A TREATISE

ON

THE LAW OF EVIDENCE

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ON THE

LAW OF EVIDENCE

BY

SIMON GREENLEAF, LL.D.

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

IN THREE VOLUMES

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BY

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OF EVIDENCE IN PROSECUTIONS FOR CRIMES AT COMMON LAW.

A TREATISE

ON

THE LAW OF EVIDENCE.

OF EVIDENCE IN PROSECUTIONS FOR CRIMES AT COMMON LAW.

GENERAL PRINCIPLES.

§ 1. **Crime defined.** A *crime is defined* to be an act, committed or omitted, in violation of a public law, either forbidding or commanding it.[1] In the common law, crimes are divided into three classes: treasons, felonies, and misdemeanors. All public wrongs below the degree of felony are classed as misdemeanors, and may be the subject of indictment, either at common law or by statute. Misdemeanors, again, are divided into two classes: *mala in se*, and *mala prohibita*. In the former class is comprised whatever mischievously affects the person or property of another, or openly outrages decency, or disturbs public order, or is injurious to public morals, or is a breach of official public duty, when done wilfully or corruptly. The latter comprises the doing any matter of public grievance forbidden by statute, or omitting any matter of public convenience commanded by statute, but not otherwise wrong; whether it be or be not expressly made indictable, or visited with any specific penalty by the statute.[2]

[1] 4 Bl. Comm. 5. This definition comprises all crimes, whether existing and recognized as such at common law, or whether created wholly by statute. A crime at common law may be defined as an act done with criminal intent, to the injury of the public: R. *v.* Wheatley, 1 Leading Crim. Cases, 3, n. {See also Christian's notes to 4 Bl. Comm. 5 (Sharswood's ed.).}

[2] 1 Russ. on Crimes, 45, 46 (3d ed.); R. *v.* Sainsbury, 4 T. R. 457; 2 Inst. 163

§ 2. **Attempt.** The *attempt to commit a crime*, though the crime be but a misdemeanor, is itself a misdemeanor. And to constitute such an attempt, there must be an intent that the crime should be committed by some one, and an act done pursuant to that intent.[1] "Quidquid criminis consummationi

[1] 1 Russ. on Crimes, 46; R. *v.* Wheatly, 1 Leading Crim. Cases, 1 and n.; R. *v.* Meredith, 8 C. & P. 589; R. *v.* Higgins, 2 East 5, 17–21; R. *v.* Kinnersley, 1 Stra. 193, 196. In some of the United States, the attempt to commit a crime is punishable by statute. And see Com. *v.* Harrington, 3 Pick. 26; Com. *v.* McDonald, 5 Cush. 365. ["Attempt and intent are two distinct things. Intent to commit a crime is not itself criminal. There is no law against a man's intending to commit a murder the day after to-morrow. The law only deals with conduct. An attempt is an overt act. It differs from the attempted crime in this, that the act has failed to bring about the result which would have given it the character of the principal crime. If an attempt to murder results in death within a year and a day, it is murder. If an attempt to steal results in carrying off the owner's goods, it is larceny:" Holmes, Common Law, p. 65. "I think attempting to commit a felony, is clearly distinguishable from intending to commit it:" Cockburn, C. J., in R. *v.* McPherson, Dears. & B. 197. "It is a general principle, that, when a consummated offence is indictable, attempts which, if successful, would have resulted in such offence, are also indictable:" Com. *v.* Tolman, 149 Mass. 229. "The act or acts done towards the commission of an offence, in order to constitute an attempt, must be such as will apparently result in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself; and if the means are apparently adapted to the end, whether those means are or are not actually such as to be necessarily successful if employed, it is sufficient; mere preliminary preparations are not the overt acts required:" Sipple *v.* State, 46 N. J. L. 197; [Cornwell *v.* Fraternal Ass'n, 6 N. D. 201.] It has been held that an attempt to commit a felony can only be made out where, if no interruption had taken place, the felony could have been effected, and so, that where a person puts his hand into the pocket of another with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to steal: R. *v.* Collins, 10 Jur. N. s. 686; 9 Cox C. C. 497; R. *v.* McPherson, *supra*. *Contra:* Com. *v.* McDonald, 5 Cush. (Mass.) 365; State *v.* Wilson, 30 Conn. 500; Hamilton *v.* State, 36 Ind. 280. The question whether there can be an attempt to commit a crime where it would be impossible to complete the crime has been recently considered at length in a case in New York. The indictment in that case charged the defendant with an attempt to commit the crime of grand larceny in the second degree, by attempting to steal, take and carry away from the person of an unknown woman, in the daytime, certain goods, chattels, and personal property of a kind and description unknown and of the alleged value of ten dollars. It was claimed that the evidence did not show an attempt to commit a larceny. The crime of grand larceny in the second degree, as defined by section 531 of the Penal Code of that State, is when a person, under circumstances not amounting to grand larceny, steals and unlawfully appropriates property of any value, by taking the same from the person of another. A person who unsuccessfully attempts to commit a crime is made punishable by section 686 of the same code. Section 34 defines an attempt as "an act, done with an intent to commit a crime, and tending but failing to effect its commission." The defendant claimed that the evidence did not show that the woman had any property in her pocket, which could be the subject of larceny, and that an attempt to commit that crime could not be predicated of a condition which rendered its commission impossible. The court, however, were of the opinion that the evidence was sufficient to authorize the jury to find the accused guilty of the offence charged, saying, "It was plainly inferrible from the evidence that an attempt to commit larceny from the person existed, and that the defendant did an act tending to effect its commission, although the effort failed. The language of the statute seems to us too plain to admit of doubt, and was intended to reach cases where an intent to commit a crime and an effort to perpetrate it, although ineffectual, co-existed. Whenever the *animo furandi* exists, followed by acts apparently affording a prospect of success, and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. To constitute the crime charged there must be a person from whom the property may be

deest, conatum constituit."[2] Thus, to incite another to steal,[3] or to persuade a public officer to receive a bribe, are alike mis-

taken; an intent to take it against the will of the owner; and some act performed tending to accomplish it; and when these things concur, the crime has, we think, been committed, whether property could, in fact, have been stolen or not. In such cases the accused has done his utmost to effect the commission of the crime, but fails to accomplish it for some cause not previously apparent to him. The question whether an attempt to commit a crime has been made, is determined solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. Some conflict has been observed in English authorities on this subject, [but it is now settled] that a person can be convicted of an attempt to steal from the pocket without proof that there was something in the pocket to steal: [R. *v.* Brown, 24 Q. B. D. 357; R. *v.* Ring, 66 L. T. N. S. 300; overruling] R. *v.* McPherson, D. & B. C. C. 197; R. *v.* Collins, 9 Cox C. C. 497; [and see] R. *v.* Goodall, 2 id. 40, where an attempt to commit a miscarriage was held to have been perpetrated on the body of a woman who was not at the time pregnant: R. *v.* Goodchild, 2 C. & K. 293. In this country the courts have uniformly refused to follow the cases of R. *v.* McPherson and R. *v.* Collins, and have adopted the more logical and rational rule, that the attempt to commit a crime may be effectual, although, for some reason indiscoverable by the intending perpetrator, the crime, under existing circumstances, may be incapable of accomplishment:" People *v.* Moran, 123 N. Y. 263. In Com. *v.* Jacobs, 9 Allen 274, it is said that "whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, a crime, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." The same rule was held in the case of Com. *v.* McDonald, 5 Cush. 365, where it was held that a person "may make an attempt, an experiment, to pick a pocket by thrusting his hand into it, and not succeed, because there happens to be nothing in the pocket, still he has clearly made the attempt and done the act towards the commission of the offence." And in the case of People *v.* Jones, 46 Mich. 441, where the accused thrust his hand into the outside cloak pocket of a woman, and there was nothing in the pocket, it was held that the defendant was well convicted of the crime of attempting to commit larceny. In Clark *v.* State, 86 Tenn. 511, the same rule was also held. In the case of State *v.* Beal, 37 Ohio St. 108, where the defendant was indicted for the crime of burglariously entering into the warehouse of William Houts, with intent to steal and take away his property, it was held, the burglarious entrance having been shown, that the defendant could be convicted, although it was proven that the warehouse did not contain any property capable of being stolen. So, in Rogers *v.* Com., 5 S. & R. 463, where the indictment charged that the defendant, with intent feloniously to steal and carry away the money of one Earle from his person, put his hand into the pocket of the coat of said Earle, the court overruling certain exceptions to the indictment, said: "The intention of the person was to pick the pocket of Earle of whatever he found in it, and, although there might be nothing in the pocket, the intention to steal is the same; he had no particular intention to steal any particular article, for he might not know what was in it." It may be considered settled that in the United States the courts generally disapprove the English cases of R. *v.* McPherson and R. *v.* Collins, *supra*.

The attempt to procure an abortion on a woman pregnant, but not quick with child, is not an attempt to commit manslaughter, as the child, in contemplation of law, is not living till the mother is quick: Evans *v.* People, 49 N. Y. 86. Grover, J., dissenting. See also *post*, §§ 163, 215. But one may be guilty of using an instrument with intent to procure a miscarriage, although there is in fact no pregnancy: R. *v.* Goodall, 2 Cox C. C. 40.

The act which is the attempt must be one immediately and directly tending to the execution of the principal crime: Stabler *v.* Com., 95 Pa. St. 318; R. *v.* Taylor, 1 F. & F. 535, per Pollock, C. B. Cf. R. *v.* Roberts, 33 Eng. L. & Eq. 553. On the whole subject see U. S. *v.* Stephens, 3 Crim. L. Mag. 536.]

[2] Evertsen De Jonge, De delictis cont. Rempub. vol. ii. p. 217. But there must be an act done; for, "Cogitationis pœnam nemo patitur:" Dig. lib. 48, tit. 19, l. 18.

[3] [Inciting to arson is an attempt, though the offer is immediately repudiated: State *v.* Bowers, 35 S. C. 262.]

demeanors.[4] So, to possess instruments for coining false money, with intent to use them.[5] So, to send threatening letters;[6] to challenge another to fight, whether with fists or weapons;[7] to solicit another to commit adultery.[8]

§ 3. **Criminal Capacity.** In regard to the *persons chargeable with crimes*, it is proper, in the first place, to consider the evidence of *criminal capacity* or the degree of reason and understanding which is sufficient to render a person liable to the penal consequences of his actions. Persons deficient in this respect are of two classes: *infants*, and persons *non compotes mentis*, or *insane*. To these may be added the class of persons deficient in *will*, that is, acting under the *constraint* of *superior force or the power of others*, and not of their own free will or accord; such as *femes covert*, acting in the presence or by coercion of their husbands, persons under duress *per minas*, and some others. For in such cases there is no liberty of the *will;* and without the consent of the will, there is, says Lord Hale, no just reason to incur the penalty or sanction of a law instituted for the punishment of crimes or offences.[1]

§ 4. **Infants.** With respect to *infants*, the period of infancy is divided by the law into three stages. The *first* is the period from the birth *until seven* years of age; during which an infant is *conclusively* presumed incapable of committing any crime whatever. The *second* is the period *from seven until fourteen.*

[4] R. *v.* Higgins, 2 East 5, 17–21; R. *v.* Vaughan, 4 Burr. 2494. {So is an offer to accept a bribe: Walsh *v.* People, 65 Ill. 58.}

[5] R. *v.* Sutton, 2 Stra. 1074. Cases may, and probably do, differ, say the editors of Leading Crim. Cases, in a note to R. *v.* Wheatly, vol. i. p. 6, as to what is a sufficient overt act to constitute the crime; but all decisions, ancient and modern, recognize the principle, that a criminal intent alone, unaccompanied by any overt act, is not punishable by the common law. We say, cases may and do differ in their application of the principle, and may sometimes be in direct conflict with each other, upon the proper effect of some particular conduct. Thus in R. *v.* Sutton, 2 Stra. 1074, more fully reported in Cases temp. Hardwicke, 370, it was thought that having instruments for counterfeiting coin in one's possession, with intention to coin money and to pass it as genuine, was a sufficient act to be indictable; and the same is laid down as law in 3 Greenl. Ev. § 2. It may be that the decision in Strange was based upon Stats. 8 & 9 Will. III. c. 25, which is cited in 2 Wm. Blackstone, 807, and was not a decision at common law; but whether it be so or not, the modern cases have established a different doctrine. But all agree that *procuring* counterfeit coin with such intent is an act indictable: R. *v.* Fuller, Russell & Ryan C. C. 308; Dugdale *v.* R., 16 Eng. Law & Eq. 380; 1 Pearce C. C. 64; 1 Ellis & Bl. 435.

[6] U. S. *v.* Ravara, 2 Dall. 297.

[7] Com. *v.* Whitehead, 2 Law Reporter 148; State *v.* Farrier, 1 Hawks 487; R. *v.* Phillips, 6 East 464. An attempt to commit suicide is a misdemeanor at common law: R. *v.* Doody, 6 Cox C. C. 463.

