negotiation than in his own? Why this sudden departure, this course so little suitable to the dignity of his birth? Why, after this, continue at an inn in *Orleans* forty days, and not return till three days after his majority, exactly in time to sign all the acts? Are this multitude, this mass, this combination of so many singular circumstances, sufficiently explained by the mere example of the former journeys, in which there is nothing at all resembling the fact in question?

If they rest upon the last solution which they would offer, if they

they say that this return, or rather this precipitate flight, is an effect of the blind submission of the *Abbé d'Orleans* to the orders of his family; what do they prove by this answer, except the fact insisted on by the *Prince de Conti*, that the family of the *Abbé d'Orleans* exercised an absolute controul over his actions; that the *Comte de Saint Pol*, who ought to have respected the prerogative of age and birth, governed him less as a brother than as a master; that all the illustrious relations who presided over his conduct, did not choose that he should appear at court, or in *Paris*, except at the time when his presence might be absolutely necessary?

And in fact, have they been able to suggest any other reason, than the condition to which the *Abbé d'Orleans* was reduced, that could lead his family to prevent his coming into *Paris*? And, if this reason is not only the most probable, but the only one that can be reasonably imagined under all the circumstances of this affair; what remains, but to conclude, that *Orleans*, and the other cities on the *River Loire*, were a kind of exile, to which it was judged convenient to banish the *Abbé d'Orleans* until age, rather than reason, enabled him to sign all the acts which might be necessary for the advantage of his family?

Such is the first fact, which precedes the execution of the writings.

You may recollect the second; it was one of those which appeared the most important and decisive, at the time of the interlocutory sentence.

In the course of the journey that immediately followed the acts that we are about to state, the care of the expence of the *Abbé d'Orleans* was committed to one of his valets, called *Peray*. He rendered an account of them every month to his master, and at the foot of each there is an allowance in the hand writing of the *Abbé d'Orleans*. At the end of four months, he ceased to have this employment; he wished to have a general discharge, and in this discharge, which includes all the preceding accounts, the *Abbé* declares, that he gave it in the presence, and by the advice and counsel of *Dalmont* his ecuyer.

What is the cause of this very extraordinary declaration, which also appears in two other pieces? It is a person of full age, a priest, the eldest branch of the house of *Longueville*, who is speaking. What is the important act which he signs? the allowance of an account of expence for three or four months, which he had audited himself, every month in particular; and in an act of this quality, he marks the circumstance of the presence, advice and counsel of his ecuyer:

It

It is *Peray* who desires this declaration for his discharge? but if that is the case, *Peray* and all his family judged him incapable of regulating his expences.

Was it the *Abbé d'Orleans* himself who thought the precaution necessary? But this second supposition is still more difficult to comprehend than the first. Shall we find another example of a person in his senses, of full age, of a priest, who supposes himself to require the assistance and counsel of his ecuyer, for the allowance of an account, who thinks he ought to express that circumstance as essential and necessary in the discharge which he signs, who submits himself voluntarily to the inspection of such an attendant, and who places himself under the yoke of a domestic curator?

It is true, that this important fact did not take place until four months afterward; but it must be observed, that it goes back almost to the time of the testament, for the month of *March* is comprised in the general discharge, and the testament is of the 26th *February*, having an interval of only a few days; therefore, although the fact did not take place till some time afterwards, its consequence and intention is applied to the time which immediately follows the testament.

Such then is the time in which all the acts were passed, all in the first moments of majority, all in less than two months, all between the adventure of *Gué de Loré*, and the fact respecting *Dalmont*.

But at what place were they passed? Was it in some remote corner, where the *Abbé d'Orleans* had no other counsel than himself, no other assistance than that of his own inclination? It was in the middle of *Paris*, and in the bosom of his family.

And who are the persons with whom he engages in the most important of these acts? It is his family themselves; if we except some contracts, from which we can draw no other inference than of his mere signature. It is not then the case of a man who contracts freely with all kinds of people, who enjoys the peaceable possession of his estate, and who is transacting personally the most important affairs with strangers, which forms at least a strong presumption of the public opinion, that he is in a state of sanity.

He had not then one of those characters of mind, which are firm, solid, exempt from all suspicion of their conduct, in which madness is regarded as an unforeseen accident, as an unexpected misfortune, as a thunderbolt which heaven darts upon the earth, to manifest the weakness and infirmity of human reason; on the contrary, it was the case of a man whose genius was below mediocrity,

mediocrity, of uncommon levity, of extraordinary inconstancy, low inclinations, a sordid avarice, an obscure life, dishonouring the great name of *Longueville*; his continual excursions without connection, without utility, without design, were the true, the faithful picture of the agitation of his mind. His incapacity was so great, that if we believe *Madame de Nemours*, he was ignorant at the age of twenty, and at the time of the first testament, whether his succession would belong to his relations or his friends.

Who then, once more, are the persons who speak in these acts?

On the one side, a family attentive to conceal its misfortune, and to make dispositions suitable to its grandeur and dignity; on the other, a man suspected of derangement of understanding, perhaps already fallen into a state of insanity, but certainly in the approach to it.

Let us follow the other circumstances; let us examine the number and nature of these acts.

The number furnishes reciprocal arguments to both the parties.

According to *Madame de Nemours*, their multitude irresistibly shews, that the *Abbé d'Orleans* was in the peaceable possession of his state.

If we attend to the *Prince de Conty*, the number of those acts in itself affords a violent presumption of weakness of mind, in the person executing them. They do not permit him to return to *Paris*, until his age rendered him competent to make an engagement; hardly is he arrived, when they load him with the signature of acts. Is it not visible, that they are in a hurry to take advantage of the remains of his docility; that they wish to anticipate that fury which was rapidly advancing, and the fatal moment in which it would be necessary to place him in a state of confinement?

And what is the nature of all these acts? is there any one which, by its dispositions, by the clauses which it contains, by the reservations which are made, bears an evident character of the sanity of the *Abbé d'Orleans*?

In the first place, we must retrench the greater number of these acts, such as the contracts for annuities, the ratification of an inconsiderable exchange made by *Madame de Longueville*, in the capacity of tutorefs, the acquittance given to the *Marquis de Beauvron*, the warrants for pensions; in all these acts there is nothing personal, except the mere signature, and we have shewn you that that is not sufficient to dissipate the suspicion of insanity.

To what then are all these acts reduced?

We can only reckon five that are of importance, except the testament itself, which we shall examine separately.

And what are these five essential acts?

The transaction of the 16th *January* with *Madame de Longueville*, the act of the 31st with the *Prince de Condé*, the universal donation of the 23d of *February*, in favour of the *Comte de Saint Pol*, and finally, the two procurations of the 26th *February*.

The transaction in itself, has nothing which is proper and particular to the *Abbé d'Orleans*, nothing which can be regarded as his work, and in a word, nothing personal: nay further, there is a kind of demonstration that he did not know the detail of the clauses of this act; and that he signed upon the faith of his counsel, and upon the credit of *Madame de Longueville*. You recollect the date of this act, it is of the 16th *January*, 1671; the *Abbé d'Orleans* arrived on the 15th, in the evening; the act is very long, it required a least a day's reading, for a man so little versed in business as the *Abbé d'Orleans*, and it occupied more than eight days meditation on the part of those who prepared it. Yet, this long, important and difficult act was signed in the morning; it was impossible for the *Abbé d'Orleans* to have read it, understood it, and examined it in all its parts; and let it not be said, that in the month of *September*, his relations had permitted him to enter into the transaction with his mother; things had changed their complexion since that time. As he was then a minor, his relations only permitted him to relinquish the estate upon a regular estimate; but after his majority, he fixes the estimation himself, he regulates the price of the lands, and all the clauses which are the natural consequences. This act is entirely different from that which was projected; and once more this act was examined, approved, and signed by him in the space of a single morning.

The second act, that is to say, the transaction by which the *Prince de Condé* gave the estate of *Nesle* in payment, was not indeed signed until fifteen days after the *Abbé d'Orleans's* return to *Paris*; but it is at the same time true, that these fifteen days were not employed in deliberating upon the conditions of the treaty, since these were all regulated before his arrival; the procuration, by virtue of which it was executed, is at the foot of the treaty, so that nothing could be added to it; now the procuration was signed on the 15th *January*, that is on the day of the *Abbé's* arrival, and sent afterwards to *Paris*, with the treaty completely prepared and ready to be signed. It was signed in this state, and is it not evident, that independently of the consent, of the will, of the examination of the *Abbé d'Orleans*, the act was resolved upon and settled, and only waited for the mere formality of signature.

The two procurations do not raise any particular presumption of sanity, they are like all the rest of the acts, which only speak as it

were by their mere signature. It is even contended, that they form a proof of insanity; it remains then only to examine the donation; and that it is the only act in which there are some clauses capable of inducing a presumption of sanity.

Such, for instance, are the reservation of an usufruct of sixty thousand livres, which appears too great for a person in a state of imbecility, the reservation of a gross sum of 60,000 livres, the moiety of the *Hotel de Longueville*, and the furniture, the power of disposing by testament of the revenues of two years, immediately succeeding the death of the *Abbé d'Orleans*.

But on the other side, they remark an universal spoliation, an abdication of all property, an affectation of inserting clauses, which did not concern the *Abbé d'Orleans*, and which had no other object than the interests of *Madame de Longueville*, and in this conflict, in which each party pretends to have the advantage, conjectures multiply, presumptions increase on the one side and on the other, and the proof becomes doubtful and uncertain.

On the one side, *Madame de Nemours* contends, that all the acts, and principally the donation, are so many legitimate proofs of the liberty, the sanity, the perfect reason of the *Abbé d'Orleans*, that all of them are judicious, reasonable, useful, necessary, and proclaim the sanity of their author. What could be more sensible, than to take advantage of the first moment of his majority, to extinguish the most favourable debt of his family, by giving the estates in payment to *Madame de Longueville*? Could he refuse to receive the estate of *Neste*, by which the *Prince de Condé* discharges the debt owing from him? Was it not proper to give up to the *Comte de Saint Pol*, all the rights and advantages attached to seniority, which he had himself solemnly renounced, by consecrating himself to religious profession; but at the same time, was it not right to reserve a considerable usufruct, a habitation suitable to his birth, a liberty confined within reasonable limits of disposing of certain sums? In short purposing to take long journies, and to go out of the kingdom, could he have made a more suitable division of his confidence, than that which he did make between *Madame de Longueville* and *Porquier* in the two procurations, by giving to the one the nomination to offices and benefices, and to the other the administration of his revenues?

On the other side, the *Prince de Conty* tells you, that there are two general views, arising both from the contracts and the donation, the one of which shews, that the *Abbé d'Orleans* had the very smallest share in all these acts; and the other discovers, that they are much less the titles of wisdom than the proofs of insanity; since all these acts have no other object than to strip him of his effects,

effects, to place him beyond the reach of injuring others and himself, and in short to reduce him to a kind of secret and domestic interdiction, less striking, but not less efficacious than one which might be more public and solemn.

It was not the advantage of the *Abbé d'Orleans*, which was the object of all these acts, but the interest of *Madame de Longueville*, and of the whole family of *Longueville*, and is it possible to have any doubt of this first reflection, when we see that in the most important of all these titles, they have inserted an extraordinary clause, a clause contrary to the principles of law, which do not admit one person to stipulate and contract for the interests of another; a clause by which the *Comte de Saint Pol* was obliged not only to ratify the transaction which the *Abbé d'Orleans* had made with *Madame de Longueville* and the *Prince de Condé*; but also to discharge *Madame de Longueville* from the jewels with which she was charged by the inventory, and from a general account of the tutelage? Is it possible, after this, to doubt of the real motive, of the single principle of all those acts, and can it be supposed, that they were the work of the *Abbé d'Orleans*, when his interest is the only one which is neglected?

In three days, the eldest branch of the *Maison de Longueville*, scarcely of age, without any apparent reason, is stripped of all his property; the donation takes from him his present effects, the testament which they get him to make deprives him of the disposition of his future. They leave him indeed a handsome usufruct to give some colour to the act; but if they give it him with one hand they take it away from him with the other, since, by the procuration which they make him sign at the same moment, they interdict him at least in point of fact from the administration of his usufruct. At last, to put the final seal to his interdiction, they give him an inspector, a kind of domestic curator, whose presence, advice, and counsel, he a short time afterwards thinks necessary, for the allowance of a trifling account of expences.

Such, Sirs, is the substance of the two contrary presumptions, which the same acts furnish to the opposite parties. It is for you to decide upon their plausibility, to judge of their weight, and to turn the balance, which is almost equally suspended between the one conjecture and the other.

But for ourselves, since our ministry obliges us to give an explicit opinion upon this conflict of presumptions, two reflections present themselves, the first of which is superfluous, because the second appears to be quite sufficient.

In the first place we should observe, that we cannot contemplate all the circumstances which attend these acts, without admitting

that there is in the presumptions offered on the part of the *Prince de Conty* a degree of probability so sensible and so apparent, that the mind can hardly refuse its assent to them.

And we add, in the second place, that it is not necessary that these presumptions should outweigh those of *Madame de Nemours*, it is sufficient that they should be equal, and in case of this perfect equilibrium, nothing but the proof by witnesses can turn the balance and fix the uncertainty of conjectures.

To explain our opinion more particularly, the presumption which the *Prince de Conty* derives from the acts themselves, is more strong than that of *Madame de Nemours*. It is true, that on the one side it is difficult to reconcile them, and particularly the donation, with the supposition of sanity, and that on the contrary, it is easy to accommodate them all to the hypothesis of insanity.

But who can doubt of the first point, when he examines what is really done in the principal acts under consideration?

We know that it is sufficiently common in great and illustrious families, for the eldest member, who devotes himself to the service of the altar, to transfer to the younger the great advantages ordained for him by nature; therefore we should not be surpris'd to see the *Abbe d'Orleans* give to the *Comte de Saint Pol* the lordship of *Neufchatel*, renounce his government, and even make a considerable donation of his most distinguished territories.

But this is not what passes in the donation that we are examining; it deprives the *Abbé d'Orleans* of all kinds of property, it is not only the splendid titles incompatible with the obscurity of his own life; not only duchies and governments that he gives to the *Comte de Saint Pol*, but he throws every thing into his hands without reserving any property, except a moderate sum not sufficient to discharge his testament. He reduces himself to the state of those whom the authority of justice only interdicts from the disposition of their principal, leaving them the administration of their revenues; and upon what occasion does he make this sacrifice to the *Comte de Saint Pol*? Is it on account of an establishment worthy of his birth and his great qualities? Are there any other apparent causes? Do the age, the infirmity, the temper of the *Abbé d'Orleans*, inspire him with this entire and universal renunciation? There is nothing of the kind, no occasion, no new conjuncture, no probable reason, except that having attained his majority, his age has placed him in the condition of rendering himself destitute, and of being the instrument, as he was already the subject, of his own interdiction.

The principle of discretion then did not require from the *Abbé d'Orleans* what he did upon this occasion; on the contrary, if he had

had any understanding, it is difficult to suppose that at the age of twenty-five, he would have cast away his patrimony by his first piece of liberality, and by one single donation deprive himself of the opportunity of ever making any other.

The Roman jurists carried this matter further than we do, and so far from regarding this donation as an act of reason, they would have considered it as a kind of proof of insanity; and although our usage has admitted of universal donations, it must be admitted that of all acts none is less adapted to constitute a proof of sanity. But without dwelling longer on these general reflections, let us proceed to the second point, and see if these acts, which are not a necessary proof of sanity, are not, on the contrary, intimately connected with the contrary supposition.

To be convinced of this, we are persuaded that it is sufficient to take a single and connected view of all the circumstances which we have hitherto examined separately.

Let us then represent to ourselves a nobleman of the quality of *M. de Longueville*, of a frame of mind below mediocrity, of a continual volatility and inconstancy, wandering from place to place at the suggestions of his inquietude, governed by his family, not even daring to return to *Paris*, because he was forbidden by the *Comte de Saint Pol*, constrained to hide himself at an inn at *Orleans*, and to wait forty days for the permission of returning into the bosom of his family, ready to sign acts which it is evident he never had time to examine, capable a short time afterwards of respecting the authority of an attendant, who naturally ought to tremble before him, persuaded that he has need of his advice, of his counsel, of his presence, to allow an account of four months current expences. Represent to yourself then a man of this quality, so little conversant with business, that, according to *Madame de Nemours*, he did not know whether his succession would belong to his relations or his friends: contemplate under all these circumstances, this man in the space of three days stripped of his property, renouncing his present effects by the donation, his future by the testament, of which he does not even continue master, and of which he leaves the minute in the hands of *Porquier*, that is, of a man devoted to the *Comte de Saint Pol*, the universal legatee of the testament; in short, depriving himself even of the administration of the usufruct, which was reserved to him; and all this for the purpose of making useless journies little suited to the dignity of a priest, still less suited to the dignity of his family, and in a few months afterwards taken into confinement during the continuance of these journies. And what took place in his family when he was put into confinement? Was any thing

thing changed in the plan which was adopted for the government and administration of his affairs? On the contrary, it was resolved, that until a solemn interdiction, they should continue to act by virtue of the procurations; the state of fury itself did not derange the measures of the family; and in fact, had they not placed the *Abbé d'Orleans* in a situation in which the most extravagant fury did not require any alteration, because he was already impotent, disarmed, incapable of hurting himself or others?

Let us suppose that the family of the *Abbé d'Orleans* had in fact the design which is imputed to them, and of which the acts excite very strong suspicions; let us suppose, that they intended to divest the *Abbé d'Orleans* of all his effects, and that, wishing to save themselves the pain of a public interdiction, they sought the means of accomplishing a private and domestic interdiction, which, as we have already said, had less notoriety, but not less effect than a solemn and authentic judgment; this design has nothing in it which is not at once lawful and probable, it would be even probable in a private family, and it approaches almost to certainty in a family so exalted as that of the *Abbé d'Orleans*.

But this design once supposed, what measures would they take to carry it into execution? Would it not be necessary first to make him sign acts for terminating in a discreet, equitable, and reasonable manner the greatest affairs of the family? Would they not afterwards make him give to the *Comte de Saint Pol* a liberty which himself could only abuse? and was it not a matter of prudence to impose upon the donatory the essential condition of executing all the acts which the state of the *Abbé d'Orleans* might have rendered doubtful? Would they not, in stripping him of the property of every thing which he possessed, leave him an usufruct proportionate not only to his present state, but to the uncertain event of his recovery? And because they could not intrust him with the administration of this usufruct, was it not natural to make him sign procurations? In fine, because it was not possible to prevent his regulating at least the ordinary expence of his establishment upon his journies, would they not place over his conduct a wise and faithful inspector, who might prevent surprise from the inferior domestics, and assure the family of the regularity with which every thing would be conducted?