[8] State *v.* Avery, 7 Conn. 266; [*contra*, State *v.* Butler, 8 Wash. 194.]

[1] 1 Hale P. C. 14, 15.

During this period the presumption continues, but is no longer conclusive, and grows gradually weaker as the age advances toward fourteen. At any stage of this period the presumption of incapacity may be removed by evidence showing intelligence and malice; for *malitia supplet ætatem;* but the evidence of that malice which is to supply age, ought to be strong and clear beyond all reasonable doubt.[1] There are, however, some exceptions to the rule governing this period; for a female under ten years of age is conclusively presumed incapable of giving consent to an act of criminal sexual intercourse with herself; and a male under fourteen is conclusively presumed incapable of committing a rape.[2] The *third* commences *at fourteen;* the presumption of incapacity arising from youth being then entirely gone, and all persons of that age and upwards being presumed, in point of understanding, capable of committing any crime, until the contrary be proved. Thus, from seven to fourteen the burden of proof is on the accuser to show the capacity of the accused; after that period it is on the accused to show his incapacity.[3] But here, also, there is an exception; for in some cases an infant will not be held liable criminally for a mere nonfeasance, where the ability to perform the duty enjoined requires the command of his property, which is not under his control.[4]

[1] 4 Bl. Comm. 22, 23. And see State *v.* Guild, 5 Halst. 163; R. *v.* Owen, 4 C. & P. 236. In these cases, the prosecutor must prove two points of fact: first, that the prisoner committed the act charged; and, secondly, that he had at that time a guilty knowledge that he was doing wrong: ibid., per Littledale, J. {Whenever a person under the age of fourteen is charged with committing a felony, the proper course is to leave the case to the jury to say whether, at the time of committing the offence, such person had guilty knowledge that he was doing wrong: 1 Russ. on Crimes, 5th Eng. ed. p. 110; R. *v.* Owen, 4 C. & P. 236, Littledale, J.; R. *v.* Smith, 1 Cox Cr. Cas. 260; [State *v.* Yeargan, 117 N. C. 706; McCormack *v.* State, 102 Ala. 156; State *v.* Nickleson, 45 La. Ann. 1172; State *v.* Milholland, 89 Ia. 5.] See also *ante*, Vol. I. c. VI., Presumptive Evidence.}

[2] 4 Bl. Comm. 212; R. *v.* Phillips, 8 C. & P. 736; R. *v.* Jordan, 9 id. 118; R. *v.* Brimilow, ib. 366; 2 Moody C. C. 122. But it has been held, that he may be guilty of an assault with an intent to commit a rape; for the reason that an intent to do an act does not necessarily imply an ability to accomplish it: Com. *v.* Green, 2 Pick. (Mass.) 380. See *contra*, R. *v.* Eldershaw, 3 C. & P. 396; R. *v.* Phillips, *supra; infra*, § 215, n. {But if it be shown that such infant has a mischievous discretion, and that he is over seven years of age, he may be convicted as principal in the second degree, in a case of rape, as aiding and assisting in the accomplishment of the offence: 1 Hale 630.}

[3] R. *v.* Owen, 4 C. & P. 236; 1 Hawk. P. C. c. 1; 1 Hale P. C. c. 3; Broom's Max. p. 149. In California, it is enacted that "an infant under the age of fourteen years shall not be found guilty of any crime:" Cal. Rev. Stat. 1850, c. 99, § 4. [His own testimony that he did not know his act was wrong, is insufficient in itself to show his incapacity: State *v.* Kluseman, 53 Minn. 541.]

[4] 1 Hale P. C. 20; 4 Bl. Comm. 22; 1 Russ. on Crimes, 2. The liability of infants for crime is fully discussed in R. *v.* York, 1 Leading Crim. Cases, 68 and n. See also State *v.* Goin, 9 Humph. 175.

§ 5. **Insane Persons.** The subject of *insanity* has been briefly treated in the preceding volume.[1] But it is proper here to repeat, that though the law, in its charity, always presumes men innocent until they are proved guilty, yet it is also a presumption, essential to the safety of society, as well as founded in experience, that every person is of sound mind until the contrary appears. And the unsoundness of mind must be established by evidence satisfactory to the jury.[2] On questions of this description, the opinions of witnesses who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease at the time of its supposed existence. But in respect to the manner in which the question is to be pro-

[1] See *ante*, Vol. II. §§ 372, 373. [How far insanity is an excuse for crime has been much agitated in recent years. As the developments of medical science have gradually added to the knowledge of insanity, it has been found that the forms and degrees of mental delusion are almost infinite in number. Although medical science has thus enlarged the number of facts which may be put before a legal tribunal in order to enable it to give its decision, yet the legal rules which govern the decision of the court upon those facts have not changed materially. The charge of Maule, J., to the jury in R. *v.* Higginson, 1 C. & K. 129, was, "If you are satisfied that the prisoner committed this offence, but you are also satisfied that at the time of committing the offence, the prisoner was so insane that he did not know right from wrong, he should be acquitted on that ground. But if you think that at the time of committing the offence he did know right from wrong, he is responsible for his acts, although he is of weak intellect." This rule, that in order to attach a criminal responsibility to the prisoner he must have known right from wrong when he committed the criminal act, is the true test, although it may in many cases be difficult of application. See also R. *v.* Barton, 3 Cox Cr. Cas. 275, Parke, B.; R. *v.* Leigh, 4 F. & F. 915; Moett *v.* People, 23 Hun (N. Y.) 60, 12 N. Y. Week. Dig. (Sept. 9, 1882) p. 444; People *v.* O'Connell, 13 id. 95; Warren *v.* State, 9 Tex. App. 619; State *v.* Redemeier, 8 Mo. App. 1.

Whether the word "wrong" here means "moral wrong," or whether it merely means "illegal," is a question of some doubt: Stephen, Dig. Crim. Law, art. 27.

If the accused defends on the ground of an irresistible impulse to commit the criminal act, produced by mental disease, the law seems to be that if such impulse was irresistible in the sense that it would have required actual mechanical restraint to prevent the accused from doing the act, and the irresistible impulse was not induced by the criminal's own default, then he is not legally responsible for his act: Stephen, Dig. Crim. Law, art. 27; but cf. R. *v.* Barton, 3 Cox Cr. Cas. 275; and R. *v.* Haynes, 1 F. & F. 666.

Irresistible impulse, unless there is proof of mental disease, is not a defence to the charge: Boswell *v.* State, 63 Ala. 307; 3 Crim. Law Mag. (1882) p. 32. For a critical article on the danger of allowing too great license to the plea of emotional insanity, see 7 Alb. L. J. 273.

The question upon whom the burden of proof lies, when insanity is relied upon as a defence in a criminal case, and what amount of proof is requisite to establish such a defence, has been decided in three ways. [See Vol. I. § 81 *a*.]

[2] If the fact of insanity is left doubtful, upon the evidence, the court ought not to instruct the jury that insanity is proved. They must be further satisfied that the prisoner was *insane* at the time of the act done; mere loss of memory not being sufficient. And if the homicide is proved, the barbarity of the act is held not to afford a presumption of insanity: State *v.* Stark, 1 Strobh. 479.

pounded to witnesses of this description, an important distinction is to be observed. They are not to be asked whether the facts, sworn to by other witnesses who have preceded them, amount to proof of insanity; for this, as has been observed by a learned judge, is removing the witness from the witness-box into the jury-box.[3] "Even where the medical or other professional witnesses have attended the whole trial, and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified by others. It is for the jury to decide whether such facts are satisfactorily proved. And the proper question to be put to the professional witness is this: If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether, in their opinion, the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances."[4]

§ 6. **Drunkenness.** In regard to insanity from *drunkenness*, we have already adverted to the distinction between criminal acts, the *immediate result* of the fit of intoxication, and committed *while it lasts*, and acts, the result of insanity remotely

[3] Per Ld. Brougham, in McNaughten's Case, Hans. Parl. Deb., vol. lxvii. p. 728; 10 Clark & Fin. 200–212; Opinion on Insane Criminals, 8 Scott N. R. 595.

[4] Per Shaw, C. J., in Com. *v.* Rogers, 7 Met. 500, 505; 1 Leading Crim. Cases, 87 and n. And see *ante*, Vol. II. § 373 and n.; R. *v.* Stokes, 3 C. & K. 185; R. *v.* Barton, 3 Cox C. C. 275; R. *v.* Layton, 4 id. 149; Freeman *v.* People, 4 Denio 29; State *v.* Spencer, 1 Zabriskie 196; Com. *v.* Mosler, 4 Barr 264; {U. S. *v.* McGlue, 1 Curt. C. C. 1; Woodbury *v.* Obear, 7 Gray (Mass.) 457; Baxter *v.* Abbott, ib. 71. See an article on the subject of medical testimony, 22 Law Reporter, 129. The most convenient mode of putting the inquiry, and the least exceptionable one, in our judgment, is to inquire what state of mind is indicated by certain facts, assumed, or testified by certain witnesses, or in any other hypothetical form of bringing the point of inquiry to the mind of the witness. If the witness says the facts assumed indicate mental unsoundness, he may be inquired of in regard to the state and degree of mental unsoundness thus indicated, and how far it will disqualify the person for business, or render him unconscious of the nature of his conduct. He should also be inquired of, whether these facts are explainable in any other mode except upon the theory of insanity, and with what degree of certainty they indicate the inference drawn by the witness: Redfield on the Law of Wills, part 1, p. 149; *post*, § 148. As to the legal tests of insanity, see State *v.* Pike, 49 N. H. 398. Upon the question how far an impulse to commit a crime excuses the commission of the crime, the court in a case in New York says: "Indulgence in evil passions weakens the restraining power of the will and conscience. The doctrine that a crime may be excused upon the motion of an irresistible impulse to commit it, when the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law:" People *v.* Carpenter, 102 N. Y. 250; Flanagan *v.* People, 52 id. 467. Medical works on insanity cannot be read to the jury, to show the opinions of the authors, unless the author verifies the opinions by oath at the trial: Com. *v.* Wilson, 1 Gray (Mass.) 338; State *v.* Hoyt, 46 Conn. 330.} [See Vol. I. § 162 *i*.]

produced by previous habits of gross intemperance; the former being punishable, and the latter not.[1] It may here be added, that drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given; because the question, in such cases, is, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation; and this passion is more easily excited in a man when intoxicated than when he is sober. So, where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But where there is a previous determination to resent a slight affront in a barbarous manner, the state of intoxication in which the prisoner was when he committed the deed ought not to be regarded,

[1] *Ante*, Vol. II. § 374. And see U. S. *v.* Drew, 5 Mason 28; 1 Leading Crim. Cases, 113 and n.; U. S. *v.* Forbes, Crabbe 558; {People *v.* Rogers, 18 N. Y. 9; State *v.* Hurley, 1 Houst. (Del.) Cr. Cas. 28; Erwin *v.* State, 10 Tex. App. 700. "The rule of law is, that although the use of intoxicating liquors does to some extent blind the reason and exasperate the passions, yet as a man voluntarily brings it upon himself, he cannot use it as an excuse, or justification, or extenuation of crime. A man, because he is intoxicated, is not deprived of any legal advantage or protection; but he cannot avail himself of his intoxication to exempt him from any legal responsibility which would attach to him if sober." Per Shaw, C. J., in Com. *v.* Hawkins, 3 Gray (Mass.) 466; [Whitten *v.* State, 22 S. 483, Ala.; State *v.* Murphy, 118 Mo. 7; McCook *v.* State, 91 Ga. 740.] See also Haile *v.* State, 11 Humph. (Tenn.) 154.

Intoxication is now very generally held to be admissible to the jury on trials of indictment for murder, not to excuse, but as bearing upon the question of mental capacity to entertain express malice, or to exercise deliberation, thus tending to show the quality and degree of the crime; and probably the same rule would be extended to all cases where the actual presence of a deliberate intent in the mind of the prisoner at the time of the act is essential to the crime: Hopt *v.* People, 104 U. S. 631; State *v.* Martin, 3 Crim. L. Mag. 44; People *v.* Williams, 43 Cal. 344; State *v.* Johnson, 40 Conn. 136; Malone *v.* State, 49 Ga. 210; Clark *v.* State, 40 Ind. 263; State *v.* Trivas, 32 La. An. 1086; State *v.* Harlow, 21 Mo. 446; Eastwood *v.* People, 4 Kern. (N. Y.) 526; Rogers *v.* People, ib. 632; Jones *v.* Com., 75 Pa. St. 403; Com. *v.* Platt, 11 Phila. (Pa.) 421; Cartwright *v.* State, 8 Lea (Tenn.) 376. This principle has been adopted in the statutes of New York in the following form: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent, is a necessary element to constitute a particular species of degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Penal Code, § 22; [Schwabacher *v.* People, 165 Ill. 618; Wilcox *v.* State, 94 Tenn. 106; Head *v.* State, 43 Neb. 30.] The only materiality, therefore, of evidence of the defendant's intoxication in any case is its bearing upon the question of deliberation, premeditation, and intent. If he was sober enough to form an intent, and to deliberate and premeditate the crime, then his responsibility is the same as if he had been perfectly sober. In weighing the evidence as to premeditation and deliberation, the jury are bound to take into account the condition of the defendant: People *v.* Fish, 125 N. Y. 146. And in a case in Massachusetts, where the indictment charged an assault upon a woman, the court held that it was competent for the jury to find from the evidence that the defendant made an attempt to do harm to the person of the woman, with intent to injure her, and that it was a question of fact for the jury to determine whether he was so far intoxicated as to be unable to form a guilty intent: Com. *v.* Hagenlock, 140 Mass. 127.}

for it furnishes no excuse.[2] And it seems, also, that if a person, by the unskilfulness of his physician, or the contrivance of evil-minded persons, should eat or drink that which causes frenzy, this puts him into the general condition of an insane person, and equally excuses him.[3]

§ 7. **Constraint.** As to persons acting under the *constraint of superior power*, and therefore not criminally amenable, the principal case is that of a *feme covert;* who is considered by the law as so far under the power and authority of her husband, that, if she commit any crime by his command or coercion, except those of treason and homicide[1] (and perhaps some others), she is not held guilty.[2] Whether, where the act is done *by the husband*

[2] R. *v.* Thomas, 7 C. & P. 817, per Parke, B. And see R. *v.* Cruse, 8 id. 546; R. *v.* Monkhouse, 4 Cox C. C. 55; Marshall's Case, 1 Lewin C. C. 76; R. *v.* Moore, 3 C. & K. 319; State *v.* McCants, 1 Speers 384; Cornwell *v.* State, Mart. & Yerg. 157; Swan *v.* State, 4 Humph. 136; Haile *v.* State, 11 id. 154; 1 Russ. on Crimes, 8; 3 Amer. Jur. 1–20; R. *v.* Meakin, 7 C. & P. 297; R. *v.* Carroll, ib. 145; U. S. *v.* Drew, 1 Leading Crim. Cases, 113 and n.

[3] 1 Hale P. C. 32; Park, J., Pearson's Case, 2 Lewin C. C. 144; 1 Russ. Crim. Law, 2.

[1] [State *v.* Barnes, 48 La. Ann. 460.]

[2] 4 Bl. Comm. 28, 29; 1 Hale P. C. 45, 47, 434. Lord Hale, in the first of the places cited, excepts only *treason* and *murder*, in "regard of the heinousness of those crimes;" in the second, he excepts "*treason*, *murder*, or *homicide;*" in the third, he excepts *treason*, *murder*, and *manslaughter*. Lord Bacon excepts *treason* only; saying that the wife is excused in cases of *felony;* Bac. Max. pp. 26, 27, 32; Reg. 5, 7. And this agrees with the case in 27 Ass. 40, cited in Bro. Abr. tit. Corone, pl. 108, where it was held, that a woman arraigned of *felony* could not be adjudged guilty, the act being done by command of her husband. Blackstone states the exception to be not only of treason, but of "crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like:" 4 Bl. Comm. 29. Mr. Russell adopts this exception, and extends it to robbery also: 1 Russ. on Crimes, 18. And see R. *v.* Stapleton, Jebb C. C. 93. Mr. Starkie states the exception as extending not only to treason, murder, and manslaughter, but to assaults and batteries, and "any other forcible and violent misdemeanors, committed jointly by the husband and wife:" 2 Stark. Evid. 399, cited by approbation by the Recorder of London, in R. *v.* Manning, 2 C. & K. 903, n. And see, accordingly, Purcell on Crim. Pl. and Evid. pp. 16, 17; Whart. Amer. Crim. Law, p. 54 (2d ed.). But in a case before Burrough, J., where a wife was indicted, jointly with her husband, for robbery, he directed the jury to acquit her, on the ground that the law conclusively presumed that it was done by coercion of the husband: 1 C. & P. 118, n. In Ohio, it has been held that coercion by the husband is to be presumed in all crimes under the degree of murder, in the commission of which she joins with him: State *v.* Davis, 15 Ohio 72. Whether she is entitled to the benefit of this presumption, in the case of inflicting an injury dangerous to life, with intent to murder, which is made a capital offence by Stat. 1 Vict. c. 85, was doubted in R. *v.* Cruse, 8 C. & P. 541. On the principle of presumed coercion by the presence of the husband, the wife has been held not liable for larceny (R. *v.* Knight, 1 C. & P. 116; Com. *v.* Trimmer, 1 Mass. 476; Anon., 2 East P. C. 559); receiving stolen goods (R. *v.* Archer, 1 Moody C. C. 143); uttering base coin (Connolly's Case, 2 Lewin C. C. 229); R. *v.* Price, 8 C. & P. 19; and burglary (J. Kelyng, p. 31). See further, 1 Russ. on Crimes, 18, 22, with the notes of Mr. Greaves; Com. *v.* Neal, 10 Mass. 152; 1 Leading Crim. Cases, 76 and n. In Com. *v.* Neal, *supra*, where the husband and wife were jointly indicted for assault and battery, it was specially found that she committed it in company with and commanded by her husband: and the court held, that she was not guilty of any civil offence, committed by the coercion of her husband, or even in his presence; and accordingly discharged her.

and wife jointly, his coercion is conclusively presumed by the law, or is only to be inferred *prima facie*, and until the contrary is shown, is a point not perfectly clear. In earlier times, it seems in such cases to have been the conclusive presumption of law, that the wife was under the husband's coercion. So Blackstone appears to have regarded it; referring to Lord Hale, and to the laws of King Ina, the West Saxon.[3] Lord Hale, in the place cited, is express, that, if the wife commit larceny by coercion of the husband, she is not guilty; adding, that, according to some, such is the presumption if the act be done by command of the husband, which, he says, seems to be law if the husband be present; for which he refers to the same law of Ina,[4] and to Brooke.[5] And so it was held in 16 Car. II., by all the judges present, in a case of burglary committed by the wife jointly with her husband.[6] Mr. Starkie adopts the same conclusion, that the presumption of law is imperative, in all cases where the husband is present and participating in the act.[7] But Lord Hale, in another part of his work,[8] expresses his own opinion, that the presumption of coercion is not conclusive; but that, "if upon the evidence it can clearly appear that the wife was not drawn to it by the husband, but that she was the principal actor and inciter of it, she is guilty as well as the husband." The law was so held by Thompson, B., in a case before him,[9] on the authority of this opinion of Lord Hale; and Mr. Russell, from these and some other modern authorities, has deduced the rule to be, that if a felony be shown to have been committed by the wife, in the presence of the husband, the *prima facie* presumption is, that it was done by his coercion; but such presumption may be rebutted by proof that the wife was the more active party, or by showing an incapacity in the husband to coerce.[10] The attention of the

[3] 4 Bl. Comm. 28, 29; 1 Hale P. C. 45.

[4] *Quoniam ipsa* (scil. fœmina) *superiori suo obedire debet:* LL. Inæ, 57.

[5] Brooke states the case, from 27 Ass. 40, of a woman indicted of felony, and held not guilty, because it was done by command of her husband; adding, "Ratio videtur ceo que *le ley entend* que le feme, que est sub potestate viri, ne osa contra dire son barron:" Bro. Abr. Corone, pl. 108.

[6] J. Kelyng, p. 31.

[7] 2 Stark. Evid. 399; ib. 337. And so it was held by Burrough, J., in the case cited in a preceding note to this section from 1 C. & P. 118, n.

[8] 1 Hale P. C. 516.

[9] R. *v.* Hughes, Lancaster Lent Ass. 1813, 2 Lewin C. C. 229.

[10] 1 Russ. on Crimes, 22. Mr. Greaves, his learned editor, collects from the cases the following propositions: 1st, that an indictment against husband and wife, jointly, is not objectionable on demurrer; nor, 2dly, is their conviction bad on error, or in arrest of judgment; 3dly, that, if he were present, coercion is to be presumed, and the

jury must be distinctly directed to the inquiry, and their opinion taken upon the fact of coercion; and, if this be not found, she will be entitled to an acquittal.[11] In all other cases, except where the husband was present, his command or coercion must be proved.[12]

§ 8. **Duress.** In regard to persons under *duress per minas*, the rule of law is clear, that "no man, from a fear of conse-

jury must be directed to acquit her; unless, 4thly, it be proved, either that she was the instigator or more active party, or that he was physically incapable of coercing her. Ibid., n. (*g*). And see, acc., R. *v.* Cruse, 8 C. & P. 541; 2 Moody C. C. 53; R. *v.* Dicks, 1 Russ. on Crimes, 19; Archb. Crim. Pl. and Evid. 17; Whart. Am. Crim. Law, 54 (2d ed.); R. *v.* Archer, 1 Moody C. C. 143; Purcell, Crim. Pl. and Evid. 15; Bract. lib. 3, c. 32, § 10. See also Com. *v.* Neal, 10 Mass. 152; 1 Leading Crim. Cases, 76 and n., where the law upon the responsibility of married women for crime is fully stated.

[11] R. *v.* Archer, 1 Moody C. C. 143.

[12] {It seems well settled now that the presumption is rebuttable, and that it only arises when the crime is committed in the presence of the husband. Even then, if it is proved that the wife is the inciter to the crime, she is liable: Seiler *v.* People, 77 N. Y. 411; U. S. *v.* De Quilfeldt, 2 Crim. L. Mag. p. 212; Goldstein *v.* People, 82 N. Y. 231.

It has been called a *slight* presumption of fact: State *v.* Cleaves, 59 Me. 295; Com. *v.* Butler, 1 Allen (Mass.) 4. Cf. Com. *v.* Murphy, 2 Gray (Mass.) 510; R. *v.* Hughes, 2 Lew. C. C. 229; R. *v.* Pollard, 8 C. & P. 553; R. *v.* Stapleton, 1 Jebb C. C. 93; and *ante*, Vol. I. § 28. In a recent case in Massachusetts the rule is said to be that when a married woman is indicted for a crime, and it is contended in defence that she ought to be acquitted because she acted under the coercion of her husband, the question of fact to be determined is whether she really and in truth acted under such coercion, or whether she acted of her own free will and independently of any coercion or control by him. To aid in determining this question of fact, the law holds that there is a presumption of such coercion from his presence at the time of the commission of the crime; this presumption, however, is not conclusive, but may be rebutted. In order to raise this presumption, the husband's presence need not be at the very spot, or in the same room, but it is sufficient if he was near enough for her to be under his immediate control or influence: Com. *v.* Daley, 148 Mass. 12; [State *v.* Fertig, 98 Ia. 139.] No exact rule applicable to all cases can be laid down as to what degree of proximity will constitute such presence, because this may vary with the varying circumstances of particular cases. And where the wife did not act in the direct presence of her husband or under his eye, it must usually be left to the jury to determine incidentally whether his presence was sufficiently immediate or direct to raise the presumption. But the ultimate question, after all, is whether she acted under his coercion or control, or of her own free will independently of any coercion or control by him; and this is to be determined in view of the presumption arising from his presence, and of the testimony or circumstances tending to rebut it, if any such exist: Com. *v.* Daley, *supra;* Com. *v.* Burk, 11 Gray 437; Com. *v.* Gannon, 97 Mass. 547; Com. *v.* Welch, ib. 593; Com. *v.* Eagan, 103 id. 71; Com. *v.* Munsey, 112 id. 287; Com. *v.* Gormley, 133 id. 580; Com. *v.* Flaherty, 140 id. 454; Com. *v.* Hill, 145 id. 305, 307. Whether there is sufficient presence to raise the presumption of coercion is for the jury to determine. The defendant need not satisfy the jury of the facts necessary to create the presumption of coercion, beyond a reasonable doubt. An instruction that, if the husband was near enough to see, hear, or know that the wife was doing the illegal act, she is not liable, is too favorable for the wife, as the presumption of coercion is merely a disputable one, and might not prevail in the minds of the jury, in view of the testimony and the circumstances of the case: Com. *v.* Daley, *supra.*} [The presumption is abolished in Georgia: Bell *v.* State, 92 Ga. 49. There is no presumption of the husband's control where she commits perjury on his behalf, having an opportunity to refuse to testify: Com. *v.* Moore, 162 Mass. 441; Smith *v.* Meyers, 74 N. W. 277, Neb.]

quences to himself, has a right to make himself a party to committing mischief on mankind."[1] But though a man may not, for any peril of his own life, justifiably kill an innocent person, yet, where he cannot otherwise escape, he may lawfully kill the assailant.[2] And though the fear of destruction of houses or goods is no excuse in law for a criminal act, yet force upon the person, and present fear of death, may, in some cases, excuse an act otherwise criminal, while such force and fear continue; as, for example, if one is compelled to join and remain with a party of rebels.[3]

§ 9. **Idiots, Lunatics, etc.** It may be added, that where an *idiot*, or *lunatic*, or *infant of tender age*, and too young to be conscious of guilt, is *made the instrument of mischief* by a person of discretion, the latter alone is guilty, and may be indicted and punished as the principal and sole offender. And so is the law, if one by physical force and violence impel another, involuntarily, against a third person, thereby doing to the person of the latter any bodily harm.[1] And, generally, where one knowingly does a criminal act, by means of an innocent agent, the employer, and not the innocent agent, is the person accountable for the act.[2]

[1] R. *v.* Tyler, 8 C. & P. 616, per Ld. Denman; [People *v.* Repke, 103 Mich. 459.] {See People *v.* Stonecifer, 6 Cal. 405; Mitchell *v.* State, 22 Ga. 211; and *ante*, Vol. II. title Duress.}

[2] 4 Bl. Comm. 30; 1 Hale P. C. 51.