Such are all the precautions which it seems possible for human prudence to take, in executing a plan which contains nothing improbable in itself, and such at the same time are those which have been actually taken. What then is the consequence to be deduced from this supposition?

If the family intended a secret interdiction of the *Abbé d'Orleans*, they

they would have taken all the measures which we have represented. Now they have in fact taken all these measures. Then it is more than probable, that they had such intention. Let us judge once more of the will by the works, of the intention by the actions, of the design by the event. Every thing which they could do, if they had had such an object in view, they have actually done. Then we may suppose that this view was the real principle and motive, which prevails in all the acts.

From the bosom of these presumptions, in the midst of these acts, issues the last testament; an act in which there are two things to be considered.

1. The general presumptions of the wisdom of the testament, and of the favourable situation of the heirs, have already been proposed, and the court has decided that these grounds were not sufficient to disallow a proof of insanity.

2d. A great number of particular circumstances, which fortify the suspicions of insanity.

1. What was the motive of the testament? None was necessary. He had given every thing by the donation. It is even pretended that the donation had taken away the charge of substitution, no present benefit engaged him to make this disposition. Why press him so much, except for the apprehension that he would even lose the faculty of making his signature?

2. The deposit of this testament, the universal legatée becomes the master of it.

3. The inexplicable circumstance of the papers found with the testament. These were either made after the testament or before. It is impossible and absurd to suppose they were made after. The *Abbé d'Orleans* deposited his testament as soon as it was made, and set off himself eight days afterwards. Could it be supposed that he intended to change all the legacies without exception? For in the projects they are all different from the testament. They must then have been made before.

But if that is the case, what is the date of them? Perhaps they were made long before. What is the design of them? To confirm the testament? If he made them before the second, it was the first which he intended to confirm; then he never intended to change it; then there was a surpise.

What arguments are opposed to all these presumptions, which arise against the testament, as well as the acts which accompany it? We have observed three principal ones.

The first, that a charge of this design, this pretended concert of the family of the *Abbé d'Orleans*, was injurious to the memory of the illustrious relations, who composed the most noble and

principal part of it. But this topic was more adapted to excite the eloquence of the orator, than to afford a principle for the decision of justice, and does not appear to us to be so clear in point of fact, as they would persuade you that it is.

If the acts which were passed by the *Abbé d'Orleans* were not all suitable to the state of his family, to the grandeur and dignity of his house, if they were not such as he would have signed himself, if he could have been apprized of his situation, supposing it to be such as is contended by the *Prince de Conty*, there might be some ground for the reasons which have been alleged, for saying that it was not probable that relations not less illustrious by their virtue than their birth, would have abused the credulity, the facility, the docility, of a person destitute of understanding, to make him sign all kinds of acts contrary to his real interests.

But what have they made him do (we are speaking upon the supposition of the *Prince de Conty*), which he would not have done himself, if he had possessed an adequate knowledge? Acts which were innocent, acts which were necessary, acts which could hardly be deferred, acts, in short, in which the welfare and splendour of the family of *Longueville* were involved. If at such a conjuncture, in which it is more easy to blame what has been done, than to find out what it is best to do; if under the apprehensions of an approaching state of fury; if to prevent the consequences of an interdiction, and of a long state of controul; if to prevent the *Comte de St. Pol* from falling into the twofold misfortune of being the brother of a madman, and of being only his younger brother in relation to the property; in short, if to give a certain form to all the affairs of a great family, they made use of the remains of docility, which were found in a weak and deranged understanding; if they did in respect to him what is done every day in the case of minors, and what the *Roman* law permits to be done with respect to those who are under the age of puberty; that is to say, the getting them to sign acts, which they neither could nor would intend to sign of themselves; under all these circumstances, is it necessary to revile an illustrious family, which wanted neither understanding nor discretion, which did what they could, rather than what they wished? Should we not, on the contrary, commiserate them, excuse them, and wish that it may never happen to ourselves, to be reduced to a similar conjuncture, where good counsels are rare, where censure is easy, where the evil is evident, and where the remedy is doubtful and uncertain?

The second general argument, by which they would combat the presumption, which the *Prince de Conty* derives from the acts themselves, is more considerable. You have been told that the acts re-  
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pel the suspicion, and that they contain clauses which can only agree with the supposition of sanity,

It must, in the first place, be admitted that such clauses only occur in the donation. The other acts contain nothing, which is either necessarily or probably a proof of sanity, in the person signing them.

But what are these clauses in the donation, which so manifestly repel even the slightest suspicions of such a concert in the family?

The usufruct, you are told, is too considerable; why leave 60,000 livres a-year, to a person out of his senses, and who did not before commonly spend more than thirty? Why give him besides a gross sum of 60,000 livres? Why reserve to him the moiety of the *Hotel de Longueville*, with furniture of the value of 100,000 livres?

In short, why reserve the liberty of making a testament? Why stipulate a return in favour of *Madame de Nemours*?

One general principle is an answer to all these objections. It is sufficient for rendering all these reservations probable, to suppose in general, that the family had foreseen a case which might arrive, that is, the recovery of the *Abbé d'Orleans*. It would not be just in such a case, that he should be reduced to an usufruct, which might be sufficient for a person in a state of insanity, or that he should have nothing to dispose of either for the purpose of recompensing his domestics, or for other just and suitable causes.

Could they besides, at least without publicly declaring him to be out of his senses, reserve to him a less considerable revenue? Could they exclude him from the *Hotel de Longueville*, or take away from him the furniture, which was necessary for occupying it? Would not this have been falling into the inconvenience which they wished to avoid, the recognizing his insanity, and furnishing a written proof of it?

The faculty of making a testament which was reserved to him, did not continue long. They make him consummate it in three days afterwards, by a testament of which *Porquier* was the depository; and if a right of return is stipulated in favour of *Madame de Nemours*, is that stipulation so much personal to the *Abbé d'Orleans*, as it is suited to the state of his family?

Finally, are we called upon at present to penetrate into all the secret reason of these acts? Besides these apparent reasons, might not the family have an infinity of others, if they could be heard upon the subject? Perhaps they might say, that so considerable an usufruct was destined for the accumulation of a fund, which  
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upon some occasion might be a resource to the *Comte de St. Pol*, without his having the power in the mean time of dissipating it. Is it necessary precisely to define the motive, which made them add such and such a clause, and is it not sufficient to shew in general that there are no clauses, which necessarily exclude the supposition of insanity, and which incontestibly establish the contrary presumption?

But, say they, the donation is an inviolable title, whether we examine what preceded it, or contemplate what followed it.

That which preceded it, is the letter which *Metayer* wrote to *St. Belus*, by order of the *Abbé d'Orleans*, a letter which he approved by some words in his own hand, and which proves, say they, demonstratively, that the donation is the act of his will.

What follows, is the approbation of the family, the confirmation of the king, the precise authority of your sentence.

Let us endeavour in two words to answer these last objections, and begin with the letter of *Metayer*.

What are the circumstances of it?

1. Why did not the *Abbé d'Orleans* write it himself? No affair could be of greater importance to him. He was not one of those who are afraid of the trouble of writing themselves. We see him writing upon affairs of no consequence, entering into the most insignificant details, record that he had taken care of furnishing the chamber of his *Ecuyer*, and a thousand other things of the like kind, which shew that he wished every thing to pass through his own hands; and that he did not even neglect those cares, to which it was entirely beneath his dignity to attend.

Yet we see him here, upon the most important occasion of his life, borrow the hand of his almoner. This is the first circumstance.

2. What are the great affairs which prevented his writing himself? You have already seen in the deposition of the witnesses. He was 30 days without any occupation at *Orleans*; at the utmost, according to *Madame de Nemours*, one hour of his time was destined to the celebration of the mass, and if we believe the witnesses of the *Prince de Conty*, he was occupied in running about the streets of *Orleans*, in jumping upon his shadow, in dancing upon the ramparts. Such are the important causes, which prevented his writing himself respecting an act, which was to divest him of all his property.

3. What does he call this act, or rather, what is it called by his almoner? A treaty which he was about to make with the *Comte de St. Pol*. It is true, that the donation is subject to several conditions, but the name of a treaty is not very suitable to an act of this

this nature. Is it even proved that the project of this act was ever sent to the *Abbé d'Orleans*, as they have ventured to assert? The letter does not say so; on the contrary, it states that *Porquier* had orders to communicate this treaty to *Saint Beuve*, and if the *Abbé d'Orleans* had seen it, so important a circumstance would not have been omitted in the letter.

4. How was this letter to be delivered? It is not confided to the ordinary course by couriers. *Dalmont* is to be the bearer of it, *Dalmont* who did not return to the *Abbé d'Orleans* until the month of *December*. *Dalmont* who, as has been proved by the witnesses, and as appears by other circumstances, was in possession of the secret of the family. *Dalmont*, in short, who sets off as soon as the letter was written. It is dated on the 28th, and he goes on the 29th.

5. In what manner does the *Abbé d'Orleans* approve of this letter? Let us repeat the terms of his addition? "Be diligent that I may be able to say to you with joy—*In viam pacis*.—I am wholly yours.—Your servant.—Every thing which *Metayer* has told you of my intentions is true.—Adieu, without adieu."

We do not think that these terms clearly manifest a great disengagement of understanding, as has been insinuated; but they prove that upon the diligence of *Saint Beuve*, and those who were employed in preparing the act, depended the return of the *Abbé d'Orleans*. *Be diligent that I may say to you with joy*, &c. and does not this irresistibly prove, that he was not yet at liberty to return to *Paris*, that the orders of the family prevented his entrance, until the acts were prepared and ready to be signed?

Let us add to all these reflections, that there was an interval of two months between this letter and the donation, and that even if it were proved that the *Abbé d'Orleans* was in a state of sanity then, it would not follow that he was so two months afterwards; and under all these circumstances, let us admit that this letter is still a doubtful title, and an equivocal argument which each of the parties by turns apply in their own favour, and which serves much less to prove the will of the *Abbé d'Orleans*, than to shew the authority of his family.

But is that which followed less considerable, than that which preceded the donation? You remember what was called a confirmation.

The relations of the *Abbé d'Orleans*, being assembled to deliberate upon the mode of administering his affairs, have always spoken of the donation as an inviolable title, which ought to be carried into execution. But had the relations any authority to impeach it? Could this act, invested as it was with a solemn and authentic form,

form, be annihilated by their changing their minds? Supposing even that they had the power, would they have had the inclination to destroy their own work? and if the supposition of the *Prince de Conty* is true, would they not on the contrary assure, by the continuation of their suffrages, the execution of an act which from them derived its birth, as it was afterwards indebted to them for its preservation? Besides was this question ever agitated, was this doubt ever started in any assembly of the relations? Had any of them an interest to contest, to combat, to destroy this donation? And how can the acts of the family of the donor be considered as a confirmation of the donation, since every thing which was necessary to raise the slightest question was equally wanting, that is to say, the power, the inclination, the interest, and the capacity?

This is not the only kind of confirmation, which *Madame de Nemours* alleges in favour of this title. The king, it is said, has authorized it by his letters patent, and yourselves, the depositaries of his sovereign justice, have added the last seal to its validity. But what are all these confirmations? This is a matter which it will not be very difficult to explain. The king has confirmed the donation, by receiving the fealty and homage of the donatory, and of *Madame de Longueville* in quality of curatrix after the donation; in remitting to the one and the other the reliefs which were due, in ordaining the execution of some recommendations of the relations founded upon the same title. The court has confirmed it in the same manner, by granting to the lord of a feignory, the feodal profits arising upon a change of property by the donation. In truth, Sirs, it is surprising that in a cause so extensive, so difficult, so full of real questions, they should mingle such facts as these, facts which had been already urged upon the interlocutory proceeding without success, and which now appear to us to be still more inefficacious. For to draw any conclusion from them, how many false facts must be supposed? 1. That he who confirms an act, without having any cognizance over it, gives it a new degree of force and authority, contrary to the common opinion of jurists and canonists; and particularly of *Charles Dumoulin*, who explains in so learned a manner, in his treatise on the *Custom of Paris*, the rule of law, *Qui confirmat nihil dat*. 2. It must also be maintained, that when the king receives fealty and homage of a new vassal, he intends without any examination, without any preceding contest, without any judgment, thereby to confirm the title by virtue of which the new vassal has taken the fief, and that he who prepares the record of having rendered fealty and homage, or at most he who signs it, thereby prejudges all the questions,

which

which may be afterwards formed concerning the vassal's right of property. Lastly, they must go further, and suppose that when you oblige a new possessor to pay the dues which belong to the lord of the fee, although the question cannot be agitated by this lord, yet you decide from thenceforth upon the goodness, the force, the execution of the contract, and that those who have an interest, can never impeach the transfer, upon this single ground; that the party acquiring the estate has been obliged to render the feudal rights and services.

If all these suppositions are equally absurd, the question of the donation is then entire; the letter of *Metayer* which precedes it, the different acts which follow it, cannot destroy the inference derived from it, nor the several presumptions which arise from this spoliation, of this abdication, of which it is the strongest proof of any in the cause.

But after having shewn you, that these presumptions are not injurious to the illustrious family of the *Abbé d'Orleans*, after having shewn you that they are not effaced by the clauses of the acts, nor by all the circumstances which precede and follow them, it remains to answer a last objection deduced from the consequences of the *Prince de Conty's* demand; or rather, we may absolutely dispense with answering it, because this objection rather applies to the interests of the parties than to the decisions of justice. It is pretended, that if the testament was to be overturned, its fall would bear along with it that of all the contracts, and that what the *Prince de Conty* would lose on the one side, would be much more considerable than what he would gain on the other. But it was for the *Prince de Conty*, that is, it was for his counsel to foresee, to examine, to prevent if possible the consequences of his demand. We contemplate them, but are content with contemplating them, without enquiring particularly what would be the points relied upon by *Madame de Nemours*, in the case which she supposes, or what would be the *Prince de Conty's* ground of defence. We suspend our judgment in that respect; happy if we could suspend it as to all the rest; and without choosing to decide at present, whether the fate of the contracts ought to be the same with that of the testament, we will content ourselves with saying, that the parties implore from this august tribunal not the counsels of its prudence, but the oracles of its justice.

Let us here pause a moment, slightly to recapitulate what we have already said, respecting the principal acts of the cause, that is to say, the acts of disposition. You have seen that all these acts have nothing personal, or which bears the character of the will and capacity of the *Abbé d'Orleans*. You have remarked all the circumstances which accompany them, the time, the place, the persons,

persons, the number of the acts, their nature; all seem to concur to establish the presumption of that judicious controul, of that necessary concert of the family of the *Abbé d'Orleans*, to pronounce against him, a kind, or favourable, or friendly interdiction. Lastly, we conceive that we have shown that the objections of *Madame de Nemours* do not remove this appearance, which so properly and naturally belongs to all the circumstances of the cause.

We go however still further, and are of opinion that it is not even necessary, that this presumption should appear to be more strong than that of *Madame de Nemours*. It is sufficient if the deductions of the respective parties are balanced, that they are equal on the one side and on the other, in order to be convinced that it is not by the acts that the cause should be decided. These acts may be doubtful, uncertain, equivocal, giving equal weight to each of the opposite presumptions. Upon the view of those acts, the balance of justice remains suspended, until the proof by witnesses inclines it to the one side or the other.

But before we pass to this second proof, we must shortly state the acts of the last period, that is, those which have passed subsequent to the testament.

We observe in them the same distinction which has been taken notice of, in respect to the acts of the time of the second testament.

There are acts of disposition and those of mere administration. The acts of disposition are all of the same nature; the nomination to a benefice which is only announced in the act of induction, a remission of seignoral rights in favour of *M. de Montefault* before the notaries of *Marseilles*, the gift of the succession of a bastard made to *Desgoureaux* at *Strasbourg*. But are there in these three acts the character of personality which we look for? Do we discover in them any act which proves the reason of the *Abbé d'Orleans*, except his mere signature; and is it not sufficient for reconciling that to the fact of insanity, merely to suppose that the family still deferred his interdiction, and that until that decisive moment, it was requisite that the acts of alienation should be signed by him? The first of these is more than probable, the second is a necessary consequence of it.

The acts of administration are reduced to bills of exchange, to allowances of accounts, to letters.

It is true that they have adduced directions, and bills of exchange, some written, others signed by him, which do not induce any suspicion of insanity, but there is one so extraordinary in its form, that it entirely outweighs the authority of all the others. You remember the observations which were made upon this bill  
of

of exchange. It is written on the whole length of a sheet of paper, and the *Abbé d'Orleans* adds at the foot, *Bien que d'autre main soit, je promets de n'en tenir compte.* There must be some fault in the words, but without stopping to examine the consequence of that, let us attend to a more material observation. The *Abbé d'Orleans* thought then that the bill was void if it was not in his hand writing, since he caused these words to be added, which contain an express approbation. It was necessary then to write this approbation with his own hand, for if the bill appeared informal because written by another person, how could he intend to repair that defect by an approbation entirely written by the hand of another? He should at least sign this approbation which appeared so essential, and yet he did not do so. He is content with signing the bill, and how does he sign it? It is to be observed, that this approbation written at the foot of the bill, only takes up about half the size of the paper, and his signature is at the side of this approbation and not below it, and it is made in a circle in order to reach the writing of the bill.

This piece which as you see is more than suspicious, is of the 5th April, 1671, that is to say five weeks after the testament, it is useless to draw any further inferences from it. Its quality, its state, its appearance speak sufficiently for themselves. It is contended on the part of *Madame de Nemours*, that the *Abbé d'Orleans* intended that the same signature should serve both for the bill of exchange and for the approbation at the foot of it, and therefore he had placed it below the first and at the side of the last; but shall this absurd design, still more absurdly executed, be regarded as a proof of understanding; and besides, what man in his senses, intending to approve an act not in his own hand writing, and thinking such an approbation necessary to render it valid, would not write the approbation with his own hand? This has not been answered, and in fact it appears difficult to answer it.

The allowances of accounts might appear a more considerable proof of the capacity of the *Abbé d'Orleans*, but the inference deduced from them is strongly opposed by the important fact which we have taken notice of, by that domestic inspection of *Dalmont*, of which we have already spoken, an inspection the necessity of which was recognized by the *Abbé d'Orleans*, an inspection to which he himself submitted. The proof of this appears in writing in three different places, and particularly in that important charge which he gave to *Peray* his valet de chambre, in the presence and by the advice and counsel of *Dalmont*, and as in this discharge are comprised all the accounts from the beginning of *March* to the 16th of *July*, it is clear that the inference goes  
back

back to the time of the testament, and forms a very strong presumption of what we have already observed to you, that after having stripped the *Abbé d'Orleans* of the substance of his property by the donation and testament, after having deprived him even of the administration of what was left by the procurations, they did not leave him master of his expenses. He had an inspector, whom we called at the time of the interlocutory discussion, and now call with still more reason, a domestic curator.