[3] Foster, p. 14. The rule or condition laid down in Sir John Oldcastle's Case is, that they joined pro timore mortis, et quod recesserunt quàm cito potuerunt: 1 Hale P. C. 50.

[1] Plowd. 19; 1 Hale P. C. 434; 1 Russ. on Crimes, 17, 18.

[2] R. *v.* Bleasdale, 2 C. & K. 768, per Erle, J.; R. *v.* Williams, ib. 51; Com. *v.* Hill, 11 Mass. 136. {In regard to the criminal liability of *corporations*, the result of the cases is, "that a corporation may be indicted for a nonfeasance, in not carrying out the provisions either of their constituting statute or of their charter; or for a misfeasance, consisting of an offence at common law, not being treasonable, felonious, or attended with violence; or for an offence against a statute, or against a prescriptive or chartered duty:" Grant on Corporations (London ed. 1850), 284; R. *v.* Great North of England Railway Co., 9 Q. B. 315; 1 Lead. Crim. Cas. 134 and n.; R. *v.* Birmingham & Gloucester Railway Co., 3 Q. B. 223; 5 Jur. 40; 1 Gale & Dav. 457; 1 Lead. Crim. Cas. 127; Com. *v.* New Bedford Bridge Co., 2 Gray (Mass.) 339; State *v.* Morris & Essex Railroad Co., 3 Zab. (N. J.) 360; State *v.* Vermont Central Railroad, 27 Vt. 103. In England it has recently been held, that a corporation could not be indicted for a violation of Stat. 59 Geo. III. c. 69, against enlisting English soldiers in foreign service: King of the Two Sicilies *v.* Wilcox, 1 Simons N. S. 335. In America it has been held that a corporation cannot be indicted for a misfeasance. In Maine it was decided that an indictment will not lie against a corporation for a nuisance in erecting a dam across a river (State *v.* Great Works Milling & Manuf. Co., 20 Me. 41); and in Virginia, for obstructing a highway (Com. *v.* Swift Run Gap Turnpike Co., 2 Va. Cas. 362). In R. *v.* Great North of England Railway Co., *ubi supra*, Lord Denman, C. J., said: "Many occurrences may be easily conceived full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correct-

§ 10. **Indictment.** It is a cardinal doctrine of criminal jurisprudence, declared in the Constitution of the United States, that *the accused has a right "to be informed of the nature and cause of the accusation"* against him; or, as it is expressed in the other constitutions, to have the offence "*fully and plainly, substantially and formally, described to him.*" This is the dictate of natural justice as well as a doctrine of the common law. The description, whether in an indictment, or information, or other proceeding,[1] ought to contain all that is material to constitute the crime, set forth with precision, and in the customary forms of law. And if more is alleged than is necessary, yet, if it be descriptive of the offence, it must be proved. Thus, though in an indictment for arson it is sufficient if it appear that the house was another's and not the prisoner's, yet if the ownership be alleged with greater particularity, the allegation must be precisely proved, for it is descriptive of the offence. This rule is deduced from a consideration of the purposes of an indictment: which are, first, to inform the accused of the leading grounds of the charge, and thereby enable him to make his defence; secondly, to enable the court to pronounce the proper judgment affixed by law to the combination of facts alleged; and, thirdly, to enable the party to plead the judgment in bar of a second prosecution for the same offence.[2]

§ 11. **Witnesses.** It is also a general rule of criminal law in the United States, that *the party accused is entitled, as of common right, to be confronted with the witnesses against him.* This

ness to mere negligence in providing safeguards, or to an act rendered improper by nothing but the want of safeguards. If A is authorized to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it? But if the distinction were always easily discoverable, why should a corporation be liable for the one species of offence and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments: but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission. Some *dicta* occur in old cases: 'A corporation cannot be guilty of treason or felony.' It might be added, 'of perjury, or offences against the person.' The Court of Common Pleas lately held, that a corporation might be sued in trespass (Maund *v.* Monmouthshire Canal Co., 4 M. & G. 452); but nobody has sought to fix them with acts of immorality."} [A corporation may be indicted for violating the eight-hour law: U. S. *v.* John Kelso Co., 86 F. 304].

[1] In preliminary proceedings before justices of the peace, in cases in which their jurisdiction is initial only, less precision is required in charging the offence than in an indictment: Com. *v.* Phillips, 16 Pick. 211; Com. *v.* Flynn, 3 Cush. 525.

[2] Com. *v.* Wade, 17 Pick. (Mass.) 395, 399. And see *ante*, Vol. I. § 65; People *v.* Stater, 5 Hill (N. Y.) 401.

right is declared in the Constitution of the United States; and is also recognized in the constitutions or statutes of nearly all the States in the Union; but in England it has not always been conceded.[1] Sir Walter Raleigh, on his trial, earnestly demanded "that he might see his accuser face to face:" protesting against the admission of a statement in the form of the substance of an examination, taken in his absence; but this was denied him, and the examination was admitted. Informations of witnesses, against a person charged with felony, taken by a justice of the peace, or a coroner, under the statutes of Philip and Mary, and subsequent statutes on the same subject, are admitted as secondary evidence on the trial of the indictment, by force of those statutes. And though at this day it is deemed requisite, upon the language of the statute, that information before a justice of the peace should be taken in the presence of the prisoner,[2] yet formerly it was held otherwise;[3] and informations returned by the coroner are still by some judges held admissible, though taken in the prisoner's absence.[4] Statutes of similar import have been enacted in several of the United States;[5] but it is conceived that, under the constitutional provisions above mentioned, no deposition would be deemed admissible by force of those statutes, unless it were taken wholly in the prisoner's presence, in order to afford him the opportunity to cross-examine the witnesses; nor then, except as secondary evidence, the deponent being dead or out of the jurisdiction; or to impeach his testimony given orally at the trial.[6] Depositions are in no case admissible in criminal proceedings, unless by

[1] 2 Hawk. P. C. b. 2, c. 46, § 9.

[2] R. *v.* Paine, 5 Mod. 163; 2 Hawk. P. C. b. 2, c. 46, § 10; R. *v.* Eriswell, 3 T. R. 722, 723; R. *v.* Errington, 2 Lewin C. C. 142; R. *v.* Woodcock, 1 East P. C. 356; R. *v.* Smith, 2 Stark. 208. This last case was fully reviewed, and somewhat questioned, in R. *v.* Walsh, 5 Cox C. C. 115.

[3] Trials per Pais, 462. And see 2 Hale P. C. 284.

[4] R. *v.* Thatcher, T. Jones 53. The reason given is, that they are *quasi* inquests of office, and part of the proceedings in the case: ibid.; J. Kel. 55; 3 T. R. 722; Sills *v.* Brown, 9 C. & P. 601; Bull. N. P. 242; R. *v.* Grady, 7 C. & P. 650; R. *v.* Coveney, ib. 667; 2 Phil. Ev. 69, 70 (9th ed.). The unsoundness of this distinction is convincingly shown by Mr. Starkie. See 2 Stark. Ev. 277–279 (6th Am. ed.). And see 2 Russ. on Crimes, 892.

[5] See *ante*, Vol. I. § 224.

[6] See Bostick *v.* State, 3 Humph. 344; State *v.* Bowen, 4 McCord 254; State *v.* Valentine, 7 Ired. 225; N. Y. Rev. Stats. vol. ii. p. 794, § 14. [In Massachusetts, the defendant in a criminal case may by leave of the court have a commission granted to examine witnesses in his behalf out of the State, and the prosecuting officer may join in this commission and have witnesses examined for the prosecution: Mass. Pub. Stat. c. 213, § 41. See also Pub. Stat. c. 212, § 40, for the general rule as to depositions in criminal cases.]

force of express statutes, or, perhaps, by consent of the prisoner in open court.[7]

§ 12. **Plea.** The *answer* to a criminal prosecution in the courts of common law, where the trial is upon the merits of the case, is, that the party is *not guilty* of the offence charged; no other form of issue being required. This plea involves a denial of every material fact alleged against him, and, of course, according to the principles already stated,[1] the prosecutor is bound affirmatively to prove the whole indictment; or, as it has been quaintly expressed, to prove *Quis*, *quando*, *ubi*, *quod*, *cujus*, *quomodo*, *quare*. The allegations of *time* and *place*, however, are not material to be proved as laid, except in those cases where they are essential either to the jurisdiction of the court, or to the specific character of the offence.[2] Thus, for example, where the night-time is material to the crime, as in burglary, or, in some States, one species of arson, it must be strictly proved. So, in prosecutions for violation of the Lord's Day, and several other cases. So, where the place is stated as matter of local description, it must be proved as laid; as in indictments for forcible entry, or for stealing in a dwelling-house, and the like; or, where a penalty is given to the poor of the town or place where the offence was committed; or, where a town is indicted for neglecting to repair a highway within its bounds. But in all cases it is material to prove that the offence was committed within the county where it is laid and where the trial is had, the jurisdiction of the court and jury being limited, in criminal cases, to that county.[3]

[7] Dominges *v.* State, 7 S. & M. 475; McLane *v.* Georgia, 4 Ga. 335. In several of the United States, depositions may, in certain contingencies, be taken and used in criminal as in civil cases. See *ante*, Vol. I. § 321.

[1] See *ante*, Vol. I. §§ 74–81.

[2] In Massachusetts, in a recent case, it was held, that on the trial of an indictment charging the defendant with being a common seller of intoxicating liquors on a particular day, evidence of sales before or after that day is inadmissible: Com. *v.* Elwell, 1 Gray (Mass.) 463. In this case, the general principle, that when an indictment alleges an offence as committed on a certain specified day, the day is not material, and evidence of the commission of the offence on any other day than that named, if within the period of the statute of limitations, is sufficient, was held to apply only when the offence charged consists of a single act; and that the principle is not applicable to the offence of being a common seller of spirituous liquors, which implies an offence not consisting of a single act, but of a series of acts. {An indictment charging an assault as having been committed is sustained if the assault is proved to have been committed in any other town in the county and within the jurisdiction of the court: Com. *v.* Toliver, 8 Gray (Mass.) 386; Com. *v.* Creed, ib. 387.

An allegation in the indictment that the offence was committed at an impossible time, as, for example, on a future day, is fatal to the pleading: State *v.* Litch, 33 Vt. 67.}

[3] 2 Russ. on Crimes, 800, 801. Therefore, a special verdict finding the defendant

§ 13. **Intent.** Another cardinal doctrine of criminal law, founded in natural justice, is, that it is the *intention* with which an act was done that constitutes its criminality. The intent and the act must both concur, to constitute the crime.[1] "Actus non facit reum, nisi mens sit rea."[2] And the intent must therefore be proved, as well as the other material facts in the indictment. The proof may be either by evidence, direct or indirect, tending to establish the fact; or by inference of law from other facts proved.[3] For though it is a maxim of law, as well as the dictate of charity, that every person is to be presumed innocent until he is proved to be guilty; yet it is a rule equally sound, that every sane person must be supposed to intend that which is the ordinary and natural consequence of his own purposed act. Therefore, "where an act, *in itself indifferent*, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is *in itself unlawful*, the proof of justification or excuse lies on the defendant; and, in failure thereof, the law implies a criminal intent."[4]

guilty of the offence charged in the indictment, but not finding him guilty in the county where it is alleged to have been committed, cannot be supported. But such a verdict will not operate as an acquittal: Com. *v.* Call, 21 Pick. (Mass.) 509; R. *v.* Hazel, 1 Leach C. C. (4th ed.) 368. And see Dyer *v.* Com., 23 Pick. (Mass.) 402.

[1] 7 T. R. 514, per Ld. Kenyon. "Cogitationis pœnam nemo patitur:" Dig. lib. 48, tit. 19, l. 18.

[2] 3 Inst. 107; R. *v.* Wheatly, 1 Leading Crim. Cases, 7. {See 2 Greene's Cr. L. Rep. 218, for a discussion of this maxim.}

[3] {Mr. Stephen (General View of the Criminal Law, p. 268) says: "A mental element is a necessary part of every crime. *Malice*, either in its general shape or in some specific shape, must be combined with bodily motions in order to make them criminal, and the existence of those states of mind has always to be inferred from circumstances."}

[4] Per Ld. Mansfield, in R. *v.* Woodfall, 5 Burr. 2667; [State *v.* Huff, 89 Me. 521; State *v.* Zichfield, 23 Nev. 304; Com. *v.* Murphy, 165 Mass. 66; State *v.* Southern R., 30 S. E. 133, N. C.]. {For an acute analysis of the question, what constitutes intent in a criminal case, see Holmes, Common Law, Lect. ii., and Stephen, General View of the Criminal Law, p. 81, for a discussion of what mental accompaniments to an act constitute it a crime. If a person intentionally does an act which the law prohibits, it is no defence that he believed he had a right to do the act (U. S. *v.* Anthony, C. Ct. (U. S.) 11 Blatchf. 200; s. c. 2 Green's Cr. L. Rep. 208 and n.); or that he believed it would be harmless (U. S. *v.* Bott, 11 Blatchf. C. Ct. (U. S.) 346). It is competent for the prosecution to show that the prisoner had a special motive for committing the act; but it is not necessary: Com. *v.* Hudson, 97 Mass. 565; People *v.* Robinson, 1 Parker (N. Y.) Cr. 649; Baalam *v.* State, 17 Ala. 451.

In a recent case in New York, People *v.* Flack, 125 N. Y. 334, the rule as to intent in that State is discussed and stated as follows: "It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system (unless in exceptional cases) both must be found by the jury to justify a conviction for crime. However clear the proof may be, or however uncontrovertable may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and

§ 14. **Same Subject.** This *rule*, that *every person is presumed to contemplate the ordinary and natural consequences of his own acts*, is applied even in capital cases.[1] Because men generally act deliberately and by the determination of their own will, and not from the impulse of blind passion, the law presumes that every man always thus acts, until the contrary appears. Therefore, when one man is found to have killed another, *if the circumstances of the homicide do not of themselves show that it was not intended but was accidental*, it is to be presumed that the death of the deceased was designed by the slayer; and the burden of proof is on him to show that it was otherwise. And because, ordinarily, no man may lawfully kill another, and intentional homicides are in general the result of malice and evil passions, or proceed from "a heart regardless of social duty, and fatally bent on mischief;" in every case of intentional homicide, not otherwise explained by its circumstances, it is further to be presumed that the slayer was actuated by malice;[2] and here, also,

jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury. The general rule that in criminal cases the question of criminal intent must be submitted to the jury, however significant the facts may be, has frequently been declared by this court." In McKenna *v.* People, 81 N. Y. 360, which was a case of indictment for murder, it was held that, however clear the circumstances might be, the question of guilty intent must be left exclusively to the jury, and in that case a conviction for manslaughter was reversed for error in the instruction to the jury, "that the jury, if they believed the evidence offered in behalf of the people to be true, would be justified in finding the prisoner guilty." The presumption that a person intends the ordinary consequences of his acts is held in New York, as applied to criminal cases, to be a rule to aid the jury in reaching a conclusion upon a question of fact, and is not a presumption of law (Filkins *v.* People, 69 N. Y. 101), and on the trial of an indictment the intent is traversable, and the defendant may testify as to his intent: Kerrains *v.* People, 60 N. Y. 221; People *v.* Baker, *supra;* People *v.* Flack, 125 N. Y. 334.]

[1] In York's Case, 9 Met. (Mass.) 103, this rule was stated and illustrated by Shaw, C. J., in the following terms: "A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such person's life. So, if the direct tendency of the wilful act is to do another some great bodily harm, and death in fact follows, as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used, with violence, upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life, or to do him some great bodily harm, is a necessary conclusion from the act." And see *ante*, Vol. I. § 34; R. *v.* Farrington, Russ. & Ry. 207; Com. *v.* Webster, 5 Cush. (Mass.) 305.

[2] "Malice, although in its popular sense it means hatred, ill-will, or hostility to another, yet, in its legal sense, has a very different meaning, and characterizes all acts done with an evil disposition; a wrongful and unlawful motive of purpose; the wilful doing of an injurious act, without lawful excuse:" 9 Met. (Mass.) 104. And see 4 B. & C. 255; Wills *v.* Noyes, 12 Pick. (Mass.) 324; 1 Russ. on Crimes, p. 483, n. (3d ed.); McPherson *v.* Daniels, 10 B. & C. 272, per Littledale, J.; Com. *v.* Webster, 5 Cush. (Mass.) 304, per Shaw, C. J.

the burden of proof is on him to show that he was not; but that the act was either justifiable or excusable.[3]

[3] See York's Case, 9 Met. (Mass.) 103; where upon a diversity of opinion among the learned judges, the question whether the law implied malice from the fact of killing underwent a masterly discussion, exhausting the whole subject. This case and its doctrines are ably examined in the North American Review for Jan. 1851, pp. 178-204. See also Com. *v.* Hawkins, 3 Gray (Mass.) 463; Best on Presumption, §§ 128, 129; Best's Principles of Evidence, § 306; Alison's Crim. Law of Scotland, pp. 48, 49; R. *v.* Greenacre, 8 C. & P. 35; State *v.* Smith, 2 Strobh. 77; Hill's Case, 2 Gratt. 594. In Ohio, the presumption of law against the prisoner, from the mere fact of killing, is, that he committed a murder of the second degree: State *v.* Turner, Wright 20. So also in Virginia: Hill's Case, *supra*. In Georgia, "malice shall be implied when no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart:" Hotchk. Dig. p. 705, § 28. The statute of Arkansas, Rev. Stats. 1837, div. 3, art. 1, § 4, is in nearly the same words; so is the statute of California, Rev. Stats. 1850, c. 99, § 21; and of Illinois, Rev. Stats. 1845, c. 30, § 24. {See State *v.* Knight, 43 Me. 11; State *v.* Johnson, 3 Jones (N. C.) 266; Greene *v.* State, 28 Miss. 687. In many cases statutes provide that certain acts, if done "wilfully and maliciously," shall be crimes. In such cases the malice is more than simply implied. It must be proved to be actual malice or bad intent. This point was discussed in a recent case in New Jersey (Folwell *v.* State, 49 N. J. L. 31), in which case the defendant was indicted for tearing down an advertisement of sale set up by the sheriff to enforce an execution. The defendant in the prosecution was the same person as the defendant in the execution, and his defence at the trial of the criminal action was that he took down the advertisement in question with the purpose of showing it to his counsel, and that he had no bad purpose in doing the act. The court held that the word "maliciously," when used in the definition of a statutory crime, the act forbidden being merely *malum prohibitum*, has almost always the effect of making a bad intent or evil meaning constituent of the offence, saying, "The whole doctrine of that large class of offences falling under the denomination of malicious mischief is founded on this theory." In Com. *v.* Walden, 3 Cush. 558, the word "maliciously," as used in the statute relating to malicious mischief, was held not sufficiently defined as "the wilfully doing of any act prohibited by law, and for which the defendant has no lawful excuse," but that the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge. The word "wilful," as used in the statutes, has been held to mean not merely "voluntarily," but to imply the doing of the act with a bad purpose: Com. *v.* Kneeland, 20 Pick. 220. And to the same effect is State *v.* Clark, 5 Dutcher 96, the charge being of wilfully destroying a fence on land in the possession of another. Even when a statute merely prohibits an act if done intentionally, without adding "maliciously," the animus of the person inculpated may be an element of the crime: Halsted *v.* State, 12 Vroom 552; Cutter *ads.* State, 7 Vroom 125; in the latter case the court deciding that the *mens rea* was an ingredient of the statutory offence, although the legislative language was simply prohibitive of the act described: Folwell *v.* State, 49 N. J. L. 31.

Whenever the existence of a purpose, or state of mind, is the subject of inquiry, explanatory conduct and accompanying expressions of the party himself, or of other persons to him or in his presence, may be shown by proof; Schlemmer *v.* State, 51 N. J. L. 26. Thus in the case of Hunter *v.* State, 11 Vroom 495, it was declared by the Court of Errors that the declarations of a third party explanatory of an act that was part of the *res gestæ* were not hearsay, but were legitimate evidence. In the case of People *v.* Dowling, 84 N. Y. 478, which was a prosecution for receiving stolen goods, after the State had proved the receipt of the goods, the defendant, in order to rebut the inference of guilty knowledge on his part, offered to show what statement the thief had made to him at the time he purchased the property, with respect to the source from which he had got it; and such statements were held competent evidence by the Court of Appeals. So, where one was indicted for selling with intent to defraud, it was held that the fact that he sold this property before it had become his might afford a legitimate inference that it was fraudulent: Com. *v.* Reed, 150 Mass. 68. So where one was indicted for having adulterated milk in his possession with intent to sell, the Court says: "Even if it be conceded that the milk, which the defendant is charged with having in his possession with intent to sell, is adulterated, it is the contention of the defendant (and this is the only point argued), that the case for the government afforded no evidence of any

§ 15. **Proof of Intent.** In the *proof of intention*, it is not always necessary that the evidence should apply directly to the particular act, with the commission of which the party is charged; for the unlawful intent in the particular case may well be inferred from a similar intent, proved to have existed in other transactions done before or after that time.[1] Thus, upon the trial of a person for maliciously shooting another, the question being whether it was done by accident or design, evidence was admitted to prove that the prisoner intentionally shot at the prosecutor at another time, about a quarter of an hour distant from the shooting charged in the indictment.[2] So upon an indictment for sending a threatening letter, the meaning and intent of the writer may be shown by other letters written, or verbal declarations made, before and after the letter in question.[3] So, upon a trial for treason in adhering to the enemy, and proof that the party was seen among the enemy's troops, evidence of a previous mistake of the prisoner in going over to a body of his own countrymen, supposing them to be enemies, was held admissible to show the intent with which he was after-

intent on the part of the defendant to sell, even if it were true that the milk was adulterated, and was in the possession of the defendant by his servant. The wagon of the defendant, bearing his name and being also numbered, was at a corner of a public street and place in the city in the early morning. The servant of the defendant was upon it, and there were several cans in the wagon, from one of the cans, which was an eight-quart can, the collector of milk samples took a sample, which was the alleged adulterated milk. The fact that the wagon was that of the defendant, the place where it was, the time when it was there, the condition of the cans and the contents, the fact that the sample collector was permitted, without objection from the defendant's servant, who had the wagon and its contents in charge, to take a sample, furnish some evidence against the defendant of an intent to sell the milk, which the jury were properly allowed to consider:" Com. *v.* Smith, 143 Mass. 171.}

[1] Though the evidence offered in proof of intention, or of guilty knowledge, may also prove another crime, that circumstance does not render it inadmissible, if it be receivable in all other respects: R. *v.* Dorset, 2 C. & K. 306. And where several larcenies were charged in one count, and the judge directed the jury to confine their attention to one particular charge, it was held, that the prosecutor was entitled to give evidence of all the charges, in order to show a felonious intent: R. *v.* Bleasdale, ib. 765. But in a more recent case, upon a charge of feloniously *receiving* stolen goods, it was held, that the possession of other stolen goods, not connected with the immediate charge, was not admissible in proof of guilty knowledge; as it could not lead to any such conclusion, but, on the contrary, was quite consistent with the supposition that, on the former occasions, the goods had been *stolen by the prisoner himself*. Lord Campbell, in this case, said: "With regard to the admission in evidence of proof of previous utterings, upon indictments for uttering forged notes, I have always thought that those decisions go a great way; and I am by no means inclined to apply them to the criminal law generally:" R. *v.* Oddy, 5 Cox C. C. 210, 215.

[2] R. *v.* Voke, Russ & Ry. 531. {But where a party is charged with poisoning, evidence that the prisoner poisoned another person some months before is inadmissible: Farrar *v.* State, 2 Ohio St. 54; *post*, § 19, and *ante*, Vol. I. [§ 14 *q.*]}

[3] R. *v.* Robinson, 2 Leach C. C. (4th ed.) 749; R. *v.* Tucker, 1 Moody C. C. 134; R. *v.* Kain, 8 C. & P. 187.

wards among them.[4] So, also, in cases of homicide, evidence of former hostility and menaces, on the part of the prisoner against the deceased, are admissible in proof of malice.[5] The like evidence of acts and declarations *at other times*, in proof of the character and intent of the principal fact charged, has been admitted in trials for arson,[6] robbery,[7] libel,[8] malicious mischief,[9] forgery,[10] conspiracy,[11] and other crimes. In regard to the distance of time between the principal fact in issue and the collateral facts proposed to be shown in proof of the intention, so far as it affects the admissibility of the evidence, no precise rule has been laid down, but the question rests in the discretion of the judge.[12] Evidence of facts transacted three months before,[13] and one month afterwards,[14] has been received to prove guilty knowledge in a charge of forgery; and evidence of facts occurring five weeks afterwards has been rejected.[15] It has been held, that, in the case of subsequent facts, they must appear to have some connection with the principal fact charged. Thus, in a charge of forgery, evidence of the *subsequent uttering* of other forged notes was held inadmissible, unless it could be shown that they were of the same manufacture.[16] But in regard to the *previous uttering* of forged notes of a different kind, though the admissibility of such evidence has been thought questionable, it is now continually admitted. For evidence that a man had uttered forged notes of different descriptions raises a pre-

[4] Malin's Case, 1 Dal. 33.