It remains only to examine the letters. Three or four are adduced in which we observe several obscurities, useless repetitions, a great lowness of mind, without however any particular indication of folly. But, besides that three or four letters can never be a sufficient proof of a man's state, besides that these letters have not prevented your allowing a proof by witnesses; there is a further reason which incontestably proves that the presumption drawn from the letters is neither convincing nor infallible. At the time of the interlocutory examination a letter was produced written by the *Abbé d'Orleans* after he was placed in confinement, and this does not contain any greater marks of derangement than the others. What conclusion then can be drawn from the letters, since even at the very time of his fury, and in the confinement of his prison, he could write a letter not more extravagant than those adduced by *Madame de Nemours* as demonstrative of his sanity?

Such, Sirs, are all the written acts, all the presumptions that are drawn from them, all the proofs resulting from them. In the period preceding the testament, you have seen the letter of *Madame de Longueville*, and that of *Metayer*; the first shews the clouds that were beginning to spread over the state of the *Abbé d'Orleans*, the second is a very equivocal and doubtful sign of his alleged capacity. At the period of the testament, you have seen the conflict of presumptions which the principal acts have excited between the parties, and in this conflict we have endeavoured to establish three presumptions which appeared to us equally certain; the one, that the conjectures of the *Prince de Conty* are much more specious, more probable, more conformable to the whole set of acts than those of *Madame de Nemours*; the other, that supposing the presumptions to be equal on the one side, and on the other, the cause ought to be decided by the witnesses. Finally, in the last period, we have observed that excepting some acts in which there is nothing personal, except the mere signature of the *Abbé d'Orleans*, the rest are either indifferent, or capable of forming strong presumptions, and commencements of proof, by writing both by the figure and tenor

of the acts; and by the conspicuous proofs which the *Abbé d'Orleans* has given against himself, of the state of servitude to which the necessary inspection of a domestic curator had reduced him. The discussion of the acts then leads us to the necessity of passing to an examination of the proof by the witnesses.

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#### FOURTH AUDIENCE.

WE are at length arrived at that moment which is more difficult and important to ourselves than even to the parties; in which we are obliged to determine between the different ideas that have been given of the state of the *Abbé d'Orleans*; and to present you with a faithful picture of it, in which you may discover either the features of reason, or the characters of madness. We avow, in beginning this last part of the cause, and we avow it with some degree of confusion, that after three audiences, we bring it before you precisely in the same state, in which it has been from the time of your former sentence; and if we have stated the circumstances of fact, re-established the principles of law, weighed the opposite reasonings upon the written instruments, balanced the respective presumptions; we had satisfied the duties of our ministry upon all these objects, at the time of the interlocutory sentence; but we could not excuse ourselves from again recurring to them, in order to recal our former ideas, and shew the point in contest. Every thing this day concurs to render it necessary to enter into a discussion of the proof by witnesses, and to this examination we are now exclusively to attend.

We observed, in establishing the general principles upon the subject, that all testimonial proof ought to be contemplated in two different manners, by its exterior surface, that is to say, by the number and quality of the witnesses, and by its interior substance, that is, by the multitude and importance of the facts.

Let us now apply these general rules to the particular circumstances in this cause; let us examine, first, the exterior of the proof, and make a short parallel of the number and dignity of the witnesses, in the one inquest and in the other.

We shall not dwell upon the observation, that in one there are 85 witnesses, and in the other 76. This difference is not sufficiently considerable, to influence the decision of the cause; and besides, if we deduct from the 85 witnesses of *Madame de Nemours*, those who are absolutely negative, who merely say that the *Abbé*

*d'Orleans* did not appear to them to be in a state of insanity, or that he appeared to them to be a person of good sense, if we take away a part of 25 witnesses, who were examined at *St. Marie aux Mines*, and who, only deposing to the same facts, are, according to the ordonnance, to be reduced to the number of ten: If we make these just and necessary retrenchments, the witnesses of *Madame de Nemours* will be fewer than those of the *Prince de Conty*. But to return to our principles, the number of witnesses cannot be very material, except in the proof of a single public and general fact; but when the general fact absolutely depends upon particular facts, the number of witnesses becomes useless, and the particular facts are alone decisive.

Neither should we enlarge upon the quality and dignity of the witnesses. If we except on each side certain important witnesses, of whom we shall presently make a comparison, the advantages of the parties are in this respect nearly equal; we find in each of the inquests, priests, members of religious societies, gentlemen, tradesmen, artisans, and persons of the lowest condition; there is so little difference in this respect between the inquests, that it does not require any longer consideration.

If we make a comparison between the more important witnesses, that is, such as were in the family of the *Abbé d'Orleans*, of *Madame de Longueville*, or of the *Comte de St. Pol*, and had an opportunity of being the most exact observers of a person they ought to consider as their master; you will doubtless be surpris'd at the confidence with which it has been so often asserted, on the part of *Madame de Nemours*, that the witnesses of the *Princes de Conty* ought not even to be placed in comparison with hers.

Let us begin by retrenching from this number *M. le Nain*, whose testimony alone would be worthy to decide this celebrated difference, if it was as considerable by the facts which it contains, as it is illustrious by the name and virtue of its author. But if we except this single witness, to what are all the other domestic witnesses in the inquest of *Madame de Nemours* reduced? There are only two, whose quality can give any particular weight to their depositions; the one is *David*, secretary des commandements of the *Duke de Longueville*, the other is *Péray*, valet de chambre to the *Abbé d'Orleans*, but of these two, *Peray* is justly excepted to, *David* then is the only considerable officer who remains; for we do not suppose that they can seriously rely upon the deposition of *Noccy* and his wife, whose only knowledge consists, in saying, they know nothing about it, except that *Madame de Noccy* thinks, without being able to affirm it, that she has heard the *Abbé d'Or-*  
*leans*

*leans* celebrate mas: draw as many arguments as you please from their silence, it is not by negative presumptions, but by positive facts, that the cause must be decided.

After this, nothing more is necessary than to exhibit that crowd of inferior domestics, that have been examined on the part of *Madame de Nemours*, a cook of *Madame de Longueville*, a tailor, a footman of the *Comte de St Pol*, a coachman and his wife, a porter and his wife, a postilion, a groom, a muleteer; the most considerable are a chamberlain, and a master of the pantry. None of these domestics followed the *Abbé d'Orleans*, upon the important journey by the river *Loire*, none of them were attached to his person; even the person who assumes the quality of his coachman says, that at the time of the testament and long before he had no carriage, because he had given it to the *Comte de St. Pol*; and besides you will see by the depositions, or rather you have already seen, that a carriage was to him a very useless equipage: such is the quality of the witnesses, examined on the part of *Madame de Nemours*:

But what do we find on the other side? Is it a set of witnesses, a comparison with whom would, as you have been told, be injurious to those of *Madame de Nemours*? They are all such as had the honour of being continually about the person of the *Abbé d'Orleans*; they are those in whom the family reposed the care of his conduct, those who accompanied him throughout, who saw him, who followed him upon all occasions, finally, those whom *Madame de Longueville* honoured with her most intimate confidence, and who filled the most considerable employments in her family. They are, in a word, of the quality of those domestics whom the disposition of the civil law required to be called, in default of relations, to a family council, and whom the prætor consulted upon the interest of pupils. *Requirat* (prætor) says the law § 8. f. 11. ff. de reb. eor. qui sub tut. vel cur. sunt sine decreto non alien. *Requirat necessarios Pupilli, vel Parentes, vel Libertos aliquot fideles.*

Two almoners of the *Abbé d'Orleans*, two gentlemen, the *Sieur Desgoureaux*, and the *Sieur de Gastines*, who accompanied him in his journies, a valet de chambre, the ancient domestic, faithful to his master until his death, and who served him in his two conditions of sanity and insanity: such are the principal witnesses from the domestics of the *Abbé d'Orleans*. Let us add the domestics of *Madame de Longueville*: the *Sieur de Billy*, her last ecuyer, his wife, who performed the functions of a lady of honour, *Marguerite le Bastia*, her first femme de chambre, add to these witnesses, two femmes de chambre of *Mademoiselle de Vertus*, who resided in the *Hotel de Longueville*, a page of the *Comte de St. Pol*,

who commonly attended the *Abbé d'Orleans*, and his principal *Maitre de Hotel*, whom *Madame de Nemours* at first chose for one of her witnesses, but afterwards rejected, expecting him to be unfavourable to her. Let us also include *Tixier*, who from his free access in the house of *Longueville*, from the confidence of the *Prince de Conty*, of *Madame de Longueville*, and even of the *Abbé d'Orleans*, from the inspection of his conduct up to the very time of his death, may be deemed as important as the domestic witnesses. Here are 40 witnesses, such as a person would wish for if he had not, such as he would chuse, if it was customary, upon these occasions, to select a list of witnesses, as they select a list of relations, such, in short, that they cannot even find two on the part of *Madame de Nemours*, who could, we will not say, balance their authority, but even enter into a comparison with them, and diminish their suffrage.

It is true, that after this we find in the inquest of the *Prince de Conty*, seven or eight domestics of an inferior order, and whose quality is similar enough to that of the witnesses of *Madame de Nemours*; but the essential difference which is observable, is that in the inquest of *Madame de Nemours*, these witnesses have hardly any body at their head to render them respectable, whereas, those on the *Prince de Conty* are supported by 40 principal officers, whose testimony communicates its force and virtue to the depositions of the subaltern officers, and gives them a degree of certainty, which they perhaps would not have in themselves.

After having made this examination, and parallel of the quality of the witnesses, we might now enter into a comparison of the facts, but we think it necessary previously to discuss some general suspicions which each of the parties opposes to the inquest of the other.

On the one side they accuse the persons employed by the *Prince de Conty*, of having assigned the *Chartreaux* at *Orleans*, and of having afterwards prevented them from giving their testimony, because they foresaw that their depositions would not be such as was wished for. But if they are not deceived in their conclusions in this fact, the counsel of *Madame de Nemours* should begin with applying the same exception to themselves, since we see that after having assigned the *Sieur David de Marpré*, they have nevertheless prevented him from deposing in the inquest of *Madame de Nemours*; and he would never have been examined, if the counsel of the *Prince de Conty*, who had intelligence of this proceeding, had not assigned him to depose in his.

They afterwards throw out some suspicions of sollicitation, and even of subornation of witnesses, and *Madame de Nemours* pre-  
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tends to have the proof of it in the deposition of a witness of *Angers*, who says, that the *Abbé de Jumeau*, and the *Dame de Ris*, came to request him to give them a declaration signed by him; but besides that it only appears by the deposition of this single witness, that they have taken any improper means, to obtain from him a favourable deposition, we think we may say in a word, that it is surprising they should rely upon these kind of facts, on the part of *Madame de Nemours*; when three positive witnesses, in the inquest of the *Prince de Conty*, concur in deposing that a cavalier, disguised as a monk, pressed them to depose in favour of *Madame de Nemours*, offering strong menaces if they did not, and advantageous offers if they did, and left them, saying, you have to do with a strong party.

Lastly, we cannot help taking notice here of a fact, which took place at *Saumur*, with respect to a person of the name of *Barut*. When she appeared before the commissary, instead of presenting the process of her assignation, she presented her deposition ready written. The procureur of *Madame de Nemours* demanded an acknowledgment of this; the commissioner granted it, and went to hear mass, after which he was called upon to interrogate the witness upon this fact. The witness declared that as it was a long time since the facts to which she deposed had taken place, she requested one of her neighbours to write, under her dictation, all the circumstances, which she from time to time recollected, and that she had caused them to be read over to her, before she came to give her deposition, as she could not either read or write.

Whatever we may say of the truth and consequences of this fact, we shall always think it much less important, than the rumour of the approaching canonization of the *Abbé d'Orleans*, given out at *Orleans* and elsewhere, and spoken to by several of the witnesses, in the inquest of the *Prince de Conty*. Three witnesses from *Orleans* depose to it particularly; amongst the rest a *Carmelite*, who is the 35th witness of the *Prince de Conty*, declares, that a person employed by the agents of *Madame de Nemours*, asked him if he had not seen virtuous actions performed by the *Abbé Orleans*, and said that he was a saint.

But why seek in the inquest of the *Prince de Conty*, for the proof of this fact, of which you discover all the consequences, since it is contained even in the inquest of *Madame de Nemours*; and her 43d witness declares that he came to *Paris* upon the solicitation of a person on behalf of *Madame de Nemours*, who told him that she did not care for the succession of the *Abbé d'Orleans*, but that she wished to shew that he had lived as a saint.

After this, Sirs, we shall leave it to be judged, which of the two

parties has most interest in wishing that these suspicions had never been introduced; we should have thought ourselves warranted in passing over them in silence, if the parties had not made them a considerable point in the cause; we have stated the facts without drawing any inference from them. We even wish that it was possible to blot out the remembrance of them, and all that we can say and think upon this subject is, that if it be true that the blind zeal of inferior officers has induced them to take those oblique and indirect steps, of which we would always willingly doubt, we are at least persuaded, in common with the public at large, that they have herein acted contrary to the intention, contrary to the sentiments, contrary even to the orders, of the parties whom they have the honour to serve; and if the parties themselves could have the slightest suspicions of it, they would revolt even more than ourselves against such conduct, and would be the first to disavow it, with all the publicity which their wounded honour would require from them upon such an occasion.

Let us suspend then our judgments in this respect, and without dwelling longer upon the external parts of the proof, let us endeavour to penetrate into its interior substance, and confine ourselves to the examination of two questions of fact, which involve all the difficulty of this cause.

Was the *Abbé d'Orleans* in a state of formed insanity? That is the first question.

Is it to be presumed that the insanity was constant, or on the contrary may it be supposed that there were favourable intervals, in which he might make his testament? This is the last and not the least important part of this cause. After having read the principal depositions on the one side and the other, it only remains to connect, to arrange, to state the facts in so plain an order, that you may deduce from them all the consequences which are necessary for the proof of sanity or insanity. But as sanity is conformable to the order of nature, and insanity is contrary to it, as the one is presumed without any proof, and the other ought to be proved, we will examine first, whether the *Prince de Conty* has established a case of insanity, and afterwards whether *Madame de Nemours* has established a state of sanity in so incontestable a manner, as to destroy all the presumptions of insanity, or at least to render them doubtful, equivocal, and uncertain.

Let us here follow the general division, which has been traced by the parties themselves; let us consider the *Abbé d'Orleans* in two different states, let us distinguish two persons in one, a public person whom we shall contemplate in his ecclesiastical functions, a private person whom we shall consider in his private actions.

actions. Let us add to these two general facts, a third, not less important than the preceding, that is the judgment which strangers, which his domestics, and his own family pronounced upon his situation. To this the whole proof of insanity is reduced. We shall not distinguish it any longer by places, but by the kinds of actions; and that we may bring before you, as in so many pictures, all the facts of the same class, each of which makes one of the particular traits, of which the general character of the *Abbé d'Orleans* was composed, let us examine first, what the *Prince de Conty* has proved concerning the ecclesiastical functions. Of these we may distinguish four kinds:

Prayers and other acts of general piety.

Exhortations, catechisms, preachings.

Confessions--The mass.

These four articles deserve to be examined separately.

Let us begin with the prayers and other acts of general piety. How were these performed by the *Abbé d'Orleans*? You remember the account given by the witnesses.

That continual agitation in the church of *St. Maur*, which *Follard* depicts in his deposition. The *Abbé d'Orleans* was restless, agitated, going sometimes to the altar, sometimes to the sacristy, returning to the choir, passing along the nave, running to the bells. All the people, witnesses of this unsteadiness, behold him with astonishment, and his quality of *Duc de Longueville* renders the scandal still more glaring; but these were only equivocal signs, feeble forerunners of insanity, which we may pass slightly over, as they did not prevent his emancipation.

Let us resume the succession of facts. Let us see the *Abbé d'Orleans* go to *Tours*, enter the monastery of *Minimes*, require to be conducted to the chapel of *St. Francis de Paule*, pray the person who took him there to leave him alone to repeat the service, thunder out with a loud voice when alone in this chapel, *Deus in adjutorium*, in the same tone which is used in a full chant, scarcely staying there time enough to say a *Miserere*, says the witness, come out immediately afterwards without having said his breviary, walk deliberately in a small wood in the midst of a fall of snow, fly precipitately at the sight of his domestics who came in search of him, and leave the members of the convent astonished at the derangement of his mind.

Let us see him afterwards arrive at *Saumur*, walk with precipitancy along the quay without a hat, running here and there as a man possessed (*comme un extravagant*), these are the words of the witness, enter the inn calling aloud *Κυρι ελισω, Κυρι ελισω*; this we learn from a witness of *Madame de Nemours*; continuing his

recital in the inn, and persevering in this exercise until he got into the chamber that was prepared for him.

Let us examine what he did at *Saumur*. He goes into a church celebrated by the devotion of the people of that province, called the church of *Notre Dame des Ardilles*. He falls upon his knees before the image of the virgin, pours out his benedictions with an unusual elevation of his arms, rises in a hurry, leaves his hat upon the ground, runs to the chapel of the late *M. de Servien*, crosses himself three or four times, enters into the sanctuary, mounts upon the steps of the altar, makes three grand benedictions, returns with precipitation to the balustrade of the great altar, crosses himself again, gives the same benedictions, runs with the same quickness out of the church, leaves his hat there; his people run after him, bring him back into the church, to the place where he fell upon his knees at his entrance. The persons who saw these facts pronounced the same judgment of his insanity.

This is not the only instance, of his giving extraordinary benedictions which were regarded as signs of folly. At a village near *Orleans*, he walked at a great rate along a wall. Every body was surprized to see him coming with this precipitation, making at every step profound genuflexions, as if he was at the holy sacrament; blessing himself eagerly in rising, his meeting the witness who recounts this fact, did not divert him from this painful and absurd exercise.

At length he returns to *Paris*, where he is often met on the grand quay, *mumbling*, says a witness, in his diurnal; he is seen at the Hospital of Charity, *servicing the surgeon's boys, having on an apron, (ceint d'une serviette) carrying the plaister, saying that he had no greater pleasure than in seeing them cut off an arm or a leg*, running away as soon as any body appeared by whom he might be known, or concealing himself in the beds of the patients, and making every body who saw him exclaim, that he had lost his understanding.