[5] 1 Phil. Ev. 476.

[6] R. *v.* Taylor, 5 Cox C. C. 138.

[7] R. *v.* Winkworth, 4 C. & P. 444. {So of other receipts of stolen goods: Shriedly *v.* State, 23 Ohio St. 130.}

[8] Stuart *v.* Lovell, 2 Stark. 34; R. *v.* Pearce, 1 Peake's Cas. 75. The same principle is applied in actions for slander: Russell *v.* Macquister, 1 Campb. 49, n.; Charlter *v.* Barrett, 1 Peake's Cas. 22; Mead *v.* Daubigny, ib. 125; Lee *v.* Huson, ib. 166; {State *v.* Riggs, 39 Conn. 498.}

[9] R. *v.* Mogg, 4 C. & P. 364; R. *v.* Dorset, 2 C. & K. 306.

[10] R. *v.* Wylie, 12 Russ. on Crimes, 403, 404 (3d ed.); 1 New Rep. (4 Bos. & P.) 92; State *v.* Van Houten, 2 Pa. 672; Hess *v.* State, 5 Ham. 5; Reed *v.* State, 15 Ohio 217; State *v.* Williams, 2 Rich. 418; Com. *v.* Stearns, 10 Met. 256; Com. *v.* Martin, 11 Leigh 745; R. *v.* Millard, Russ. & Ry. 245; R. *v.* Taverner, 4 C. & P. 413, n. (*a*). {Proof of having passed a counterfeit bill, some time prior to the time alleged in the indictment on trial for the same offence, is competent: Bersh *v.* State, 13 Ind. 434. See also *post*, § 19; *ante*, Vol. I. [§ 14*q*.]}

[11] Com. *v.* Eastman, 1 Cush. 189; 1 Leading Crim. Cases, 264.

[12] R. *v.* Salisbury, 2 Russ. on Crimes, 776 (3d ed.); 5 C. & P. 155, s. c., but not s. p.

[13] R. *v.* Ball, 1 Campb. 324; Russ. & Ry. 132. And see R. *v.* Ball, 7 C. & P. 426, 429.

[14] R. *v.* Smith, 4 C. & P. 411.

[15] R. *v.* Taverner, 4 C. & P. 413, n. (*a*). {See Com. *v.* Horton, 2 Gray (Mass.) 354.}

[16] Ibid.

sumption that he was in the habit of procuring forged notes, and that he had the criminal knowledge imputed to him.[17]

§ 16. **Several Intents.** If *several intents* are comprised in one allegation in the indictment, any one of which, being consummated by the principal fact, would constitute the crime, the allegation is divisible; and proof of either of the intents, together with the act done, is sufficient. So it has been held in the case of an assault, with intent to abuse and carnally know a female child;[1] and of a libel, with intent to defame certain magistrates named, and to bring into contempt the administration of justice.[2] So, of an alleged intent to defraud A, where the proof is an intent to defraud A and B.[3]

§ 17. **Intent to be proved as alleged.** The *intent*, moreover, *must be proved as alleged.* If the act is alleged to have been done with intent to commit one felony, and the evidence be of an intent to commit another, though it be of the like kind, the variance is fatal. Thus, where a burglary was charged, with intent to steal the goods of W., and it appeared that no such person as W. had any property there, but that the intent was to steal the goods of D., the alleged owner of the house; and that the name of W. had been inserted by mistake, intead of D., — it was held, that the indictment was not supported.[1] So, if it be

[17] Bayley on Bills, 619 (3d Am. ed.)

[1] R. *v.* Dawson, 3 Stark. 62.

[2] R. *v.* Evans, 3 Stark. 35.

[3] Veazie's Case, 7 Greenl. 131.

[1] R. *v.* Jenks, 2 Leach C. C. (4th ed.) 774; 2 East P. C. 514. And see Com. *v.* Shaw, 7 Met. (Mass.) 52, 57. A prisoner was indicted for having burglariously broken and entered the house of the prosecutor in the night-time, with intent to steal the "goods and chattels" therein. The jury found that he broke and entered with intent to steal mortgage-deeds. It was held, that, being subsisting securities for the payment of money, mortgage-deeds are *choses in action*, and, as such, were improperly described as goods and chattels: R. *v.* Powell, 2 Denison C. C. 403; 5 Cox C. C. 396; 14 Eng. Law & Eq. 12, 515. There is a class of cases to which this principle does not apply. In Com. *v.* Harley, 7 Met. (Mass.) 506, the allegation was of a conspiracy to cheat and defraud a particular individual named; and it was contended that a general intent to defraud, if it operated, when carried into effect, to defraud a particular individual, might well authorize the charge of a conspiracy to defraud such person, though that individual was not in the contemplation of the parties at the time of entering into the conspiracy, and it did not appear that the defendants had agreed to perpetrate the fraud on him particularly. But it was held, that proof that the defendant conspired to defraud the public generally, or any individual whom they might meet and be able to defraud, would not sustain the indictment, charging, as it did, a conspiracy to defraud the individual who was named in the indictment. "Although it is generally true," said Dewey, J., in Com. *v.* Kellogg, 7 Cush. (Mass.) 477, "that the party is to be held to have intended the legitimate effect of his acts, and, in ordinary cases of indictments for crimes, it would be quite sufficient to allege and prove the acts to have been committed against the person or property of the individual actually injured thereby, yet this principle does not fully apply to cases like the present. In an indictment for a conspiracy, the criminal offence is the act of conspiring together to do some criminal act,

alleged that the prisoner cut the prosecutor, with intent to murder or disable him, and to do him some great bodily harm, and the evidence be merely of an intent to prevent a lawful arrest, it is a fatal variance; unless it appears that he intended the injury alleged, for the purpose of preventing the arrest.[2]

§ 18. **Intent to Defraud a Particular Person.** But *in the proof of an intent to defraud a particular person*, it is not necessary to show that the prisoner had that particular person in his mind at the time; it is sufficient, if the act done would have the effect of defrauding him; for the law presumes that the party intended to do that which was the natural consequence of his act. Thus, where, on an indictment for uttering forged bank-notes, with intent to defraud the bank, the jury found that the intent was to defraud whoever might take the notes, but that the prisoner had in fact no intention of defrauding the bank in particular, the conviction was held right; for it is an inference of law that the party, in such cases, intended to defraud the person who would have to pay the bill or note, if it were genuine; and this inference is to be drawn, although, from the manner of the execution of the forgery, or from the ordinary habit of caution on the part of that person, it would not be likely to impose upon him; and although, from its being a negotiable instrument, it would be likely to defraud others before it should reach him.[1]

§ 19. **Intent; Corpus Delicti.** It may, in conclusion of this point, be observed, that though in the proof of *criminal intent* or *guilty knowledge*, any *other acts* of the party, *contemporaneous* with the principal transaction, may be given in evidence, such as the secret possession of other forged notes or bills, or of im-

or to effect some object, not in itself criminal, by criminal means. The offence may be committed before the commission of any overt acts. The gist of the offence being the conspiracy preceding all such overt acts, the purpose of the conspiracy should be truly stated. If it was a general purpose to defraud, and not aimed at any particular individual; if the person, who, upon the commission of the overt acts, would be defrauded, was unknown, — then it would be improper to apply to the original conspiracy the purpose to defraud the party who was eventually defrauded, but not within any previous purpose or design of the conspirators, or in reference to whom the conspiracy itself had any application." {Causing an abortion by assault and battery is not within a statute punishing it if caused by any instrument, drug, or other means whatever, unless the assault was with the intent to cause the abortion: Slattery *v.* People, 76 Ill. 217. But burning a hole through the door of a prison, without intent to burn the building, but with intent to escape, is arson within a statute which punishes wilfully setting fire to or burning a building: Luke *v.* State, 49 Ala. 30.}

[2] R. *v.* Boyce, 1 Moody C. C. 29; R. *v.* Duffin, Russ. & Ry. 365; R. *v.* Gillow, 1 Moody C. C. 85; 1 Lewin C. C. 57.

[1] R. *v.* Mazagora, Russ. & Ry. 291; Bayley on Bills, 613 (2d Am. ed.); Sheppard's Case, Russ. & Ry. 169; R. *v.* Marcus, 2 Car. & Kir. 356.

plements for counterfeiting, or other instruments adapted to the commission of the crime charged, or the assumption of different names, or the like;[1] yet such evidence regularly ought not to be introduced, until the principal fact, constituting the *corpus delicti*, has been established.[2]

§ 20. **Mistake and Ignorance.** If a criminal act is done through *mistake or ignorance of the law*, it is nevertheless punishable as a crime. Ignorance of the municipal law is not allowed to excuse any one who is of the age of discretion, and *compos mentis*, from the penalty for the breach of it; for every such person is bound to know the law of the land, regulating his conduct, and he is presumed so to do.[1] "Ignorantia juris, quod quisquis tenetur scire, neminem excusat," is a maxim of law, recognized from the earliest times, both in England and throughout the Roman empire. Thus, if a man thinks he has a right to kill a person outlawed or excommunicated, and does so, it is murder.[2] And the rule is applied to foreigners charged with

[1] See Bayley on Bills, 618, 619 (3d Am. ed.); R. *v.* Millard, Russ. & Ry. 245; R. *v.* Wylie, 1 New Rep. 92; 1 Leading Crim. Cases, 185; R. *v.* Hough, Russ. & Ry. 120; R. *v.* Harris, 7 C. & P. 429; *infra*, § 110.

[2] {Where the prisoner was indicted for the murder of his wife by poison, and there was evidence of his criminal intimacy with the wife of another man, whose life was insured, the proceeds of which insurance, on his death, the defendant sought to procure, evidence that the husband died with the same symptoms as the defendant's wife, and that he had been attended by the defendant, was held inadmissible: Shaffner *v.* Com., 72 Pa. St. 60; *ante*, § 15, Vol. I. § 53, n.; *post*, § 213, n. On the charge of forgery of the signature of a deed, evidence of affixing a false seal is competent, or any circumstance going to show a fraudulent disposition: People *v.* Marion, 29 Mich. 31. Other similar false pretences are admissible, in an indictment for cheating by false pretences: The Queen *v.* Francis, 22 W. R. 653.}

[1] 1 Hale P. C. 42; Doct. & Stud. Dial. 2, c. 46; 2 Co. 3 *b*; Bilbie *v.* Lumley, 2 East 469; Co. Lit. Pref. p. 36; Broom's Maxims, p. 122. {In a previous discussion of this so-called presumption, *ante*, Vol. I. § 34, it has been shown that the ground of the rule does not rest upon any probability (as any real presumption must), since not only is there no probability that all men know the law, but it is highly improbable that more than a few know the larger part of the law, and highly improbable that any man knows the whole of the law. The true meaning of the rule is evident in its Latin form. Ignorantia legis neminem excusat, *i. e.*, Ignorance of the law excuses no one. It is a rule of policy founded on the difficulty of administering justice, if the excuse of ignorance were pleadable, and does not admit of evidence in rebuttal: U. S. *v.* Learned, 1 Gall. C. C. 62; U. S. *v.* Anthony, 11 Blatchf. C. C. 200; Com. *v.* Bagley, 7 Pick. (Mass.) 279; Brent *v.* State, 43 Ala. 297; [Jellico Coal Co. *v.* Com., 96 Ky. 373; State *v.* McLean, 28 S. E. 140, N. C.]

For the limits of the application of this rule see R. *v.* Mayor of Tewksbury, L. R. 3 Q. B. 629; and Mr. Greene's note to U. S. *v.* Anthony, 2 Cr. Law Rep. 215.}

[2] 4 Bl. Comm. 27; Plowd. 343. "Regula est, juris quidem ignorantiam cuique nocere facti vero ignorantiam non nocere:" Dig. lib. 22, tit. 6, l. 9. Lord Hale expresses it in broader terms, —"Ignorantia eorum, quæ quis scire tenetur, non excusat:" 1 Hale P. C. 42. This rule, in its application in civil transactions, was discussed, with great depth of research, by the learned counsel, in Haven *v.* Foster, 9 Pick. (Mass.) 112. It is founded in the necessities of civil government, and the dangerous extent to which the excuse of ignorance might otherwise be carried.

criminal acts here, which they did not in fact know to be such, the acts not being criminal in their own country.[3]

§ 21. **Mistake of Fact.** *Ignorance or mistake of fact* may in some cases be admitted as an excuse; as, where a man intending to do a lawful act, does that which is unlawful. Thus, where one, being alarmed in the night by the cry that thieves had broken into his house, and searching for them, with his sword, in the dark, by mistake killed an inmate of his house, he was held innocent.[1] So, if the sheep of A stray into the flock of B, who drives and shears them, supposing them to be his own, it is not larceny in B.[2] This rule would seem to hold good, in all cases where the act, if done knowingly, would be *malum in se*. But where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation.[3] Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril.[4]

[3] R. *v.* Esop, 7 C. & P. 456.

[1] Levett's Case, Cro. Car. 538; 1 Hale P. C. 42.

[2] 1 Hale P. C. 507. And see R. *v.* Riley, 17 Jur. 189; 1 Pearce C. C. 149; 14 Eng. Law & Eq. 544; *infra*, tit. Larceny, § 159 and notes.

[3] [State *v.* Dorman, 9 S. D. 528; Riley *v.* State, 18 S. 117, Miss. And see Com. *v.* Murphy, 165 Mass. 66.]

[4] {It is adultery to marry again while the lawful husband is alive, although believed to be dead: Com. *v.* Mash, 7 Met. (Mass.) 472. It is an offence to sell an article, the sale of which is prohibited, although the seller does not know that it is the prohibited article. So held as to veal (Com. *v.* Raymond, 97 Mass. 567); as to intoxicating liquor (Com. *v.* Boynton, 2 Allen (Mass.) 160); as to oil (Hourigan *v.* Nowell, 110 Mass. 470; Com. *v.* Wentworth, 118 id. 441); as to milk (Com. *v.* Waite, 11 Allen (Mass.) 264); [as to adulterated articles (State *v.* Kelly, 54 Ohio, 166).] So where an act contrary to the statute — *malum prohibitum* — is done without knowledge of the criminal ingredient in the act, as prohibiting a person under a certain age, without knowledge of the age, to play billiards: Com. *v.* Emmons, 98 Mass. 6. But see, *contra*, Stern *v.* State, 53 Ga. 229; Heane *v.* Garton, 2 El. & El. 66; Cutter *v.* State, 36 N. J. 125. In a recent case in Pennsylvania (Com. *v.* Weiss, 139 Pa. St. 250), it is said that whether a criminal intent, or a guilty knowledge, is a necessary ingredient of a statutory offence, is a matter of construction. The question for the courts to decide is whether or not, from the language of the statute, and in view of the manifest purpose

§ 22. **Proof of Names.** As it is required, in indictments, that the *names of the persons injured, and of all others whose existence is legally essential to the charge*, be set forth, if known, it is, of course, material that they be precisely proved as laid. Thus, the name of the legal owner, general or special, of the goods stolen or intended to be stolen, must be alleged and proved.[1] And if the person be described as one whose name is to the jurors unknown, and it be proved that he was known, the variance is fatal, and the prisoner will be acquitted.[2] But this averment will be supported by proof that the name of the person could not be ascertained by any reasonable diligence.[3] If there be two persons, father and son, of the same name and resident of the same place, the father will be understood to be designated in the indictment, unless there be the addition of *junior*, or some other designation of the son.[4] And if the person, who was

and design of the same, the legislature intended that the legality and illegality of the sale should depend upon the ignorance or knowledge of the party charged. Under a statute in Massachusetts, prohibiting the selling, keeping, or offering for sale, of adulterated milk, it was held that the penalty was incurred, although the sale was made without any knowledge of the adulteration, as when the seller had bought the milk for pure milk: Com. *v.* Farren, 9 Allen 489; Com. *v.* Nichols, 10 id. 199. It is settled law, that the statutes against selling intoxicating liquors are violated, although the vendor does not know that it is intoxicating: Com. *v.* Boynton, 2 id. 160; Com. *v.* Goodman, 97 Mass. 117; Com. *v.* Hallett, 103 id. 452. Under a statute prohibiting the selling, or keeping for sale, naphtha, under any assumed name, it was held that it made no difference that the accused was not aware that the article sold was naphtha, but believed it to be some other oil: Com. *v.* Wentworth, 118 id. 441. So, where a party is charged with furnishing liquors to minors, or for permitting a minor to play billiards in his saloon, his ignorance of the minor's age cannot shield him: Com. *v.* Emmons, 98 id. 6. So, also (*In re* Carlson's License, 127 Pa. 330), although the appearance of the purchasers indicated that they were of full age, and as a precaution before selling, the barkeeper asked their age, and each responded that he was of full age. To the same effect are Com. *v.* Sellers, 130 Pa. St. 32; Com. *v.* Holstine, 132 id. 357; and Com. *v.* Zelt, 138 id. 615; Com. *v.* Weiss, 139 id. 252. So in regard to selling intoxicating liquors, it has been repeatedly decided that guilty knowledge that one is acting in violation of law is not essential to the offence of unlawfully selling intoxicating liquor; and that whoever has a license is bound, at his peril, to keep within the terms of it: Com. *v.* Uhrig, 138 Mass. 492; Com. *v.* Finnegan, 124 id. 324; Roberge *v.* Burnham, ib. 277; Com. *v.* Emmons, 98 id. 6. So, where by statute the sale of liquor to an intoxicated person is forbidden, the statute does not make guilty knowledge by the defendant one of the elements of the offence; it is immaterial whether the defendant knew that the person to whom he sold was intoxicated: Com. *v.* Julius, 143 id. 134.]

[1] R. *v.* Jenks, 2 East P. C. 514; 2 Leach C. C. (4th ed.) 744; Com. *v.* Clifford, 8 Cush. (Mass.) 215; *infra*, tit. Larceny; [R. *v.* Toole, 3 Jur. N. S. 420; S. C. 40 Eng. Law & Eq. 583.]

[2] R. *v.* Walker, 3 Campb. 264; R. *v.* Robinson, 1 Holt N. P. 595. But see Hulstead's Case, 5 Leigh 724.

[3] R. *v.* Campbell, 1 C. & K. 82; R. *v.* Stroud, ib. 187.

[4] In R. *v.* Peace, 3 B. & Ald. 579, 1 Leading Crim. Cases, 226, it was held, that, on the trial of an indictment for an assault upon E. E., it is sufficient to prove that an assault was committed upon a person of that name, although it appeared that two persons had the same name, — E. E., the elder, and E. E., the younger. In State *v.* Vittum, 9 N. H. 519, the indictment alleged that the defendant committed adultery

the subject of the crime, be described with unnecessary particularity as, in a charge of polygamy, by marrying "E. C., *widow*," this is a matter of essential description, to be strictly proved;[5] though, in the description of the prisoner herself, as being "the wife of A. B.," these words have been held immaterial to be proved.[6] The *name of the prisoner* needs no proof, unless a mis-

with one L. W., without any further designation. It appeared that there were in that town two individuals of that name, father and son, and that the son used the addition of "junior" to his name, and was thereby well known and distinguished from his father. It was held, that the defendant had the right to understand that the offence was charged to have been committed with the father, and that evidence of adultery with the son was not admissible in evidence. In Hodgson's Case, 1 Lewin C. C. 236 (1831), the prisoner was indicted for stealing a horse, the property of Joshua Jennings. It appeared in evidence, that the horse was the property of Joshua Jennings, the son of Joshua Jennings, the father. For the prisoner it was objected, that the person named in the indictment must be taken to be Joshua Jennings the elder. But Parke, J., on the authority of R. *v.* Peace, overruled the objection. The same point was afterwards ruled on the same authority in Bland's Case, York Summer Assizes (1832), by Bolland, B. See 1 Lewin C. C. 236. In a recent case in Maine, the same objection was taken as in R. *v.* Peace, and overruled: State *v.* Grant, 22 Me. 171. In this case, which was an indictment for larceny, the property charged to have been stolen was alleged to have been "the property of one Eusebius Emerson, of Addison, in the county of Washington." The evidence was, that there were, in that town, two persons, father and son, and that the property belonged to the son, who had usually written his name with the word "junior" attached to it. And it was held, that junior is no part of a name, and that the ownership, as alleged in the indictment, was sufficiently proved. In an indictment for perjury, a suit in the Ecclesiastical Court was stated to have been depending between A. B. and C. D. The proceedings of the suit, when produced, were between A. B. and C. D., the elder, and it was held that there was no variance: R. *v.* Bailey, 7 C. & P. 264. In this case Williams, J., referred to a manuscript case before Lawrence, J., where it was alleged that there was an indictment against A. B. and C. D. at a former time; and, on the record being produced, it appeared that it was an indictment against A. B. and C. D., the younger, and the variance was held to be fatal. In assumpsit on a promissory note made by the defendant, payable to A. B., and indorsed by A. B. to the plaintiff, it appeared that there were two persons of the same name, father and son, and there was no evidence to show to which of them the note had been given; but it appeared that the indorsement was in the handwriting of A. B., the son. It was held, that although *prima facie* the presumption that A. B. the father, was meant, that presumption was rebutted by the son's indorsement: Stebbing *v.* Spicer, 8 C. B. 827 See also Kincaid *v.* Howe, 10 Mass. 205.

[5] R. *v.* Deeley, 4 C. & P. 579; 1 Moody C. C. 303. The contrary had been ruled at the assizes, in the description of the owner of goods stolen: R. *v.* Ogilvie, 2 C. & P. 230. And see R. *v.* Tennent, 4 id. 580, n.

[6] Com. *v.* Lewis, 1 Met. (Mass.) 151. See further, on the subject of this section, *ante*, Vol. I. § 65. In the following cases of infanticide, a variance in proving the child's name was held fatal: Clark's Case, Russ. & Ry. 358; R. *v.* Stroud, 1 C. & K. 187; 2 Moody C. C. 270. {In many States, however, at the present day variance in names is made amendable. Thus, in New York the legislature has in this manner interposed, and an indictment is sufficient if it contains the title of the action, specifying the name of the court to which it is presented, the names of the parties, and a plain and concise statement of the act constituting the crime; and the Code provides that when the offence involves the commission of a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is not material (Code Crim. Proc. §§ 275, 281), and declares that when upon the trial of an indictment, a variance between its allegations and the proof, in respect to the name of any person, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defence on the merits, direct the indictment to be amended according to the proof, and after such amendment, the trial is to proceed in the same manner, and the verdict and judgment have

nomer is pleaded in abatement,[7] in which case the substance of the plea is, that he is named and called by the name of C. D., and ever since the time of his birth has always been named and called by that name; with a traverse of the name stated in the indictment. The affirmative of this issue, which is on the prisoner, is usually proved by production of the certificate of his baptism, with evidence of his identity; or by parol evidence that he has always been known and called by the name alleged in his plea, and not by the name stated in the indictment. This plea is usually answered by replying that he was and is as well known and called by the one name as by the other. But to prove this, evidence that he has once or twice been called by the name in the indictment, will not suffice.[8] Should the defendant in his plea also state that he was *baptized* by the name he alleges, it has been held, that the allegation is material, and that he must prove it.[9] But this may perhaps be questioned, as, in the ordinary mode of pleading, it would be but matter of inducement to the principal allegation; namely, that he in fact had always borne a different name from that by which he was indicted.[10]

§ 23. **Substance of Issue.** It may be added in this place, as a rule equally applicable in criminal as in civil cases, that the *substance of the issue* must be proved. This rule has already been discussed in a preceding volume.[1]

§ 24. **Burden of Proof.** The same may be observed as to *the burden of proof*, the rules in regard to which have been stated in the same volume.[1]

the same effect, as if the indictment had originally been framed in its amended form (ib. §§ 293, 294, 295): People *v.* Johnson, 104 N. Y. 215.{

[7] If the defendant pleads not guilty, he cannot afterwards plead in abatement: Turns *v.* Com., 6 Met. (Mass.) 235; Com., *v.* Dedham, 16 Mass. 139.

[8] Mestayer *v.* Hertz, 3 M. & S. 453, per Ld. Ellenborough. {In Rockwell *v.* State, 12 Ohio St. 427, were the plaintiff was indicted by the name of O. Alonzo Rockwell, and pleaded in abatement that his name was Orville A. Rockwell, it was held that proof that he usually signed his name and was generally called O. A. Rockwell, and that certain of his relatives called him Alonzo, was insufficient to sustain a replication that he was as well known by the first name as the last. See also, as bearing upon the question of the name of the prisoner, Alexander *v.* Com., 105 Pa. St. 8; Com. *v.* Brigham, 147 Mass. 416; Com., *v.* Warren, 143 id. 569.}

[9] Holman *v.* Walden, 1 Salk. 6; Weleker *v.* Le Peletier, 1 Campb. 479.

[10] Chitty on Plead. 902, 1142; 1 Stark. Ev. 386, 390, *cum not.*

[1] See *ante*, Vol. I. part 2, c. 2, *per tot.* §§ 56–73.