Let us add to these facts, one which is subsequent indeed to the last testament, but following it so close that it may be joined with the others; it took place about fifteen days after the testament. The *Abbé d'Orleans* enters into the church of *La Bresse*, (a village in the neighbourhood of *Lyons*;) he there finds the people assembled at a solemn festival, the sermon having begun in the middle of the parish mass. He enters, having his night-cap under his arm, with his hat; he goes to ask with a loud voice for vestments for the celebration of mass from the *Curé*, who was hearing the sermon; the *Curé* answers that he will give them him as soon as the grand mass

mass is finished. He is so indignant at this answer, that he runs out with precipitation, lets his night-cap fall in the church, and sets off in an instant from the place. At the distance of two leagues he discovers the loss of his night-cap, sends a man express to look for it. They appease him by telling him, that they will buy him a new one at *Lyons*, and in fact, it appears by the registers of his expence, that one was bought for him there.

Such is the first trait in the picture of the *Abbé d'Orleans*, respecting his prayers and other acts of piety. Let us afterwards examine him in his exhortations and preachings; this is the second kind of his ecclesiastical functions.

What are the places he chose for catechising and giving instructions? Sometimes the chapel of *Saint Maur*, sometimes that of the *Hotel de Longueville*, and these were the most suitable places, sometimes in the stables, sometimes in the chamber of the footman; once he stopped in the country near *Saumur*, to preach to the peasants; a coach-house is the place which he chose at *Nantes* for catechising; at *Paris* the gargottes, these are the terms of the witnesses, and the small pot-houses, the common receptacles of the dregs of the people, are his theatres, and he preaches with more pleasure to people who are drunk than to others, because they do not give him any answer. Lastly, the very streets of *Paris* are the places of his catechising and giving instructions to beggars.

All hours as well as all places appeared to him proper for his exhortations. He interrupted himself in the middle of low mass at *Saint Maur*, in the *Hotel de Longueville*, to make a kind of preaching; the time between eleven and twelve at night, or at day break, appeared to him particularly suitable for the instruction of the domestics; he preached to them even in their beds, and absolutely forbade their rising.

What were the subjects of his discourses? You recollect the singular fact of the funeral oration of the *Curé of Saint Samson le Angers*, a fact proved by the deposition of *Metayer*, who says, that the *Abbé d'Orleans* repeated to him a part of what he had said in his sermon, which was *nothing but a tissue of extravagancies*, proved also by the deposition of *Remi Dumont*, who says, that *Porquier*, valet de chambre of the *Abbé d'Orleans*, remonstrated with him on account of this funeral oration of a *Curé* whom he had never known; proved by the testimony of *Desgoureaux*, who says that *Metayer* told him of it at the time; by that of *Follard*, who says, that the action was spoken of in the *Hotel de Longueville*, as a trait of folly; and finally, by the deposition of one of the witnesses of *Madame de Nemours*, who says, that the *Abbé de Boissemont*, who was very much attached to the *House of Longueville*, was sorry for

for what the *Abbé d'Orleans* had done at *Saint Samson le Angers*; a circumstance which perfectly accords with the relation of the witnesses of the *Prince de Conty*.

In what manner did he procure auditors? He preached to the beggars in the street, he seized them and pinched them to compel them to hear him. He preached to his domestics at *Angers*; if they fell asleep or laughed, he went to pinch them, or give them blows under the chin, to force them to attend to him.

Lastly, how did he acquit himself of this important ministry? Those who heard him, state that there was no meaning in what he said, he became the subject of a thousand indecent railleries in the pot-houses where he catechised; and one of the most common fruits of his exhortations was the mockery and derision of those to whom they were addressed. *Madame de Longueville* was seized with grief, she herself related many wild circumstances, and amongst others, that which has been read to you in the deposition of *Texier*, and what the *Abbé d'Orleans* said to an assistant of the cook, *My brother, do not call me any longer his bigbness, call me his lowness. (Mon frere, ne m' appelle plus son alteffe, appelle moi plutôt sa petiteffe.)*

Such were his instructions. Next see what was his character with regard to confession. We may distinguish here two kinds of facts, the one particular, the other general, which, although serious in themselves, are still more considerable, because they include a perfect proof of the particulars.

Let us run over those facts which are already known to you by the relation of them having been so often read in your audience.

By how many different characters have the witnesses delineated that surprising passion, that excess of furious zeal which made the *Abbé d'Orleans* always desirous of confessing all kinds of persons at all times and in all places? Some of them describe him to you as either employing prayers or using menaces, others represent him as giving money, of which he was naturally avaricious, as even making use of actual violence to oblige the domestics of the *House of Longueville* to confess themselves to him, and that without its being proved that he had ever obtained permission in *Paris*. He would influence a footboy by fear of a cane; and, not content with these slight measures, he threatened to pull out his tooth; he went further, and forced an iron crow into his mouth to make him fall before his feet and confess his sins; he endeavoured to tempt a priest suspended by the bishop of *Angers*, by offering him his credit and money, provided he would consent to his blind ardor to fill a ministry, of which his family judged him incompetent. He obtains by surprise upon his journies permissions to take confessions, and how does he obtain them? Is it after an examination of his capacity

capacity and morals? It is, on the contrary, by means that would be criminal in a person in possession of reason. He suborns an ecclesiastic, he sends down by a valet de chambre a purse full of crowns, and the permission granted him at this price becomes at once the sad proof of the *Abbé's* derangement of mind, and of the other's corruption of heart. If any body asks him by what title he confesses, he answers, *that he laughs at the rector, the bishops, the archbishops, that he is of the blood royal, and has a right to confess.* Sometimes he says, *that he has a general permission from the Archbishop of Paris, who could not give a general permission, and who never appears to have been willing to give even a particular one.*

It is necessary to add to all these facts, which prove the unlimited passion of the *Abbé d'Orleans* for taking confessions, a detail, which would be almost infinite, of the extravagancies which he fell into in the exercise of that awful ministry.

Shall we speak of the times which he chose for taking confessions? You remember what he did at *Nantes*, you know that he called up the stable and tailor boys at four o'clock in the morning to oblige them to confess to him. At what places did he take confessions? You have seen him confessing the stable boys in the *écurie*, the tailor boys in the place where they slept, a chimney sweeper in the inn-yard, where the *Abbé d'Orleans* sat on a ladder to take his confession, and afterwards gave him a piece of money as the reward of his complaisance. They have wished to raise an ambiguity upon the fact of the confession of a valet of the *écurie*; it is true, that a witness says, that one of the valets whom the *Abbé* confessed was ill, and died two days afterwards; but the same witnesses shew that he confessed several others, and one of them was so little ill, that he on the same day got drunk. You remember particularly the grand fact of the prisoners of *Nantes*, whose confession the *Abbé d'Orleans* went to purchase: all those who had the weakness to receive his money confessed to him every day; even a criminal already condemned to the galleys accused him of having revealed his confession, and said that he ought to be burned. The *Abbé d'Orleans* believed him upon his word, and gave him money not to mention it.

In short, having been the object of contempt to the valets and servants of the inn, and the unhappy sport of the prisoners at *Nantes*, he returns to *Paris*, and, possessed by the same desire of taking confessions, he goes to the monastery of *Picpus*; he there examines all the places of confession, tries them one after another, and does not find any that suits him; and although a ladder had appeared before a proper situation for taking a confession, no place will do now but the sacristy. There satisfied with the situation of the

the confessional, he says that he would confess for eight, ten, or a dozen hours together. The superior of the monastery is witness of this fact, and is equally astonished at the weakness of the *Abbé d'Orleans*, and at the patience of his family.

Let us also add the fact spoken of by *Follard*, that important intelligence which was given of what passed at the *Hospital of Charity* to the almoner of *Madame de Longueville*, that the *Abbé d'Orleans* absolutely insisted upon confessing the patients, and that his fury carried him so far, that he gave some of them absolution without their having confessed to him. But there are particular facts enough without this; let us proceed to the more general ones which confirm all the others.

And what are these general facts?

The first is the continual attention of *Madame de Longueville*, to prevent her son from taking confessions; an attention proved by the orders which she gave to *Madame de Billy* to watch him in her house; by those which she gave to *Metayer* to prevent permissions being obtained by surprise for the *Abbé d'Orleans*, orders which *Metayer* has executed. This is not denied on the part of *Madame de Nemours*.

The second fact is the indignation of *Madame de Longueville*, when she learned that the wife of one of her officers had had the weakness to confess to her son. How does she speak of this action? She said it *was an abuse of the sacraments*.

The last fact is the letter which the late *Prince de Condé* wrote to the *Archbishop of Lyons*, to request him to revoke a permission which the *Abbé d'Orleans* had obtained from him by surprise, under the name of *John of Paris*.

Shall we say after this, with *Madame de Nemours*, that if *Madame de Longueville* and the *Prince de Conty* prevented the *Abbé d'Orleans* from taking confessions, it was because they thought that function too humiliating for a nobleman of his quality? But who can suppose that so great a prince and so pious a princess could think that the function of a judge in the sacred tribunal of penitence, that the august exercise of the supreme power of binding and releasing was beneath the most elevated birth? It has often been said, that the state of a sinner, who, in the humble posture of a criminal, implores for favour, was a humiliation useful but painful to nature; it has never hitherto been heard, we believe it has never been thought, there was any thing low and humiliating in the function of a confessor; and if *Madame de Longueville* had contemplated it in this manner, (which assuredly was very far from the dignity of her sentiments,) would she have said, even upon such supposition, *that, it was an abuse of the sacraments to confess*

confess to the *Abbé d'Orleans*? Who does not see in the force of this expression what she thought, what she felt upon the situation of her son?

But let us go to the fact of the mass, where we find as with respect to the confessions, both particular facts and general; particular facts which regard either his exterior appearance in saying mass, or his manner of saying it, the singularities which were observed in it, the indecencies which he committed, or the impressions which his conduct in this respect made upon the mind of the spectators.

Habited as a poor priest, and frequently unknown, he affected to appear as a mendicant. *He ate an allowance of pottage with his fingers, in the porter's lodge of the jacobins, in so offensive a manner, that some sacristans refused to let him have the vestments.*

His eagerness for saying mass led him to alight from horseback in passing a church at *Angers*. He hardly allowed them to take off his spurs, and continuing in his boots, he invests himself in the sacred habits; he goes to say the mass in this condition. A priest and one of his domestics remonstrate with him, he bursts out a laughing and remounts his horse. It is true, that one of the witnesses of *Madame de Nemours* pretends that the *Bishop of Angers*, to whom an account was given of this fact, answered, that there was nothing indecent in it.

If this answer was really given, we doubt very much, whether all the circumstances could have been explained to him. But let us proceed to facts of more importance.

In what manner did the *Abbé d'Orleans* celebrate mass? With so much precipitation, that every body was scandalised at it.

He fell into singularities which were never seen in any other person. We see him twice make a stop in the middle of low mass, to preach to two peasants of *Saint Maur*, and some domestics of the *Hotel de Longueville*.

But what shall we say to the grave and scandalous indecencies which took place both during the continuance of mass, and afterwards?

During the mass, *Gravin* states to you what took place in saying *ite missa est*, he adds aloud, "let them put a steak on the gridiron for breakfast." *Madame de Billy* relates another adventure so sad and painful to *Madame de Longueville*, who was punished for her curiosity in hearing him say mass. Between the gospel and the oblation he interrupts the sacrifice, and with the tone of a person in a state of agitation, he says aloud, "give me a chamber pot." He repeats the same thing several times very quick, and goes from the altar, and, without mass being finished, he runs from one side to the other,

other, crying out more than thirty times, "a piffer, a piffer." We repeat these words with pain, but since they have been heard with grief in the temple of religion, we may be permitted to repeat them with the sentiment in that of justice; and in fact, she had seen too much. This fact only passed in the presence of *Madame de Longueville*, of *Madame de Billy*, and a little boy, who served the mass to the *Abbé d'Orleans*; but several other domestics of the family, that is to say, *Fouilleuse*, *Gastine*, *Follard*, and *Daflon*, all say that it was spoken of in the *Hotel de Longueville*, as a trait of insanity. *Gastine* mentions all the important circumstances of it, and accords perfectly with *Madame de Billy*.

How have they combated this striking fact? They tell you that it was not probable; but in the first place can they elude a fact proved, by conjectures and contrary probabilities? Besides, where is the want of probability? It is said, that many circumstances must concur before such a fact is admitted as probable; and what are those circumstances? is their concurrence so difficult? In the first place, it requires a wish in *Madame de Longueville* to judge for herself, of the manner in which her son said the mass. Is there any thing in that which has not the appearance of being true? It was requisite that she should wish to observe it without its being known. Nothing more sensible and natural. It was necessary to execute this design, that she should go across the (court of the) *Hotel de Longueville*, and how could she do that without being observed? There were a thousand ways of preventing it, but you see that after all she did not succeed, since some of her domestics knew of it at the time. Finally, it was requisite that no person should be present at the *Hotel de Longueville*, to attend the celebration of this mass; and what difficulty is there in believing that? What fact could ever be certain if such objections to its probability were sufficient to render it doubtful?

Let us finish the facts relative to the celebration of the mass, and for that purpose let us recal what passed at *Orleans* in the *Church des Carmes*. Two witnesses, both priests, both regulars of the same order, testify this fact. The *Abbé d'Orleans* said the mass with a great precipitation; he returned to perform his thanksgiving in the sanctuary, threw against the credence \* a platter which they presented to him, and threw down a wax taper, which was broken into several pieces. A regular priest ascends the altar, opens the tabernacle to give the communion to several persons who were at the feet of the balustrade, and at that moment the communion cloth being on the balustrade, the *Abbé d'Orleans* leaped

\* A cupboard for keeping the plate and other things used in the celebration of mass.

briskly over it; and ran on tip-toe with an extraordinary and scandalous precipitation. Two persons who were apparently his domestics wished to follow him, and leaped after him over the balustrade. The priest called out against the indecency of this action, and is to-day the first witness of it. It is true, that the other ecclesiastic who speaks to the same fact, says, that the *Abbé d'Orleans* passed as in leaping (*passa comme en saltant*) over the balustrade; but he agrees in all the other circumstances, and this expression hardly changes the nature of the action: they both add, that the same thing took place at two different times. From hence it has been inferred, that the action is not very indecent, as the *Carmelites* would not in that case have suffered the *Abbé d'Orleans* to have come a second time to say mass in their church; but if their having too great a respect for him prevented their refusing him the vestments, if their complaisance degenerated into a real meanness, what has that in common with the fact of insanity, which is now the object of inquiry? And can such colours as these efface so marked an action, and so striking a trait of derangement? And let it not be said, that the witnesses who relate this fact, did not regard it as a proof of insanity; the one said publicly, that it was not such an action as could come from a person in his senses; the other, that the *Abbé d'Orleans* must have had a very weak mind to fall into such improprieties.

Here is a first example of the impression which these and other similar actions have made upon the minds of the spectators. There is another more strong related by a domestic of the almoner of *Madame de Longueville*, who shews, that his master was one day obliged to force the *Abbé d'Orleans* from the altar, between the epistle and the gospel, because he was not in a condition to perform the sacrifice.

All these particular facts become more probable by the general facts which accompany them.

If these facts were not certain, why was the inclination, which led the *Abbé d'Orleans* so constantly to wish to say mass, regarded as a *kind of fury*? These are the terms of the witnesses; whence arose that deep displeasure, those piercing afflictions of *Madame de Longueville*, whom some of the witnesses represent as penetrated with grief, bathed in tears, prostrated to the ground, groaning before God, and opening her heart in his presence, when she learned that her son had said the mass, and seeking to expiate his irregularities by the tears of her repentance?

Why should she send to certain churches to desire that they would not admit the *Abbé d'Orleans* to the celebration of the mass? In short, why, from that sorrowful day, when she saw with her own eyes what she with difficulty would have believed, if it had

had been related to her by others, did the absolutely forbid his being allowed to say mass, so that from that time he only said it by surprise, and without her knowledge, as we are assured by several of the witnesses? If there was nothing more in the cause than these general facts, would they not be sufficient to induce very reasonable suspicions respecting the facts connected with the celebration of the mass? But we will not dwell upon them at present, we shall be obliged to touch upon them again in a moment. And after having shewn you in four different pictures, what was the character of the *Abbé d'Orleans* in every thing relating to his ecclesiastical functions; let us contemplate him in the second point of view, which we before distinguished, that is to say, as a private person, and let us see what were his actions in that character.

Madness is an invisible quality, as we have observed several times, but it discovers itself, it presents its picture, it betrays and accuses itself by the most ordinary actions.

The habit, the exterior appearance, the conversations, the gait, the walks, every thing which we see, every thing which we hear, give a public and striking testimony of the secret and interior dispositions; there is nothing, even the manner of eating and drinking, the time destined to sleep, and the other functions of nature, which may not furnish proofs of insanity.

Let us run over these points in a very few words, and endeavour to discover in them the lively and faithful image of the *Abbé d'Orleans*.

What is the picture which all the witnesses have drawn of his habit and exterior appearance? He was frequently met in the streets, the most frequently in a short cassock, dressed, say some, as a village priest, (*un Hyvernois*), say others, as a mendicant priest, say a greater part of the witnesses, all over dirt, like an idiot, or a chairman, *crotté comme un Fol, ou comme un Porteur de Chaises*, these are the different expressions; never chusing to change his linen, in a state which was horrid to behold, frequently covered with vermin, adds one of the witnesses. He was remonstrated with on this state, so indecent for a person of his quality, he answered *so much the better; and he would have a shirt made of shamois, which might never be changed*; a large hat, flapping over his shoulders, covered his face in a ridiculous manner, to which he added for an ornament a branch of box; *un battelier*, the toll gate-keeper of a bridge seized his hat, and when he gave it him back again, the *Abbé d'Orleans*, surprisid with not finding his branch of box, had a quarrel with him upon this subject. Lastly, we find him at *Paris*, in a short cassock (*en sottanelle*), and in white stockings; they ask him if he had taken those of his coachman? he answers *so*



His gait is not less singular than his promenades: a precipitation and extraordinary quickness are the sensible image of the levity of his mind; always in a sweat, like an idiot (*un fol*) going almost always on tiptoe. Such were his general habits, as proved by the witnesses. Let us join some particular facts. When he was at *Saint Maur*, he had hardly arrived at the *Porte Saint Antoine*, when he jumped from his carriage and run away so fast that nobody could follow him. At *Orleans*, he was seen to leap upon his shadow, dancing upon the ramparts of the city, kicking away every thing which lay before him.

At *Paris*, an apothecary who marks the impetuosity of his course, deposes, at the same time, that he always gave him the higher part of the pavement, and made him pass the first at all the gates.

It is little to have shewn you the quality of his promenades, and the singularity of his gait; we must also state in a few words the principal adventures which took place in his continual rambles. He twice passed the bridge without paying the passage; the first time the gate-keeper ran after him, and would have given him a blow if he had not been prevented by a sister of one of the maids of *Madame de Longueville*; the second time the gate-keeper seized his hat and that of a page who followed him; fortunately a woman belonging to the *Hotel de Longueville* lends him a few pence, he goes to redeem his hat, and flies into a rage against the gate-keeper for having taken away the branch of box.

Is it necessary to recal to your recollection the ridiculous combat which he had with the little boys in the court of the *Hospital of Charity*? *Madame de Billy* describes him as running like them, drawing them, and drawn by them. When pressed to come away, he asked her if she would be of the party.

But what appears to us to be the last degree of his infirmity, is the deplorable state in which several of the witnesses have seen him pursued in the streets by the little boys, who threw dirt at him, made him drop his hat, and followed him with continual bootings, which did not seem to give him any uneasiness; a fact almost incredible in all its circumstances, if it was possible not to believe what is attested by a witness at *Saumur*, and four witnesses of *Paris*, all uniform in their depositions.

Shall we be astonished after this at the anxiety, represented by some of the witnesses to have been felt by *Madame de Longueville*, respecting the continual ramblings of the *Abbé d'Orleans*? Some fresh account was given to her every day; and had she not reason to fear in the end that some tragical adventure would terminate, in an unfortunate manner, so deplorable a life?

Let

Let us finish the picture of the private life of the *Abbé d'Orleans*, by the facts which relate to the necessary functions of life, such as eating, drinking, and sleeping.

We have already mentioned the joy which he testified when he said that he had been living with his good friends the tailors or barbers; it was with such persons as these that he delighted to eat and drink. At *Nantes*, he exhorted the wife of a journeyman tailor to confess to him, and he afterwards sent for a pot of wine, which he drank with her. At *Paris*, you have seen him go to beg an allowance of pottage at the gate of the jacobins, and eat it with his fingers: and these are the most honorable places which he chose for his repasts. We have already represented him going to what the witnesses call the *cabarets borgnes et des gargottes*, where nobody ever enters but the very lowest dregs of the people. His manner of eating is regarded by many witnesses as a mark of his derangement. He eats with perplexity and inquietude, and in a manner exciting horror; excessive sometimes in his abstinence, and sometimes in his intemperance; sometimes he passes two hours in a cabarette and drinks one small glass of wine; at other times he falls into real excesses; and we see the heir of the house of *Longueville*, the ninth duke of his race, get drunk in taverns, which a common shopkeeper would be ashamed to enter.

His sleep is not more regular than his repasts; he sleeps little, makes a great noise during the night, prevents those who lie under him from sleeping, goes to the beds of his valets, and makes them go into his. This fact is even deposed to by one of the witnesses of *Madame de Nemours*, who says, however, that it was because his own bed was too soft. That reason might very well prevent his lying in it, and induce him to order another; but not to make one of his servants sleep in a bed which a counsellor of *Angers* had procured expressly for himself.

After this, Sirs, you will excuse our entering into the details which have appeared before you respecting the other functions of life, you remember the fact of the pan at *Blois*, of the *Fauteuil* at *Richlieu*; the names alone will recal to your recollection the indecent actions recited by the witnesses. No answer has been attempted to what passed at *Richlieu*; but they would efface what passed at *Blois*, by the mere negative deposition of the master of the inn, who said that he never heard the fact mentioned in his family; as if such a negation could destroy a positive fact proved by the deposition of *Gravin*, who saved the *Abbé d'Orleans* from the hands of the cook, who ran after him, and who related the fact at the time to the other domestics who now depose to it.

What remains after all these facts but to add, that if you believe some of the witnesses, his weakness was sometimes changed into fury, and gave the sad presages of the state into which he fell a short time after? He ran sometimes after his people, beating them and abusing them; the worth of *Madame de Longueville* alone retained them in his service. In the midst of a conversation full of levity and extravagance, he all at once seized *Monf. de Billy* by the throat; he quitted him laughing like an idiot, and said, *M. de Billy, you are a good man.* He did another act of the same kind with regard to a footman; he took up a spit in the kitchen, and would have run through *Fouilleuse*, who was obliged to let him go, not being able to follow him in the streets: *Fouilleuse* escaped the blow and only had his waistcoat pierced. At *Lyons*, a short time after the second testament, three beggars followed up their prayers with blows, because, under pretence of drawing a tooth for one, he endeavoured to take away his handkerchief. At *Valence*, he imagined that *Gravin* had beaten him, he fell a-crying, and ran after him, saying, *to the prevot, to the prevot, you have beaten a priest.*

But we have said more than enough as to the two first general facts; the ecclesiastical functions and private actions: let us proceed to the third general fact, which will be much shorter, but not less important than the two others, and this fact is the judgment which was pronounced respecting the state of the *Abbé d'Orleans*.

We do not call upon you to observe, that all the witnesses, except one, who confounds him with a different person, believed him to be in a state of real madness; it is a certain fact, but there are others more essential.

Three kinds of persons have formed a judgment upon the state of the *Abbé d'Orleans*; and the judgment of all of them is the same:—Strangers, the domestics, his own family. Strangers—of this you have already seen many proofs; for what would those children say who gathered around him, who followed him in the streets, who hooted after him, who offered him so many outrages? Do they not render an unsuspecting judgment of the public, and constant opinion of his madness? Do not those who followed him at the *Hospital of Charity*, and who said, as he went away, that he had lost his senses, pronounce the same judgment? Let us add to all these facts, the names which were given him at different places, and which are so many proofs of his insanity, the more strong as they are the less affected. At *Orleans*, they call him a *bajut*, which, according to their dialect, is a fool. At *Nantes*, they say in the prisons, that he has a stroke of the gibellet in his head; and in the inn, a stable boy has the insolence to call him with impunity the *Abbé de haute folie*.

The domestics do not judge more favourably: we learn from a great number of witnesses, that his folly was the most common subject of their conversation. They point at him with their finger, they forget what is due from them to him, and he is the continual subject of their railleries; sometimes they touch their foreheads, to intimate to those who did not know him, the deplorable state of his reason; sometimes they say to those who speak of him to them, *it is a great pity to be a fool*; sometimes they call him amongst themselves, *notre biscaïe!*

Finally, did not his own family sufficiently indicate the unhappy judgment which they had formed of his condition, by the acts which we have already examined; by the sentiments of grief, of affliction, of inquietude, which the witnesses have shewn in *Madame de Longueville*; by the orders which were given to revoke any permission for taking confessions which the *Abbé d'Orleans* might have surpris'd; by the precautions which *Madame de Longueville* took to prevent his saying mass; lastly, by the express prohibition which followed the circumstance mentioned in the deposition of *Madame de Billy*? But besides all these facts which you have already remarked, there are still some which belong to this stage of the cause, and which appear to us extremely important.

The first relates to the journey of the *River Loire*. Two motives for this journey have been mentioned by the witnesses; the one, to spare his family the grief of seeing him, and the shame of exposing him; the other, to get over the interval until his majority, until the precious moment when he was to do all the acts which he was required to do for the benefit of his family.

The second fact regards the stay of the *Abbé d'Orleans* at *Paris*, at the time of his testament; this stay was to be very short according to the intention of the family. The witnesses and the acts concur in shewing us that they would not suffer him to return to *Paris* until his majority; and one of the witnesses adds, that he was to leave it the beginning of *February*, that is, fifteen days after his arrival; but that some incidents occurred, which deranged this first plan.

The third fact relates to the liberty which they allowed the *Abbé d'Orleans*, both at the time preceding and that following it; a liberty in respect to which there are three important facts, that we are obliged to bring before you at this moment. The first, that *Madame de Longueville* answered those who press'd her to take measures for the confinement of the *Abbé d'Orleans*, *We are obliged to manage him and support him for the welfare of the family*. The second, that upon another occasion when they represented to her, that it would be proper to restrain that liberty which he abus'd; she replied, *Let his*

*relations do it, I will not involve myself with them, (me les attirer.)* And lastly, when they asked *Madame de Vertus* why *Madame de Longueville* did not place her son in confinement, she answered, *Can the poor princess do what she would?*

We content ourselves with simply stating the facts; and we conceive that you will draw all the necessary inferences without our submitting them to you.

The last fact which proves the judgment of the family, is what five witnesses have said concerning the acts. They all remark, that they got the *Abbé d'Orleans* to execute several acts at that time, and amongst others, the universal donation; because he was incapable of governing his property.

Such, Sirs, is the summary, the abridgment, the general plan of the public and private life of the *Abbé d'Orleans*; such are the judgments which strangers, which the domestics, which his family pronounced concerning his reason. It seems that we might now terminate this great cause; for what arguments could be so powerful as to efface the general impression which results from this infinite multitude of different actions, all tending to the same point?

We are obliged, however, to enter into the examination of two great and important objections, which have been made against these facts.

It is asked, in the first place, if it is true, that all these facts are proved?

In the next place it is asked; but are all these facts, such proofs of insanity, that none of them can receive a favourable interpretation?

To answer the first question, we suppose there to be two objections, the one of law, the other of fact.

We yesterday considered the point of law. You remember the distinction which was stated between general facts and particular. When the only question is as to the proof of a particular fact, the concurring testimony of two witnesses is absolutely necessary; but when the question in dispute relates to a general fact, and most especially a fact of habit, it is sufficient for the witnesses to agree in the general fact, and is not necessary for them to agree in the particulars.

Even if you should allow the same rigour which is introduced in criminal affairs, if you should only reckon ten witnesses as one, there would still be a complete proof by seventy-five witnesses, who would at least be equivalent to seven uniform witnesses; and this general fact being once proved, the particular facts only serve to determine the nature of it.

Lastly, *Madame de Nemours* can never contest this principle of law,

law, since she herself has only single witnesses. It is true, that there are many who agree as to the kind of actions, for instance, there are a great number who speak of the fact of the mass; but if we were to follow the rigorous principles as to there being only a single witness, there are not two witnesses in her whole inquest who appear certainly to have heard the same mass; so that the general fact could not be proved, since each particular fact would only be supported by the deposition of a single witness.

But besides these reasons of law, there is an invincible answer founded in the fact itself, and it is this, there are several grave and important facts proved by the uniform deposition of several concurring witnesses; and those facts which would be sufficient in themselves being once established, the other particular facts are no longer doubtful, because they are branches issuing from the same root, streams derived from the same source, parts of the same whole; which, from the moment that the whole is certain, are allowed to take their place and incorporate with each other, to compose a single body, and an entire tissue of actions.

It only remains then to lay before you a list of facts, which are proved by the deposition of two witnesses.

*(M. d'Aguesseau here recited a statement of the facts, upon which there were at least two depositions.)*

The second question has something more specious; and certainly there are several actions, of which the portrait of the *Abbé d'Orleans* is composed, which may receive a more favourable explication, and are more conformable to the natural presumption of sanity. It is even pretended that there are hardly any, which, taken separately, would not be susceptible of a legitimate excuse and a probable colour.

We are of opinion, that, in answer to this objection, it will suffice to observe, that all the facts of which we have given an account so much at length, may be considered in two manners; either separately and detached from each other, or jointly and united together, as forming one entire chain of conduct.

Now, in which ever manner we contemplate them, the proof is equally established.

If we examine them separately, we shall find some, which of themselves are demonstrative of insanity, because they can never be explained upon any other supposition than that of a real derangement of intellect.

If we consider them together, then they will afford a mutual assistance, and their union will produce a conviction which we conceive it will be difficult to resist.

This shall be shown in very few words.

Let us select a very small number of actions from the multitude of those which we have contemplated, and let us see if it was possible that a person who still retained a ray of understanding, a spark of reason, could be capable of committing them.

The desire of confessing all sorts of persons, at all times, and in all places, and that without permission, making use of intreaties, money, menaces, violences, to accomplish this design; forcing an iron crow into the mouth of a footman, to extort from him a confession; offering a suspended priest to procure his absolution from the bishop, provided he would confess himself to another priest without authority, (for such was the *Abbé d'Orleans* when he made this offer); running with a lanthorn in his hand in the streets of *Nantes*, to call up the tailors' apprentices and oblige them to confess; capable of revealing a confession without any criminal design and from mere levity, or supposing he had revealed it when in fact he had not; and giving money to a criminal to conceal a fact which he had only invented to put a price upon his silence; going to try the confessionals at *Picpus* without finding any place suitable, except in the *sacristie*, where he offers to confess for a dozen hours together; leaping over the balustrade of the altar after having said mass, and at the time when the priest was going to give the communion; all those genuflexions, those signs of the cross, accompanied with benedictions, which he made in the church of *Notre Dame des Ardilliers*; undertaking to make, and actually making a funeral oration on a *Curé* who had died two days before, and who was never known to him; turning to the people, and ordering aloud as soon as he had said *ite missa est*, that they should get him a steak; calling for a chamber pot in the middle of the mass, and running like a madman from one side of the altar to the other, and the other circumstances which accompany that indecent action; his preaching in the lowest pot houses, delighting to preach to persons who were drunk, running along the streets exposed to an infinity of melancholy adventures, pursued and abused by the children, become the object of public derision, leaping upon his shadow, dancing upon the ramparts of a city, fastening a branch of box to his hat, vehemently lamenting the loss of it, and a great many acts of the same description—Are these equivocal actions which may be favourably interpreted; or rather is it not visible, that as no man in his senses could commit such actions, no man in his senses could seriously offer to excuse them?

But what will it be, if, after having detached all these facts, after having examined them separately, we connect them with a crowd of other circumstances, which we have already mentioned? When we run through, as we have done, all the ecclesiastical functions, and

and all the most simple and common actions of private life ; when we examine the singularity of his prayers, the absurdity of his exhortations, the general and particular irregularities of his confessions, the indecencies which he committed in the celebration of the mass, the disorder and want of connection of his conversations, the indignity of his exterior appearance, the wildness of his rambles, the meanness of the places and companies which he frequents, the sad, the ridiculous, the humiliating adventures, which occurred to him, his irregularity in eating, drinking, sleeping, and in all the details of his life ; when we join to all this the opinions of strangers, the discourses of the domestics, and above all, the unanimous suffrages of all who approached him ; finally, the judgment and conduct of his family ; can there yet remain a reasonable doubt in any body's mind, can it be supposed that a person in such a situation shall be ranked amongst the number of wise and reasonable persons, capable of disposing of their property ? Shall it be said, that he was capable of filling that mediocrity of duties, of proprieties, of offices, which is the lowest degree of reason ; and do we not, on the contrary, see that all the most common duties were effaced from his mind, all propriety forgotten, all the offices of civil life entirely violated ? We add further, these duties, these proprieties, these offices, increase and augment in proportion to the degree of grandeur and elevation of the person who fulfils them ; frequently even that which would not pass for a sign of insanity, in a person in an obscure condition, becomes a convincing proof of derangement in one of distinguished birth. And if we judge of the *Abbé d'Orleans* by this rule, which nobody can condemn, you will find that there is hardly any of the actions of his life which is not a sensible argument of the derangement of his mind ; since there was hardly any in which he was not wanting in what he owed to the public, to his family, and to himself, or which did not dishonour his name, obscure the splendour of his birth, profane the dignity of his sacerdotal character, and, to say all in one word, in which he did not indicate an entire extinction of sentiment, a profound forgetfulness of himself, a stupidity and animal insensibility, which is one of the principal characters of insanity.

In this condition it is asked, whether he could make a testament ? Let us picture to ourselves a man of this character, who, in the days of ancient *Rome*, and when a testament, invested with all the solemnities of the law, ought to be published and promulgated in the comitia like the law itself ; let us picture to ourselves then a man, who, in the situation of the *Abbé d'Orleans*, had risen in the midst of the assembly of the *Roman* people, and had brought his  
testament

testament to receive its authority by the consent of all his fellow citizens; would not his presence and discourse have excited a general stir, an universal murmur, a kind of insurrection amongst the people? Would they not have cried out on all sides, that this was an abuse of the law which allowed the making of testaments; that it only intended to commit its power to a sage legislature, but not to have placed arms in the hands of a madman? Let 75 witnesses have risen at the same time, to declare those facts which we have now recited, all of them attesting the grand fact of opinion and public notoriety, and can we doubt that all the assembled people, so far from confirming the testament of a man, in the state to which the weakness of his mind had reduced the *Abbé d'Orleans*, would have instantly given him a curator, and have placed him under the servitude of a perpetual interdiction?

But without looking for instances at a distance, let us suppose that, with an inquest like that of the *Prince de Conty*, an application had been made to confirm a sentence of interdiction; can it be believed, as it has been boldly asserted, that there would be any serious and real doubt upon the subject? Even if the answers given by the *Abbé d'Orleans* upon an inquisition, should be sensible and apparently full of reason, could they ever efface the prodigious multitude of facts, which form so lively an image of the character of his mind? And do you not recollect what passed last year in a cause of some celebrity, which was brought before you respecting a person of the name of *Bursamer*, whose interdiction it was required to repeal? He underwent three interrogatories at different times; his answers were full of reason and good sense. There was only one on which he admitted an action of folly, which he had committed, as he said, by way of penitence. Yet, notwithstanding the reasonableness of his answers, you confirmed his interdiction; and that upon facts contained in his letters, which his answers could not destroy. It is true, that at the end he consented himself to be interdicted; but independently of his consent, which was of no great weight upon such an occasion, you pronounced the continuance of his interdiction. Let us make the same supposition of rationality, in the answers of the *Abbé d'Orleans*. However sensible they might be, could they obliterate the facts which are contained in the depositions of the witnesses? This appears to us to be absolutely impossible; and if such is the case, what are the rules respecting interdictions founded on insanity? Is it not certain that they have a retrospective effect, that they go back to the moment at which the insanity is proved; because in these interdictions nature anticipates the office of the judge; it is she, properly speaking, who pronounces the interdiction; the judge only declares it, and renders

it more solemn. Thus, in this case, the effect of the interdiction would extend to the testament which preceded it, because the testament is included in the time of a proved insanity.

Let us finish, with a single reflexion, every thing which relates to the inquest of the *Prince de Conty*. What is the answer opposed to the greatest part of the facts which it contains? All these facts, say they, may be the effect of an extraordinary zeal, of a profound humility, of a desire to annihilate, and reduce himself to a state of apostolical poverty and simplicity; in a word, actions of sanctity, which the children of this world mistake for signs of folly; and, abusing the holy expressions of sacred writ, they have dared to apply to the *Abbé d'Orleans* these words of the book of wisdom, *Nos insensati vitam illorum aestimabamus insaniam*; and they have not taken care of avoiding to confirm by that observation, all that the witnesses of the *Prince de Conty*, and even those of *Madame de Nemours*, have deposed, concerning that rumour of canonization which was spread through the cities on the *Loire*. Strange solution, injurious to the saints whom they have placed in an unworthy parallel with the *Abbé d'Orleans*, contrary even to the interests of *Madame de Nemours*, and capable of forming a complete proof of insanity; for, finally, if all the facts contained in the inquest of the *Prince de Conty* can only be explained by supposing a pretended and imaginary sanctity in the *Abbé d'Orleans*, what remains to conclude in making this supposition, which is as absurd with regard to religion as to probability, except that the *Abbé d'Orleans* was in the state in which one of the greatest philosophers of antiquity (Aristotle) represents those who can renounce the sweets of society and live in solitude? They are, says that philosopher, either above mankind, and exalted even to the throne of God himself; or below humanity, and reduced to the sad condition of savage beasts. May we not apply this idea to the *Abbé d'Orleans*? Either he was elevated by his sanctity above all human proprieties, or his insanity had degraded him below the last degree of human reason. It is visible that the first supposition cannot be true; it is only necessary to read the depositions of the witnesses to be convinced of it. It is profaning the name of *Saint* to give it rashly to a man capable of desiring to receive confessions from all kinds of persons, capable of committing all those indecencies which he fell into in saying mass, to a man whose life was a dream, a fable, a long night; to a man who got drunk in the lowest pot-houses, who did not even respect the sanctity of the tribunal of penitence, and who at a time when he desired to exercise the functions of a judge, rendered himself criminal, by the discourses described in the inquest, which combine so many kinds

of folly in a single trait, and can find no excuse but in insanity. We blush to dwell so long in refuting this unworthy comparison which has been made between a madman and the saints.

Let us conclude in one word, that since, according to *Madame de Nemours*, the *Abbé d'Orleans* was either actuated by the continual impressions of an extraordinary zeal, or the perpetual agitations of a real insanity; after having shown that the first has not the least appearance of truth, it cannot but be admitted that the fact of insanity alone can combine the characters of probability and truth.

Let us proceed, however, to the more solid arguments of *Madame de Nemours*; and let us see in a few words what are the facts of her inquest, by which she pretends to destroy that of the *Prince de Conty*.

Let us observe, in the first place, that the greater part of her facts are negative in two different ways; negative in general, because, as we have already mentioned, a reasonable action neither excludes the proof nor the presumption of insanity; negative in particular, because there is not any one of them which destroys the particular facts of the *Prince de Conty*.

Let us make a second general observation on the facts of this inquest.

There are three kinds; the first equivocal, the second adverse to *Madame de Nemours*, the third alone favourable to her.

The first equivocal, such as every thing which relates to the journey of the river *Loire*, a journey useless in itself, a journey in which the *Abbé d'Orleans* and his attendants concurred in concealing his name, a journey little suitable to his dignity in all its circumstances, a journey which the *Abbé d'Orleans* was not at liberty to finish when he pleased, as you have seen in the fact of *Gué de Loré*; a journey, in fine, for which the witnesses of *Madame de Nemours* do not assign any probable reason, except the natural inclination of the *Abbé d'Orleans* for a change of place. But if that was the only cause, why did they prevent his returning to *Paris*, when his natural inclination led him to do so? The witnesses of the *Prince de Conty* give two reasons for this journey; the one, to spare the family the pain of being a continual witness of the disordered understanding of the *Abbé d'Orleans*; the other, to get over the time until he attained his majority.

Let us place, in the number of equivocal facts, that of the precipitation which some witnesses of *Madame de Nemours* remark in the gait and speech of the *Abbé d'Orleans*; that of his rambles in *Paris*, proved by a witness of *Madame de Nemours*, who said,  
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he had seen him return late in the evening on foot, covered with dirt; that of the companions unsuitable to his condition; that of the exhortations made early in the morning to the footmen in their chamber, without permitting them to sit up in bed; finally, that of some witnesses from *Angers*, who shew us that in the house of a *Counsellor* of the presidial of *Angers*, the *Abbé d'Orleans* lay in the bed which had been assigned to his valet, and made him lie in his: none of these facts are much adapted to give a high idea of the understanding of their author, and they accord perfectly with the facts of the *Prince de Conty*.

There is a second class of facts, consisting of such as are absolutely adverse to *Madame de Nemours*. You remember the two witnesses from *Saumur* and *Angers*; their depositions have been read to you on the one side, and on the other. You know that one of them describes the *Abbé d'Orleans* as entering the inn, and reciting with a loud voice *Κυριε ελιουον*, till he got to his chamber; then he shews the valets laughing behind him, when he related the histories of which we do not enter into the detail, and making signs of derision; that the *Abbé d'Orleans* having gone to the capuchins, the witness said to the attendants, *your master has escaped*, and advised them to go and stay in the suburb, *lest any thing should be found out*; terms which are simple and natural, and sufficiently manifest the judgment which was entertained concerning the situation of the *Abbé d'Orleans*.

The other witness also describes the entrance of the *Abbé d'Orleans* into his inn: *as a seminarian, having his beviary under his arm*; he obtains a chamber by the credit of his attendants; he afterwards mentions the two adventures of the lanthorn. The *Abbe d'Orleans* went alone at six in the evening, with a lanthorn in his hand in the streets of *Angers*, to the gate of the episcopal palace; they followed him at a distance, and took notice that when he got there, instead of going in he turned back and returned leisurely to the inn. Another time, at the same hour he came into the public place with the lanthorn in his hand, walked round the walls, and without having done any thing returned to the inn; and the husband of the witness related these adventures as so many acts of folly.

The inference is too clear to require that we should stop to draw it.

Finally, there is a third class of facts, which are favourable to *Madams de Nemours*.

They are confined within a very small number.

There are three general facts, and five or six particular ones.

The first general fact is, that the insanity commenced at the

end of *September*, 1671, from which *Madame de Nemours* concludes, that it had not begun six months before the testament of *February*, 1671. But it would be much more reasonable to conclude, as follows: the *Prince de Conty* has proved that the *Abbé de Orleans* was in a state of insanity at the end of 1670, and the beginning of 1671; then it is not true, that the insanity did not commence until *September*, 1671.

What are the proofs adduced by *Madame de Nemours*, to establish the truth of this important fact?

They are of two kinds.

The one has already been examined, and found insufficient at the time of your former judgment; since, if you had been convinced by the written evidence, that the insanity did not break out until the month of *September*, 1671, you would not have allowed a proof of its having commenced a long time before. And, in fact, nothing could be more imperfect and equivocal than these proofs; the one of which is taken from the consultation of the relations in *January*, 1672, wherein they call the malady of the *Abbé d'Orleans*, a *present infirmity*; by which, it was contended, that they meant to exclude all the time that was past, and to confine themselves precisely to the present moment, when they intimate some hopes of obtaining a cure, as if it was not usual upon this kind of consultations, never to speak of the insanity as desperate and incurable. The other proof was founded upon the terms of a memorial of *Madame de Longueville*; terms which appeared to you very ambiguous at the time, because they contained two incompatible dates. It is there represented, that seven or eight months after the expiration of his tutelage, and his attaining his majority, the *Abbé d'Orleans* having taken journies into foreign countries, was found to be not in a condition to administer his affairs, by reason of the fatigues which he had undergone, and the kind of life which he had led. If you begin to reckon from the time when the tutelage finished, the testament falls within the time assigned to the state of fury; if, on the contrary, you only reckon from the time of his majority, the fury did not begin until about the month of *August*, or the beginning of *September*; and although this last computation appears more probable, because *Madame de Longueville* joined to this calculation of time the travelling in *Germany*, you however did not consider this piece as decisive, whether on account of its uncertainty, or on account of its being impossible for *Madame de Longueville* to express herself otherwise, without impeaching the acts which were the work of the family; or whether, in fine, because these terms might very well refer to the commencement of the fury, and not to that of the mere insanity.

fanity. And this is the distinction with which we are about to answer the new proofs now adduced in support of the same fact.

We have taken notice of three.

The first is a consultation, without date or name, of a physician at *Straßburg*, which is applied with tolerable probability to the *Abbé d'Orleans*, but which says nothing that can serve to determine the commencement of the insanity; he only says, that there is a very great heat in the bowels of the patient, on whose behalf he had been consulted, and that, *in order to prevent the consequences which have already caused some unfortunate accidents, it would be proper to make him take cooling draughts*; and what is there in all this from which we must conclude that the insanity was recent? On the contrary, he speaks of accidents which had already taken place, but does not fix either the times, or places; he speaks also of a preceding consultation: all this leaves the commencement of the insanity as uncertain as it found it.

The second proof is derived from the accounts of the expence of the *Abbé d'Orleans*; by which we see that couriers were sent to *Paris*, with the news of the melancholy state into which he had fallen; and upon this occasion there were extraordinary movements, of which there was not any example in the time preceding.

The last proof is drawn from the deposition of two witnesses of *Sarrebouurg*, who state the first attacks of fury in the *Abbé d'Orleans*, after having said, that hitherto he appeared to them sufficiently reasonable. There are two things in this deposition, the one that the *Abbé d'Orleans* appeared sufficiently reasonable, until these first impetuosities, from which they would conclude, that he actually was so; but this fact is absolutely destroyed by the writings adduced by *Madame de Nemours* herself.

1. The memorial of *Madame de Longueville* fixes the commencement of the fury 8 months at longest after his majority. These 8 months expired on the 12th of *September*; therefore, if we were to attach ourselves scrupulously to this memorial, we must say, that from the 12th of *September*, that is to say, before the mission of *Saint Marie aux Mines*, and before the journey to *Sarrebouurg*, the *Abbé d'Orleans* was in a state of fury.

2. The consultation of the physician at *Straßburg* was previous to the *Abbé d'Orleans* going to *Sarrebouurg*, and it marks a declared state of insanity.

3. The deposition of *Perny*, one of the principal witnesses of *Madame de Nemours*, positively affirms that the fury broke out at *Saint Marie aux Mines*. Judge after this of the credit due to the witnesses, who say that he appeared rational at *Sarrebouurg*.

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The other circumstance of these depositions, which agrees with the accompts, relates to the sending of couriers to *Paris*, and the first attacks of fury; but there is nothing in this which contradicts the case of the *Prince de Conty*. He does not contend that the *Abbé d'Orleans* was in a state of fury, at the time of the testament; he only alleges mere insanity: and the supposing a change not from sanity into insanity, but from insanity into fury, is sufficient to reconcile all the facts which are indicated both by the accompts and the witnesses.

The second general fact, proposed to you on the part of *Madame de Nemours*, receives also the same answer. They have particularly called upon you to observe, that no precaution was taken against the insanity of the *Abbé d'Orleans*, before the month of *October*, 1671; that they do not appear even to have attempted either his perfect cure, or the alleviation of his complaint, or sought for even a kind of consolation, in the application of the most ordinary assistances of medicine.

But as to all the precautions which could be taken against him, the kind and character of his insanity did not require them until the month of *September*; it was calm and tranquil, if we except two or three emotions of fury which a menace appeased; and the argument which is drawn from the want of care in applying the remedies of medicine might be very considerable, if it did not prove too much, for it might be shewn by the same reasoning, that the *Abbé d'Orleans* was never in a state of insanity in his life; since it does not appear that, even at the time of his fury first breaking out, any remedy was applied. At *Bourges*, we only find a consultation of physicians, but we do not see that any thing was done in consequence of it.

What then is the only conclusion that can be drawn from this observation? It is that to all appearance the derangement of the *Abbé d'Orleans* increased by degrees, and in consequence of a weakness in the organs which increased with it, and to which any application was considered as useless.

But, without wishing to exercise our conjectures any further upon this point, let us pass to the third general fact, which *Madame de Nemours* has proved by her inquest. This fact is, that the *Abbé d'Orleans* appeared to the greatest part of the witnesses, who have deposed in favour of his sanity, to be a person of good sense; but this is precisely what the doctors call the general fact, which can only approach to a real proof, when the witnesses add, that they were always about the person whose state is contested, so that he could never commit any extravagant action without their having been witnesses of it. Here the witnesses neither have said  
so,

fo, nor could say fo; none of the witnesses commonly attended the *Abbé d'Orleans* except *Perny*, who is a very exceptionable witness, so that the depositions in this respect only contain a mere negative, which has no more force than if they had only said, we have never seen the *Abbé d'Orleans* commit any actions of insanity.

The last general fact, which *Madame de Nemours* has relied upon more particularly, is the full and entire liberty which was enjoyed by the *Abbé d'Orleans*: master of his actions, sole arbiter of his conduct; they not only never thought of screening him from the malignant curiosity of the public; they never even charged any domestic to follow him, to watch over his conduct, to prevent the unfortunate actions which might befall him; and in a state of complete insanity, according to the witnesses of the *Prince de Conty*, they suffered the eldest branch of the *House of Longueville*, and a priest, to appear publicly in all the cities of the kingdom, and to proclaim the weakness of his mind, the dishonour of his race, and the blind facility of his family.

Although this argument only forms a presumption, and a simple probability, which is not capable of destroying positive proofs, it must nevertheless be admitted, that it would make a great impression if it was not combated by two answers, that appear to us equally solid.

1. It is true, in general, that to enjoy a perfect liberty is a presumption of sanity, but at the same time it must be admitted, that to abuse that liberty, as was done by the *Abbé d'Orleans*, is a strong proof of the contrary. There is hardly any action in general, which may not accord both with the character of a man of sense and a madman; but what distinguishes them is, that the one does it in a reasonable manner, and the other, by his manner of doing it, evidently demonstrates his folly. A man of reason and a madman may both be masters of their conduct, but the one uses becomingly the power which he has over himself, the other abuses it unworthily; or rather, the one governs himself, the other is governed; the one conducts himself by his reason, the other is dragged along by his insanity. It is not then enough to shew that the *Abbé d'Orleans* was free, if they do not destroy the facts, which prove that he made a bad use of his freedom.

If it is yet insisted, that this liberty shews at least the judgment of his family respecting his situation, since they would not have allowed him it if they had thought him capable of committing the actions, which are stated by the witnesses of the *Prince de Conty*, we say, in the second place, as we said yesterday upon another occasion, that the family was more to be commiserated than blamed; and that we must hear their reasons before we can

pronounce a solid judgment upon their conduct. Perhaps they would have told us, that if they had offered to put any constraint upon the *Abbé d'Orleans*, he would have fallen immediately into that declared fury, which took place a few months afterwards; that by leaving him master of his actions, they prolonged for some months the duration of that calm and tranquil folly, which was a smaller evil than a state of fury; that perhaps they still retained a hope of cure, which they must have absolutely renounced, if they had placed any restraint upon his conduct; lastly, that there were but two things to chuse, the one to leave him at perfect liberty, the other to place him in absolute confinement; the latter would have been the most simple; but, besides that it might have appeared too harsh, and persons hesitate a long while upon these occasions, before they go to such extremities; taking this part would not agree with the necessity which there was of making the *Abbé d'Orleans* execute the several acts, which were necessary for the good of the family. But why search longer for conjectures and colours, when we find the truths themselves written in the depositions of the witnesses?

Recollect, if you please, every thing which we have already stated concerning the judgment of the family, and, above all, those important reflections of the principal witnesses of the *Prince de Conty*, which shew it to have been very plain; that they would have confined the *Abbé d'Orleans* during his stay at *Paris*, if the important affairs of the family had not obliged them to defer the execution of this design; there are some who go still further, and who attest that *Mundame de Longueville* told them, that she was obliged to manage him, and support him for the welfare of the family.

In so delicate a conjuncture, what could they do better than send him to travel under another name, with a small number of chosen domestics, to bring him back the moment of his majority, for the purpose of tying his hands and securing all his property to the *Comte de Saint Pol*; to make him set off immediately afterwards, and to flatter his volatility and inconstancy by continual journies, until his reason should be re-established, or his insanity, converted into fury, could not be restrained within any reasonable bounds?

Such appear to have been their intentions; and, once more, was it easy to take a better part? Shall we repeat that censure is much more easy than counsel? But, under all these circumstances, it is certain that the general fact of liberty can no longer be considered as decisive.

Let us enter into the examination of particular facts. There are a great number, which are either indifferent or equivocal.

Such

Such are the sermons, the exhortations which he made to the domestics. Upon this subject we have only to join the witnesses of the *Prince de Conty*, with those of *Madame de Nemours*, to find not a presumption of reason, but a proof of madness.

Such is the fact of the visits and exhortations to the patients in the *Hospital of Charity*. You have seen the circumstances with which they were accompanied in the inquest of the *Prince de Conty*.

Such are the pious and Christian conversations, of which some witnesses speak in general, without applying any of them in particular. Those fragments of sermons, which it is said the *Pere Cheran* approved when they were recited to him by the *Abbé d'Orleans*; that Latin conversation which the vicar of a village said that he admired; all these facts are vague, general, indefinite, susceptible of all kinds of interpretations, according to their particular circumstances, which are not at all stated by the witnesses.

The deputation of *Chateaudun*, which the *Abbé d'Orleans* received in the cloister of the chartreux, is not a more decisive fact than the preceding. The witness only shews, that he received it with chagrin, and that he sent his officers to the almoner, and continued the conversation which he had begun with a chartreux. What is there in this which is to efface the suspicions of insanity? It is of the same kind with that other fact which has been brought forward with so much anxiety, that the *Abbé d'Orleans*, attentive to the rank which he derived from his birth, always took precedence of the *Bishop of Angers*. Does this fact prove any thing else, than that the habits naturally contracted from his infancy, were not at all times obliterated from his memory? Let us add, that another fact, upon which they dwelt a long time, is not less indifferent than those which we have already mentioned. It is that related by the *Sieur David*, who says, that the *Abbé d'Orleans* kept his table, and that several persons of distinction dined with him.

But this took place very seldom, since we learn from the witnesses of the *Prince de Conty*, that the most miserable pot-houses were the places which the *Abbé d'Orleans* commonly chose for taking his repasts.

Even supposing he had frequently eaten at the *Hotel de Longueville*, what conclusion could be drawn from it? Has it ever been contended, or could it be contended on the part of the *Prince de Conty*, that because the *Abbé d'Orleans* was in a state of insanity, he could never take his meals at his own house? Who are the persons of distinction referred to? Only one is mentioned, which is the *Sieur Arnauld*. Every body knows that *Madame de Longueville* honoured him with her particular esteem and confidence, and even

when the *Abbé d'Orleans* was placed in confinement, he was not concealed from a person of the character mentioned by the witnesses.

What remains then if we take off all the useless facts in the inquest of *Madame de Nemours*? Two principal facts.

The one regards his ecclesiastical functions, the other the honour which he had of taking leave of the *King* before he left *Paris*, after making his last testament.

Let us begin with the ecclesiastical functions.

Let us, in the first place, take off all the facts which took place on the mission to *Saint Marie aux Mines*.

A crowd of reasons present themselves to defeat the authority of the witnesses, who speak of it, and the circumstances which they relate.

In the first place, these facts have not received, or rather they could not receive any legitimate contradictions in the inquest of the *Prince de Conty*. Within what space of time is his proof confined, both by the original sentence, and the judgment which confirmed it? To six months preceding the testament which he opposed. Provided he has proved, that in those six months, and principally at the very time of making the testament, the *Abbé d'Orleans* was in a state of perfect and notorious insanity; he has satisfied all that your judgment required from him; he could not prove any thing more; and if *Madame de Nemours* wished to prove the sanity of the *Abbé d'Orleans* six months after his testament, she ought to have articulated that fact, as the foundation of a solid induction against the proof of the *Prince de Conty*. It is here supposed, on the part of *Madame de Nemours*, that the *Prince de Conty* had put it in issue, that the commencement of the insanity was six months previous to the time of the testament, and that on the other side, *Madame de Nemours* had articulated, that the insanity did not commence till six months after the testament. If that had been the case, a great advantage might have been derived from the witnesses of *Saint Marie aux Mines*, because their deposition would have been entirely conformable to the opposite facts alleged by the respective parties; but it is not in that manner, that the facts have been alleged in the articles; it is not true, that each of the parties have alleged different facts on their respective sides: The *Prince de Conty* has exhibited his articles, and what is the fact which he alleges? It is, that the insanity had commenced six months before the testament. *Madame de Nemours* has not proposed any opposite fact, she has confined herself to a mere negative; and if you have permitted the witnesses to be examined, it was not in compliance with her demand, for she had not made any; but to satisfy the disposition

disposition of the ordonnance, which requires that the proofs shall be always reciprocal on civil questions, and in fact, why has she examined the witnesses of *Saint Marie aux Mines*? Is it to prove, that the insanity only commenced at the end of *September 1671*? but this fact was never alleged by any memorial, it is only to destroy the proof of the *Prince de Conty*, by a negative argument, and to conclude, that the *Abbé d'Orleans* was not insane in the month of *February 1671*, since he was in a state of sanity in the *September* following. But this inference loses all its force the instant it is remembered, that it was not alleged at the time of the interlocutory proceeding, and that consequently the *Prince de Conty* could not be required to combat by his witnesses, a fact of which he might well be ignorant, because it was without the limits of the time to which his proof was to be confined.

If he could have examined witnesses upon these facts, perhaps he might have destroyed them in an invincible manner; perhaps he might have shewn, that these ecclesiastical functions, which are now so much relied upon, were like the others, an effect, a consequence, a proof of the insanity of the *Abbé d'Orleans*; perhaps he would have shewn that he had committed indecent actions, like those mentioned in his own inquest; and do we require any other proofs to be persuaded of it, than those which are derived from the witnesses of *Madame de Nemours* herself, who could not help letting drop some traits of the character of the *Abbé d'Orleans*? We learn from one of them, that he went out in his surplice in the portal of the church, and that he there called to the persons who were passing by, to come and confess to him; and what might we not expect from the witnesses of the *Prince de Conty*, when even those of *Madame de Nemours*, who once more had not in this respect, and could not have any legitimate censor, cannot but raise doubts and excite suspicions?

But let us go further, and observe, that these witnesses of *Saint Marie aux Mines* can prove nothing, because they prove too much; for if we believe them, we must be persuaded that the *Abbé d'Orleans* was much more reasonable at the eve, and almost in the very arms of his fury, than at the most distant period, since we do not see him in his confessions fall into the same irregularities which the witnesses of *Nantes* impute to him, in a manner so precise and uniform. And this is not all, for we must believe that *Madame de Longueville*, who before the journey of the *River Loire*, who before all the actions of insanity, which the *Abbé d'Orleans* committed upon that journey, and during his stay at *Paris*, had nevertheless given directions to his almoner to prevent his getting permissions to take confession; that notwithstanding all these new

facts, notwithstanding the rapid and continual augmentation of the insanity, *Madame de Longueville* had the weakness to shut her eyes upon the situation of her son, and to leave him in possession of a liberty which he never merited, and of which his last actions rendered him absolutely unworthy.

What then was the cause of this complete liberty, of performing all kinds of ecclesiastical functions at *Saint Marie aux Mines*, which the *Abbé d'Orleans* enjoyed for the space of six days? The cause is not difficult to be guessed at; the distance from *Paris*, the splendour of his name, which dazzled the people there, and made them admire as an excess of zeal, what was only the effect of a blind impetuosity; the absence of an almoner and of *Gastines*, whom *Madame de Longueville* had particularly charged with preventing her son from saying mass; the impossibility which the other officers found of confining him within the bounds of reason, and the fear they might have of probably precipitating what at last was only deferred for a few days, that is to say, the necessity of putting him into confinement.

Let us make another observation upon these facts. What preceded them, and what followed them? What preceded them you know; it is written in the depositions for the *Prince de Conty*; you know what *Gastines* and *Follard* have stated of the conduct of the *Abbé d'Orleans* at *Lyons*, and in *Provence*. The scandal which he caused at *Lyons*, by his indecencies even in the confessional, the adventure of the three beggars, from one of whom he wished to draw a tooth; the irreverence, the trouble, the agitation with which he said the mass, at *Istre* in *Provence*, forgetting the greater part of the prayers, and leaving the person who served him in doubt whether he had performed the act of consecration. Lastly, that state of folly, which was so conspicuous, that they were obliged to make him take off the sacerdotal vestments, when he went out of the sacristy; and many other circumstances, which we do not repeat. Such are the facts which preceded the mission; but what followed it was a declared fury, as *Madame de Nemours* herself admits; and who can conceive that this mission, placed in the midst of so many acts of fury, could have been so reasonable as the witnesses would persuade you?

But what completely destroys all their credit, is, that *Madame de Nemours* herself appears in opposition to their testimony, and is obliged to contradict them by her written evidence, and her other witnesses. What says that memorial of *Madame de Longueville*, which *Madame de Nemours* would have you so strictly adhere to in fixing the precise epocha of the insanity? She shews, according to the sense of *Madame de Nemours* herself, that the *Abbé d'Orleans*

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was reduced to this sad condition, seven or eight months after his majority. This expression cannot be extended beyond the end of the eighth month, and that finished on the 12th of *September*, and it was precisely on that day, that the mission of *Saint Marie aux Mines* commenced; thus this mission, according to the literal application of the memorial of *Madame de Longueville*, and giving it the utmost possible latitude, is wholly included in the period of the infancy.

Let us also see that *Perny*, one of the principal witnesses, or rather the only important witness of *Madame de Nemours*, if he was not exceptionable, informs us that it was in the course of the mission of *Saint Marie aux Mines*, that the *Abbé d'Orleans* fell into the first transports of fury, with which he was attacked, and yet not one of the 25 witnesses of this place would allow us to entertain the slightest suspicion of infirmity or weakness of mind. They all represent the *Abbé d'Orleans* as a *Saint*, an *Apostle of Germany*, full of a pure and rational zeal, in the whole course of this mission. There are even witnesses of *Madame de Nemours*, who go still further, and who, contrary to the memorial of *Madame de Longueville* against the deposition of *Perny*, attest the sanity of the *Abbé d'Orleans*, even at *Sarrebouurg*, where he did not go till some days after the mission of *Saint Marie aux Mines*.

Judge, Sirs, of the credit that ought to be given to the witnesses, who neither agree with the pretended proofs in writing of *Madame de Nemours*, nor with the deposition of her principal witness; who place wisdom in the midst, in the very bosom of madness; who, by proving so much, prove nothing; and who, not having any legitimate contradictor, have fallen into the same licentiousness in the matter of their depositions, in which the absence of an almoner had thrown the *Abbé d'Orleans*, in regard to his ecclesiastical functions.

Let us confine ourselves then to the witnesses who have deposed to the time allowed by the former judgment.

We find three kinds of functions proved by the depositions of a great number of witnesses, several of whom add, that the *Abbé d'Orleans* filled them in a very sensible manner.

The first and most important is that of priest, the second that of deacon, the third that of mere clerk, in the assistance and celebration of divine service.

It would be useless to enlarge upon the importance and weight of these facts, and particularly of the grand fact of the celebration of the mass. That is in truth all that can form a real difficulty in this cause; without that we venture to say, that it would hardly appear susceptible of any. All the other facts are useless, indis-

serent, equivocal, frequently more approaching to insanity than to reason. This one seems at once essential, positive, capable of balancing all those that are stated by the witnesses of the *Prince de Conty*; it has that character of personality which we mentioned yesterday; it is one of those actions proper to the person doing them, more strong than the signature of the greatest number of acts, and which being once proved seems entirely to exclude the least suspicion of weakness of intellect.

Yet it has been opposed by such powerful answers, that we do not think that this grand affair can be in all its circumstances regarded as decisive, since it is, on the contrary, from this very fact, that they offer to deduce the principal proofs of insanity.

Let us examine the propositions which result from it.

To decide upon their force we must distinguish two that require to be examined separately.

The one is derived from the action itself. Can we be persuaded that a person who was capable of exercising this venerable mystery of offering the august sacrifice, which is the summary of our religion, that this same man had not sufficient will, or sufficient power, for the making a testament?

The second presumption is drawn from extrinsic circumstances, and especially from the silence and forbearance of the illustrious relations of the *Abbé d'Orleans*. Who can believe that *Madame de Longueville* would have authorized, by a mean compliance, a multitude of sacrileges and profanations? for such is the celebration of the mass by a madman.

Let us answer to the first presumption, as we have already done to that which is drawn from the entire liberty allowed to the *Abbé d'Orleans*; and let us say in a word, that to perform a reasonable action in a reasonable manner, is a great proof and almost a certain sign of the possession of a reasonable mind; but to do an act of reason in a manner full of extravagance, is to furnish the most irresistible testimony of madness.

To be free, and to use that liberty wisely, is to be wise; but only to be so in order to abuse such freedom, is the reverse. Let us say the same as to the fact before us. To celebrate the mass, with the gravity, with the application, the collected mind, which so sacred an action requires, is to give the public a striking proof of reason; but to celebrate the mass with agitation, with trouble, with irreverence, to accompany it with actions unworthy not only of a priest, but of the lowest degree of human reason, to profane the ministry by scandalous indecencies, is the height, the last degree to which a folly exempt from fury can attain; yet this is what occurred to the *Abbé d'Orleans*.

It is not necessary here to recal to your recollection the facts which have been stated, that precipitation, that general irreverence which is spoken of by the witnesses, that leaping over the balustrade of the altar, at the time when he was preparing to receive the most august of sacraments; that discourse which imbecility alone can render credible, as it alone can excuse, we speak of that order given in saying *Ite missa est*; to put a steak upon the gridiron; that other adventure so affecting to *Madame de Longueville*; lastly that sad necessity to which the almoner of *Madame de Longueville* was reduced, when he obliged the *Abbé d'Orleans* to descend from the altar between the epistle and the gospel.

All these facts are present to your minds, and are sufficient to efface whatever presumptions can be drawn from the celebration of the mass.

And in fact, Sirs, what could we expect from a man, who fell into such excesses as have been related of the *Abbé d'Orleans*? Let us not divide those ecclesiastical functions, which their unity should render inseparable. How could a man, who was under the impulse of a real fury in respect to confessions, (we do not repeat the proofs) be in a condition to celebrate the mass with discretion? How could it be hoped that he would discharge this ministry with reason, after all the proofs of insanity which he had given, in his preachings, and in every thing which had reference to his ecclesiastical functions? Could he have been deranged in all the rest and reasonable only in this? Even if it was so, as there are some madmen who shew considerable sense upon particular subjects, could this fact destroy the proof of all the rest?

But no, Sirs, it does not destroy it; on the contrary it confirms it, and gives it full conviction. So far are the dignity and the sanctity of the action from justifying the sanity of the *Abbé d'Orleans*, that they on the contrary place his insanity in its very strongest point of view. To what excess of madness must he have arrived, when neither the majesty of the altars, nor the fear of God, before whom even the angels are as nothing, nor the dignity of the ceremony, nor the concourse of people, could fix the levity, the caprice, the absurd emotions of his mind? And if an ancient conceived himself to mark all the crimes of those who did not respect the sanctity of the temples, when he said *Alii in capitolio fallunt, ac fulminantem pejerant Jovem*; what can be sufficient to shew the extreme insensibility of a man who commits actions of insanity in the face of the altars, and at the very time when, as a minister of religion, he is ready to offer to the true God the only sacrifice worthy of his acceptance?

It is true that they have not proved that these glaring actions of folly occurred to the *Abbé d'Orleans*, whenever he caught an opportunity of celebrating mass; but is it necessary to shew that he committed every day prodigies of derangement, in order to supply melancholy proofs of his ordinary and habitual situation? Is it not sufficient if even in the celebration of the mass, he shewed some of those indubitable signs of folly, in order to warrant the general conclusion, that he was in a state of real insanity; since it is visible that a reasonable man can never fall into such extravagancies, and that no man who does fall into them can justly escape the imputation of folly and loss of understanding?

If it is asked how it happened, that upon some occasions no public and visible mark of insanity escaped him? we shall answer, that nothing is more common than to see insane persons perform reasonable actions, especially when they are influenced by a particular passion for some kind of action; because the same folly which inspires them with the general design to commit such action, also gives them an idea of performing it with all its exterior perfection, and without omitting any of the circumstances which they consider as necessary to it. We are not called upon to enter into the interior of the soul, still less to penetrate, by an adventurous curiosity, into questions which are infinitely beyond the reach of our feeble understandings, to know whether the *Abbé d'Orleans* had a sufficient power of mind, and what degree is sufficient in the administration of the mass. It is with reluctance that we have suffered an argument, upon which we think that we neither could nor ought to enter into an examination. There are some truths which we ought to honour by our silence, or at least, which we must submit to the bishops, and other depositaries of tradition; contenting ourselves with the humble and sincere confession of our ignorance, upon every thing which relates to the inward dispositions of other persons. And in fact this is what can only be known by God. All that the witnesses have related only regards the exterior actions. Now this exterior might, at certain times, be sufficiently regular in the *Abbé d'Orleans*, without establishing a certain proof of sanity. It is even possible that the witnesses who speak of it, may neither have been capable, nor sufficiently attentive, to judge of this exterior regularity; and this is even very probable when we examine the quality of those who relate the fact, and who are some of the inferior domestics of the *Houſe de Longueville*.

But without entering into this discussion, let us rest upon this grand reflection which appears to us sufficient. The celebration of the mass with wisdom, is one of the strongest presumptions of the

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the sound and regulated disposition of the priest who celebrates it; but the mass said with irreverence, interrupted with scandal, and profaned by indecencies, which it is even painful to mention, is the very strongest proof of insanity.

But if that is true, as nobody can doubt, how are we to explain the patience of the family of the *Abbé d'Orleans*? This is the second presumption which results from the fact of the mass, and which, although it appears at first entirely decisive, is however not more strong than the first, when it comes to be examined; on the contrary, we may say that it is destroyed, in a manner still more invincible.

Let us distinguish, upon this point, two periods in the life of the *Abbé d'Orleans*. The first, that which preceded the important and decisive fact of this cause; that is the fact of which *Madame de Longueville* was herself a witness. The second, including the time which followed it.

Up to that time *Madame de Longueville* doubted of her calamity, she still flattered herself by indulging a hope of cure; she was, it is true, even more exalted by the sanctity of her life, than by her birth; but she was a mother, and she thought perhaps that it would not be possible to keep her son in a state of continual dependance, and he was sometimes allowed to act without any superintendant of his conduct. Yet although there was still some doubt and some uncertainty in her mind, she from that time took every precaution to prevent the *Abbé d'Orleans* from being admitted to the celebration of mass. We learn from several witnesses, that she sent to give notice to the superiors of the church not to admit her son to so sacred a ministry; but it must be allowed that these intimations had not any great effect, and the *Abbé d'Orleans* still found too many opportunities of exercising the sacerdotal functions. We must even admit that it does not appear, that during the journey of *Orleans*, *Madame de Longueville* charged his almoner to prevent his saying mass, as she had charged him with preventing his receiving confessions; therefore it seems very probable, that it was not until the return from that journey, that *Madame de Longueville*, finding the weakness of the *Abbé d'Orleans* considerably increased, took more effectual precautions to prevent his saying mass.

But after that adventure which she saw with her own eyes, she no longer took any measures; *Madame de Billy*, the *Sieur Gafines*, and some other witnesses apprise us that she absolutely forbade her son being allowed to say mass, and if he said it afterwards, the same witnesses inform us, that it was by surprize, without the knowledge of *Madame de Longueville*, and by the unfortunate collusion

collusion of *Porquier*, who was afterwards the depositary of his testament.

We shall not enlarge upon the functions of deacon which he exercised only twice in the two months next adjoining to the testament, one of which was at the institution, where his madness was not known, and the joy of performing this function prevented its appearing at that moment. We shall not speak of the functions of clerk, which he does not appear to have exercised within the time to which the proof is confined.

The fact of the *Abbé d'Orleans* having taken leave of the king, is only proved by a rumour which took place at the *Hotel de Longueville*, and besides it amounts to no more than a mere matter of ceremony, which he might be supposed capable of performing at a time when his folly was as yet fearful and docile.

But after having shewn you, that there never was a proof more certain and convincing than that which arises from the inquest of the *Prince de Conty*; after having shewn you that it is not destroyed by that of *Madame de Nemours*, but on the contrary, confirmed in several particulars; it only remains very shortly to discuss the last question of this cause. The first question was, whether the insanity was proved? the second is, whether it was continual, or susceptible of lucid intervals, in which it might be presumed that the testament was made?

In respect to the law, there are three objects upon which we shall make very summary reflections.

1. What is a lucid interval, and whether there is any ground for confounding it with an action of apparent reason?

2. In what kind of folly the law presumes such intervals?

3. In what manner it ought to be proved?

Let us follow these reflections, and examine first, what it is that the jurists call a lucid interval.

Two conditions discover the real idea of it.

The first, is the nature of the interval; the second, its duration—*its nature*—It must not be a superficial tranquillity, a shadow of repose, but on the contrary, a profound tranquillity, a real repose; it must be not a mere ray of reason, which only makes its absence more apparent when it is gone, not a flash of lightning, which pierces through the darkness only to render it more gloomy and dismal, not a glimmering which unites the night to the day; but a perfect light, a lively and continued lustre, a full and entire day, interposed between the two separate nights, of the fury which precedes and follows it; and, to use another image, it is not a deceitful and faithless stillness, which follows or forebodes a storm, but a sure and steadfast tranquillity for a time, a real calm, a perfect

fect serenity, in fine, without looking for so many metaphors to represent our idea, it must be not a mere diminution, a remission of the complaint, but a kind of temporary cure, an intermission so clearly marked, as in every respect to resemble the restoration of health. So much for its *nature*.

And as it is impossible to judge in a moment of the quality of an interval, it is requisite that there should be a sufficient length of time, for giving a perfect assurance of the temporary re-establishment of reason, which it is not possible to define in general, and which depends upon the different kinds of fury, but it is certain there must be a time, and a considerable time. So much for its *duration*.

These reflections are not only written by the hand of nature in the mind of all men, the law also adds its characters, in order to engrave them more profoundly in the heart of the judges. There are two important laws upon this subject: 1. The law 18. § 1. ff. L. 41. Tit. 2. de acq. vel. amit. poss. (a). It supposes the case of a person in a state of fury, who appears reasonable, who contracts, who acquires, who takes possession; his folly is so concealed that the vendor is absolutely deceived, and yet so certain that the jurist decides; he does not acquire the possession. What terms does he make use of to mark this condition, *in conspectu inumbratae quietis*; and in what does the shadow of repose consist? in the two conditions which we have marked, *its nature*; this is only an exterior tranquillity; if they had passed this first surface, if they had entered into the sanctuary of reason, they would have found him under the actual slavery of his fury, which was only in a state of transitory slumber; *its duration*, it is only a moment, which passes *in conspectu*; it is nothing but a glance, a fleeting light, a short and rapid view. 2. The law 6. cod. L. 5. Tit. 70. (b). de curatore furiosi, &c. de-

(a) Si furioso, quem sane mentis esse existimas, eo quod forte in conspectu inumbratae quietis fuit constitutus, rem tradideris: licet ille non erit adeptus possessionem, ut possidere desinis, sufficit quippe dimittere possessionem, etiam si non transferas. Illud enim ridiculum est, dicere, quod non aliter vult quis dimittere, quam si transferat: imo vult dimittere, quia existimat se transferre.

(b) Cum aliis quidem hominibus continuus furiosus infortunium accidat, alio autem moribus non sine laxamento aggradiatus, sed in quibusdam temporibus quendam eis intermissio perveniat, et in hoc ipso multa sit differentia, ut quibusdam breves inducatur, aliis majores ab hujusmodi vitio inducantur: antiquitas disputabat, utrumne in mediis furoris intervallis permaneret eis curatori intercessio, an cum furore quiescens finit, iterum morbo adveniente redintegraretur? Nos itaque ejus ambiguitatem decidentes, sancimus (cum incertum est in hujusmodi furiosis hominibus, quando resurserint, sive ex longo, sive ex propinquo spatio, et impossibile est, et in consilio furoris et sanitatis eam sapius constitui, et post longum tempus sub eadem esse varietate, ut in quibusdam videatur etiam pene furor esse remotus) curatoris conditionem non esse finiendam, ut in quibusdam videatur etiam pene furor esse remotus: sed manere quidem eam donec talis furiosus videretur, quia non est pene tempus in quo hujusmodi morbus desperatur.

cides the question by requiring *intervalla perfectissima, ut in quibusdam videatur etiam pœne furor esse remotus*. We may join the term made use of in law 9. *furiosum cod. L. 6. Tit. 22. qui testamenta facere possent*: this remarkable term is *in suis induciis*. It is then an entire suspension, a real truce, which only differs from a peace in as much as its effect is only temporary.

After this it is easy to remove the ambiguity which they have endeavoured to introduce, by confounding a sensible action with a lucid interval.

*First Answer.* An action may be sensible in appearance, without the author of it being sensible in fact; but an interval cannot be perfect, unless you can conclude from it, that the person in whom it appears is in a state of sanity; the action is only a rapid and momentary effect, the interval continues and supports itself; the action only marks a single fact, the interval is a state composed of a succession of actions.

And to have a sensible proof of this, let us examine the case of those, who are only affected upon one or two principal points: one person is always seeing precipices, another supposes the people want to stop him; one transforms himself into a beast, another, by a folly still more outrageous, believes himself to be God. If you do not introduce these subjects, they appear reasonable as to every thing else; put them upon these points, they immediately discover their weakness. The madman who believed that all the merchandize which came into the port of *Pyreum*, was consigned to him, could still judge very reasonably of the state of the sea, of storms, of signs, from which he might hope the safe arrival of vessels, or apprehend their loss. The person of whom *Horace* has given so ingenious a picture, who always thought he was attending at a shew, and who, followed by a troop of imaginary comedians, became a theatre to himself, in which he was at the same time both the actor and the spectator, observed in other respects all the duties of social life:

*Cætera qui vitæ servaret munia recto*

*More, bonas sane vicinus, amabilis hospes, &c.*

Yet, who could suppose that such persons were in a condition to make a testament?

*Second Answer.* If it was true that a proof of some sensible actions was sufficient to induce a presumption of lucid intervals, it must be concluded, those who allege insanity could never gain their cause, and that those who maintained the contrary could never lose it. For a cause must be very badly off, in which they could not get some witnesses to speak of sensible actions. Now,  
if

if from thence alone you were to draw the inference of lucid intervals, and supposing them sufficiently proved, should conclude that the testament ought to be presumed to have been made in one of those intervals, there could never be any doubt of success. The consequence would be absurd, the principle therefore cannot be true.

You see, Sirs, what a lucid interval is; its nature is a real calm, not an apparent one; its duration must be sufficiently long to admit a judgment of its reality. Nothing can be more distinguishable than a reasonable action and an interval. The one is an act, the other is a state; the act of reason may subsist with the habit of madness, and if it were not so, a state of folly could never be proved.

Let us see, however, in what kind of folly intervals may be presumed.

We have said that the jurists distinguish two kinds of insanity, to which they give different names, they call the persons affected by the one *furiosos*, the others *mente captos*.

Now it is easy to prove that intervals only occur to the first.

Upon this point let us proceed from the expositors to the law, and from the law to the light of reason.

With regard to the expositors, let us confine ourselves to two, who have been cited.

*Faber*, upon the law 17. ff. (a). *Qui testam facere possunt*, says expressly that the distinction of lucid intervals hardly ever takes place in the case of a mere want of reason. *Hæc distinctio vix cadit unquam in mente captum*; and let it not be said that the text of the law is otherwise, for that law does not relate to intervals, or even to insanity; the question there is of a person who in the height of a fever loses his reason, and it is said that at such a time he is incapable of making a testament; therefore, so far from its being a question of intervals of reason in a madman, it relates, on the contrary, to intervals of fury in a reasonable person.

*Dumoulin*, upon the title in the Code, *Qui Test. fac. possunt*, establishes the same opinion in two words, by the mere chain of his reasoning.

He establishes it as a principle, that those whom he calls *stulti*, and those whom he calls *furiosi*, are equally incapable of making a testament; and he speaks afterwards of lucid intervals, but only speaks of them with reference to the former. It is to them alone that he applies this distinction, and could he more clearly mark that it is not applicable to the former?

(a) L. 28. l. 1. In adversa corporis valetudine mente captus eo tempore testamentum facere non potest.

But let us leave the expositors and proceed to the laws, they furnish us with three arguments, two negative, and one positive.

*First negative Argument.* They could not cite a single law, which speaks of intervals, with regard to those who are *mente capti*; on the contrary, all the laws which speak of them refer solely to persons in a state of fury.

*Second negative Argument.* We see that they admit furious persons in their intervals even to the function of a judge. Law 39. ff. de *judiciis*, L. 5. Tit. 1. but was any thing of the kind ever heard of in case of a mere destitution of reason?

*Third Argument*, which is positive, and which forms a kind of demonstration, derived from the law 25. *Code de nuptiis*.

It was some time before a question, whether the children of persons who fell into a state of insanity, were obliged to wait for their consent to marry, and there is a progress in the law upon this question. It was first decided only in favour of daughters.

Afterwards in favour both of sons and daughters of a person who was *mente captus*.

With respect to the son of a furious person, the doubt continued until the time of *Justinian*, who decided, by the law which has been cited, that they should also be allowed to marry without waiting for the consent of the father; till then it seems to have been necessary to obtain a particular permission, or to wait for a lucid interval.

Hence arise the invincible arguments.

Why should they permit that to the son of a person *mente captus*, which was not allowed to the son *furiosi*, except that the law did not presume there to be any intervals, in which the former could consent, and did presume them in regard to the latter? There is no other ground of difference. Then the presumption of law is established, not only by negative, but also by positive arguments:

Let us now ascend to the highest degree, that is to reason, which is the source of these laws.

Two essential reasons are the foundation of them.

I. The nature of mere insanity, which being commonly the effect of temperament, is rather a weakness of organs, an habitual evil, than an accidental malady. It is otherwise with respect to fury, which may have a temporary cause, which is sometimes cured and frequently suspended; and, to make use of the elegant terms of the author of the factum, distributed by *Madame de Ne-*

*mours,*

mours, in 1673; "Infirmity of mind, particularly when it is the effect of temperament, is not cured by succeeding years; they only serve to fortify the complaint, which may even be considered incurable, being a privation which can never return to being, and existence." This was applied to the insanity of the *Abbé d'Orleans*.

2. Even if nature may admit of intervals in a case of simple insanity, (a question which must be left to the professors of medicine,) Jurisprudence cannot recognize them: for the grand rule is, *de his quæ non sunt, et quæ non apparent, idem est iudicium*.

We may observe the paroxysms and the intervals of a furious person; how can we know the changes in an idiot which are almost imperceptible? This constitutes the very definition of insanity, according to *Baldus, demens qui nullum extrinsecus ostendit furorem, qui habet furorem latentem*. It lives, it nourishes itself within, and gives no signs without: for instance; those who are only touched upon a single subject, have the marks of understanding in every thing else. Now if we do not sensibly perceive the departure of reason, what indication can there be of its return?

Let us come to the third reflection, how should intervals be proved, even in a case of fury?

Many expositors have thought that, *semel furiosus semper presumitur furiosus*.

But there is a surer distinction.

Either they have not proved the fact of intervals, and then they are never presumed, however reasonable the act may be, unless it is in its nature entirely personal, and to this, the passage of *Bartolus*, which has been cited, must be reduced.

Or it is proved there were considerable intermissions, and then if the act is reasonable, the presumption will be for placing it at the time of the lucid intervals.

As to the fact, there are two points to examine, the one what is the kind of folly, the other, what proof there is of intervals.

Let us first see what is the kind of folly.

It certainly is not a state of fury, except some momentary attacks which it was easy to stop in an instant. This is proved by the liberty which he enjoyed, and by the facts of the inquest. The witnesses speak of levity, agitation, ramblings, foolishness, laughing, incoherent discourses, infantine conduct; the words *insanity*, (*démence*), and imbecility, are employed in the deposition.

In the second place, he was really in a state of privation of reason, and imbecility, (*un insensé, un imbecille*), of which there are two proofs in writing.

The sentence of the council, where we see the expression, *Weakness of mind.*

2. The factum of *Madame de Nemours*, which says, that the *Abbé d'Orleans* fell into a weakness of mind, or rather, as was too evident and too sensible to *Madame de Nemours*, into an entire imbecility. Here you have the kind well characterized: let us add the expressions which we have already taken notice of; an infirmity which is the effect of temperament, a privation which has never any return to being and existence, and elsewhere, a continual insanity without intermission, without any proper intervals.

Let us apply then the maxims of law to the circumstances of fact. Intervals in this kind of insanity are not presumed.

The reasons of the maxims are equally applicable with the maxims themselves.

1. The nature of the infirmity (*mal*). We see plainly that it was an entire derangement of the organs, which are subservient to operations of the mind, and not an accidental malady.

2. It is impossible to know when the infirmity ceased, and when it began. It was really similar in some respects to those which we have described, as a mind only affected in certain points. Who can doubt that his furious desire of confessing was of this number, and, at the same time, who can doubt that, at whatever moment any body offered to confess to him, he would have accepted the proposal with avidity? Then the folly always continued.

Let us next examine what proof there is of intervals, and as to that, let us look at what has been said on the one side for *Madame de Nemours*, and on the other for the *Prince de Conty*.

With respect to *Madame de Nemours*, let us be satisfied with three observations.

The first, that she never articulated the fact of intervals; yet this could never be supplied.

The second, that her witnesses do not prove it; either because they prove too much, and consequently prove nothing; or because they only speak of particular actions, and those actions are not intervals; and because they did not see him for a sufficient continuance, particularly at the time of the testament, when he was continually running out of the *Hotel de Longueville*, to be able to give an account of an interval sufficiently long, to induce the presumption of a real intermission.

The third, that this proof should apply to the time of the testament, which is not the case.

Let us consider, on the other side, what has been established by the *Prince de Conty*.

What

What does he prove by the deposition of the witnesses, whom he has examined?

1. Some of them shew the continual agitation of the *Abbé d'Orleans*; they represent him as always disturbed, and without any moment of quiet and tranquillity.

2. Many of them express the same thing in other terms, speaking of a state of *insanity*, (*demence*,) of absolute incapacity.

3. The succession of actions in which we hardly see any pause, forms another proof of continuity.

At *Paris*, before the journey of *Orleans*, he ran about the streets, jumped upon his shadow, vaulted over the balustrade of the altar, and that several times. At *Blois*, the fact of the casserolle, and that of the powder; at *Tours* he ran wildly about the streets, the same at *Saumur*. He sings in the streets, makes ridiculous signs and benedictions in the church, at *Richlieu* the fauteuil, at *Angers* the funeral oration and the mass. At *Nantes*, he runs the streets as elsewhere, and shews a continual fury for taking confessions. At *Paris*, he hardly ever eats at the *Hotel de Longueville*. We see him incessantly in the streets, the subject of several adventures. Where can we find the slightest interval?

Let us conclude by one reflection. It is very difficult in *France* to allow the fact of intervals.

The inconvenience of it, or rather of the interpretation which they wished to give it in the *Roman law*, was sensibly experienced.

Every thing would be doubtful and arbitrary. The state of men ought to be more simple. It is true that the ancient practitioners, who thought they had done a great deal, when they translated a *Roman law* into *French*, said, that they found an exception in favour of these intervals. But *Mornac* has judged better when he says, *Servamus ex decretis curiæ irritum esse testamentum, quod a testatore habente lucida intervalla scriptum est.*

And in fact they have not been able to cite any case for *Madame de Nemours*, which has admitted and authorized the distinctions of intervals, to support a testament made after the commencement of a state of insanity.

We shall not enter particularly into the appeal from the sentence, which concerns the exception proposed against *M. de Machault*: it will suffice to say, 1. That this appeal is useless, as you are now to pronounce upon that from the definitive sentence; 2. That the exception was dilatory; 3. That the ground of it was an affected law suit.

(He here made a recapitulation which was not reduced into writing.)

Let us finally add two reflections, one, that there is no uniformity between the time of the first testament and the second.

The other, that the conflict here is not between a testament and an heir by blood, whose only title is the law, but between two testaments; and if we combine all the circumstances which we have already examined, it is impossible to doubt but that the first is the more favourable, and ought to outweigh the last in the scale of justice.

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THE COURT, AFTER TAKING TIME TO DELIBERATE AND EXAMINE THE PROCEEDINGS, PRONOUNCED A JUDGMENT CONFORMABLY TO THE ABOVE OPINION, IN FAVOUR OF THE PRINCE DE CONTY,

# I N D E X

OF THE

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THE END.

# ERRATA.

## VOL. II.

Page.	Par.	Line.		
40	4	5	For <i>exceeding</i> read <i>exceeding</i> .	
45	1	3	For <i>a personal</i> read <i>an entire</i> .	
61	3	8	Dele <i>and even where there are more than two</i> .	
64			Note, Line 10, for <i>examples</i> read <i>protests</i> .	
109	1	19	Dele the semicolon.	
143			Note, Line 2, for <i>their</i> read <i>its</i> .	
144			Note, Line 5, 6, 7.—The words from <i>Now</i> to <i>not so</i> inclusive, to be transposed to the end of the note.	
159	4	13	After <i>method</i> read <i>was</i> .	
176	4	7	Dele <i>as</i> .	
185	2	6, 7	Transpose the words <i>person</i> , <i>witness</i> .	
214	3	9	For <i>confesi</i> read <i>contrast</i> .	
217	2	7	For <i>information</i> read <i>confirmation</i> .	
228	3	2	For <i>exclusive</i> read <i>excessive</i> .	
220	3	7	Dele <i>in</i> .	
224	2	5	Dele <i>necessary</i> .	
239	2	2	Dele <i>at the time of writing the sentence</i> , for <i>grander</i> read <i>grand</i> .	
240	1	7	For <i>form</i> read <i>point</i> .	
245	1	7	For <i>firm</i> read <i>strong</i> .	
		22	After <i>frequently</i> read <i>to be</i>	
247	2	18	Dele <i>abr. ady alluded to</i> .	
255	1	18	Dele <i>which</i>	
259	2	29	For <i>in-line</i> read <i>incline</i> .	
261	1	38	For <i>discontinuance</i> read <i>discontinence</i> .	
262	2	4	For <i>concerned</i> read <i>concurring</i> .	
263	1	27	For <i>any, in,</i> read <i>in any</i> .	
266	1	4	For <i>object</i> read <i>question</i> .	
268	1	31	For <i>repressed</i> read <i>suppressed</i> .	
269	2	4	For <i>them</i> immediately read <i>their immateriality</i> .	
277	1	16	After <i>cure</i> read <i>out</i> .	
287	2	19	For <i>I have known evidence</i> read <i>evidence was</i> .	
		3	4	Dele <i>properly</i> .
293	3	21	For <i>degrees</i> read <i>degrees</i> .	
		28	For <i>is</i> read <i>are</i> .	
373	4	11	For <i>Maximilian</i> read <i>Maximian</i> .	
374	2	11	Dele <i>the</i>	
		21	Dele <i>as</i> .	
376	2	7	For <i>distinct</i> read <i>distant</i> .	
		8	For <i>upon</i> read <i>from</i> .	
387	1	26, 28	For <i>drawer</i> read <i>pages</i> .	
392	2	27	For <i>quasi</i> read <i>quam</i> .	
402	1	4	For <i>by</i> read <i>of</i> .	
		1	5	For <i>from</i> read <i>if from</i> .
403	1	11	For <i>accident</i> read <i>conduct</i> .	
		24	For <i>thereof</i> read <i>thereof</i> .	
		28	For <i>one</i> read <i>case</i> .	