[1] See *ante*, Vol. I. part 2, c. 3, §§ 74–81; Com., *v.* McKie, 1 Gray (Mass.) 61; 1 Leading Crim. Cases, 347 and n. The question as to the burden of proving the negative averment of disqualification in the defendant, arising from his *want of license* to do the act complained of, was fully considered in Com. *v.* Thurlow, 24 Pick. (Mass.) 374, which was an indictment for selling spirituous liquors without license. The Chief Justice delivered the judgment of the court upon this point in the following

§ 25. **Character.** Upon the admissibility of *evidence of character*, whether of the prisoner or of the party on whom the crime is alleged to have been committed, there has been some fluctuation of opinion. Evidence of the prisoner's good character was formerly held to be admissible, *in favorem vitæ*, in all cases of treason and felony; but this reason is now no longer given, the true question being, whether the character is in issue. "I can-

terms: "The last exception necessary to be considered is, that the court ruled that the prosecutor need give no evidence in support of the negative averment, that the defendant was not duly licensed; thereby throwing on him the burden of proving that he was licensed, if he intends to rely on that fact by way of defence. The court entertained no doubt that it is necessary to aver in the indictment, as a substantive part of the charge, that the defendant, at the time of selling, was not duly licensed. How far, and whether under various circumstances, it is necessary to prove such negative averment, is a question of great difficulty, upon which there are conflicting authorities. Cases may be suggested of great difficulty on either side of the general question. Suppose under the English game laws, an unqualified person prosecuted for shooting game without the license of the lord of the manor, and after the alleged offence and before the trial the lord dies, and no proof of license, which may have been by parol, can be given; shall he be convicted for want of such affirmative proof, or shall the prosecution fail for want of proof to negative it? Again, suppose under the law of this Commonwealth it were made penal for any person to sell goods as a hawker and pedler, without a license from the selectmen of some town in the Commonwealth. Suppose one prosecuted for the penalty, and the indictment, as here, contains the negative averment, that he was not duly licensed, to support this negative averment, the selectmen of more than three hundred towns must be called. It may be said that the difficulty of obtaining proof is not to supersede the necessity of it, and enable a party having the burden to succeed without proof. This is true: but when the proceeding is upon statute, an extreme difficulty of obtaining proof on one side, amounting nearly to impracticability, and great facility of furnishing it on the other, if it exists, leads to a strong inference, that such course was not intended by the legislature to be required. It would no doubt be competent for the legislature so to frame a statute provision as to hold a party liable to the penalty, who should not produce a license. Besides, the common-law rules of evidence are founded upon good sense and experience, and adapted to practical use and ought to be so applied as to accomplish the purposes for which they were framed. But the court have not thought it necessary to decide the general question; cases may be affected by special circumstances, giving rise to distinctions applicable to them to be considered as they arise. In the present case, the court are of opinion that the prosecutor was bound to produce *prima facie* evidence that the defendant was not licensed, and that, no evidence of that averment having been given, the verdict ought to be set aside. The general rule is, that all the averments necessary to constitute the substantive offence must be proved. If there is any exception, it is from necessity, or that great difficulty, amounting, practically, to such necessity; or, in other words, where one party could not show the negative, and where the other could with perfect ease show the affirmative. But if a party is licensed as a retailer under the statutes of the Commonwealth, it must have been done by the county commissioners for the county where the cause is tried, and within one year next previous to the alleged offence. The county commissioners have a clerk, and are required by law to keep a record, or memorandum in writing, of their acts, including the granting of licenses. This proof is equally accessible to both parties. The negative averment can be proved with great facility, and, therefore, in conformity to the general rule, the prosecutor ought to produce it, before he is entitled to ask a jury to convict the party accused:" 24 Pick. (Mass.) 330, 331. This point has since been settled otherwise, in Massachusetts, by Stat. 1844, c. 102, which devolves on the defendant the burden of proving the license. {See also Gen. Stat. 1860, c. 160. So it is held at common law in North Carolina (State *v.* Morrison, 3 Dev. 299); and in Kentucky (Haskill *v.* Com., 3 B. Monr. 342); and in Maine (State *v.* Crowell, 25 Me. 171); and in Indiana (Shearer *v.* State, 7 Blackf. 99). And see *ante*, Vol. I. § 81 *c*.}

not, in principle," said Mr. Justice Patteson, "make any distinction between evidence of facts and evidence of character. The latter is equally laid before the jury, as the former, as being relevant to the question of guilty or not guilty. The object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case."[1] The admissibility of this evidence has sometimes been restricted to *doubtful* cases;[2] but it is conceived that if the evidence is at all relevant to the issue, it is not for the judge to decide, before the evidence is all exhibited, whether the case is in fact doubtful or not; nor indeed afterwards; the weight of the evidence being a question for the jury alone.[3] His duty seems to be, to leave the jury to decide, upon the whole evidence, whether an individual, whose character was previously unblemished, is or is not guilty of the crime of which he is accused.[4] But the prosecutor is not allowed to call witnesses to the general bad character of the prisoner, unless to rebut the evidence of his good character already adduced by the prisoner;[5] and even this has recently, in England, been denied.[6] The evidence, when admissible, ought to be restricted to the trait of character which is in issue; or, as it is elsewhere expressed, ought to bear some analogy and reference to the nature of the charge: it being obviously irrelevant and absurd, on a charge of stealing, to inquire into the prisoner's loyalty;

[1] R. *v.* Stannard, 7 C. & P. 673. Williams, J., concurred in this opinion. And so is the law in Scotland : Alison's Pract. p. 629. The same view was taken by that eminent jurist, Chief Justice Parsons, of Massachusetts, who thought that the prisoner ought to be allowed to give his general character in evidence, in all criminal cases: Com. *v.* Hardy, 2 Mass. 317. The other judges concurred in admitting the evidence in that case, *in favorem vitæ*, it being a trial for murder; but were not prepared at that time to go further. And see State *v.* Wells, Coxe 424; Wills on Cir. Ev. p. 131 ; Com. *v.* Webster, 5 Cush. (Mass.) 324, 325; Wharton's Am. Crim. Law, pp. 233–237 (2d ed.).

[2] U. S. *v.* Roudenbush, 1 Baldw. 514. And see R. *v.* Davison, 31 How. St. Tr. 217, per Ld. Ellenborough ; Wills on Cir. Ev. p. 131 ; State *v.* McDaniel, 8 Sm. & M. 401.

[3] [See *ante*, Vol. I. §§ 14 *b*–14 *h*.]

[4] 2 Russ. on Crimes, 785, 786.

[5] Bull. N. P. 296 ; Com. *v.* Webster, 5 Cush. (Mass.) 325 ; People *v.* White, 14 Wend. 111 ; Carter *v.* Com., 2 Va. Cas. 169 ; Best on Presump. § 155, p. 214 ; State *v.* Merrill, 2 Dev. 269. The prisoner cannot, for this purpose, rely on the general presumption of innocence ; his good character must be otherwise proved: State *v.* Ford, 1 Strobh. 517, n.

[6] R. *v.* Burt, 5 Cox C. C. 284.

or, on a trial for treason, to inquire into his character for honesty in his private dealings.[7]

§ 26. **Same Subject.** But it is *not in all public prosecutions* for breach of law, that evidence of the party's general character is admissible. In a trial of an information by the Attorney-General, for keeping false weights, and for offering to corrupt an officer, this evidence was rejected by Ch. Baron Eyre, who said that it would be contrary to the true line of distinction to admit it, which is this: that, in a *direct prosecution for a crime*, such evidence is admissible; but where the prosecution is not directly for the crime, but for the *penalty*, as in this information, it is not.[1] It would seem, therefore, to result, that wherever, in a criminal prosecution, guilty knowledge or criminal intention is of the essence of the offence, evidence of the general character of the party is relevant to the issue, and therefore admissible; but where a penalty is claimed for the mere act, irrespective of the intention, it is not.[2]

§ 27. **Character of Injured Party.**[1] In regard to the *character of the person on whom the offence was committed* no evidence is in general admissible, the character being no part of the *res gestæ*. Hence, where evidence was offered to prove that the person killed was in the habit of drinking to excess, and that drinking made him exceedingly quarrelsome, savage, and dangerous, and when intoxicated he frequently threatened the lives of his wife

[7] *Ante*, Vol. I. § 55; 1 Phil. Ev. 469 (9th ed.); 2 Russ. on Crimes, 784; Best on Presump. § 153, p. 213.

[1] Attorney-General *v.* Bowman, 2 B. & P. 532, n. From this case Mr. Peake has deduced the rule to be, that evidence of character is admissible only in prosecutions which subject a man to *corporal punishment;* and not in actions or informations for penalties, though founded on the fraudulent conduct of the defendant. Peake's Evid. by Norris, p. 14. But the correctness of the former branch of his rule may perhaps be questioned; inasmuch as crimes, which are *mala in se*, are in some cases punished only by a pecuniary mulct. In the Attorney-General *v.* Radloff, 26 Eng. Law & Eq. 416, which was a proceeding in the Court of Exchequer, on the part of the Attorney-General, to recover penalties by means of an information, Martin, B., said: "In criminal cases, evidence of the good character of the accused is most properly, and with good reason, admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime; but in civil cases such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty alleged against him. But it is not admissible in such cases as the present; and the reason given is (as indeed it must be), that the proceeding is not a criminal proceeding, but in the nature of a civil one, and that therefore the good character of the defendant would afford no just ground of presumption that he had not done the act in respect of which the penalty is imposed."

[2] See *supra*, § 25; Best on Presump. § 153, p. 213.

[1] [See *ante*, Vol. I. §§ 14 *b*–14 *h*.]

and others, whom the prisoner had more than once been called upon to protect against his fury (all which was matter of common notoriety); it was held rightly rejected, as having no connection with what took place at the time of the homicide.[2] The only exception to this rule is in trials for rape, or for an assault with intent to commit that crime; where the bad character of the prosecutrix for chastity may, under the circumstances of particular cases, afford a just inference as to the probability of her having consented to the act for which the prisoner is indicted.[3] But on a charge of homicide, the existence of kindly relations between the deceased and the prisoner, and the expressions of good-will and acts of kindness on the part of the latter towards the former, are always admissible in his favor.[4]

§ 28. **Lex Fori governs as to Evidence and Procedure.** It is further to be observed, that every criminal charge is to be tried by the rules of evidence recognized by our own laws. *Foreign rules of evidence* have no force, as such, in this country; nor have the rules of evidence in one State of the Union any force, on that account, in another State of the Union. In this respect, the law in civil and criminal cases is the same; the general rule being this, that so much of the law as affects the rights of the parties, or goes to the merits and substance of the case (*ad litis decisionem*), is adopted from the foreign country; but the law which affects the remedy only, or relates to the manner of trial (*ad litis ordinationem*), is taken from the *lex fori* of the country where the trial is had.[1] Thus, though deeds prepared and witnessed as prescribed by a statute in Scotland, are admitted to be read in the courts of that country without further proof, yet they cannot be read in the courts of England without proof by the attesting witnesses.[2] So, in some of the United States, deeds duly acknowledged and registered are, by statute, made admissible in evidence, without further proof of execution;

[2] State *v.* Field, 14 Me. 244. And see York's Case, 7 Law Rep. 507–509; State *v.* Thawley, 4 Harringt. 562; Quesenberry *v.* State, 3 Stew. & Port. 308; State *v.* Tilley, 3 Ired. 424. But where it was doubtful whether the killing was from a just apprehension of danger, and in self-preservation, such evidence has been held admissible: Monroe's Case, 5 Ga. 85. See also *post*, § 149; State *v.* Bryant, 55 Mo. 75.

[3] R. *v.* Clarke, 2 Stark. 241; 1 Phil. Evid. 468 (9th ed.); R. *v.* Barker, 3 C. & P. 589.

[4] 1 Phil. Ev. 470 (9th ed.). And see further, on the subject of character in evidence, Wharton's Am. Crim. Law, pp. 233–237.

[1] Huber *v.* Steiner, 2 Bing. N. C. 202; *ante*, Vol. I. § 49 n. *sub finem*.

[2] Yates *v.* Thomson, 3 Cl. & Fin. 577, 580, per Ld. Brougham. And see Story, Confl. Laws, § 634 *a*, and n.

while, in others, the proof required by the common law is still demanded in all cases.[3] In respect to crimes, they are regarded by the common law as purely local, and therefore cognizable and punishable only in the country where they were committed. No other nation has any right to punish them; or is under any obligation to take notice of or enforce any judgment rendered in a criminal case by a foreign tribunal.[4]

§ 29. **Quantity of Evidence.** A distinction is to be noted between civil and criminal cases, in respect to the degree or *quantity of evidence* necessary to justify the jury in finding their verdict for the government. In civil cases, their duty is to weigh the evidence carefully, and to find for the party in whose favor the evidence *preponderates*, although it be not free from reasonable doubt. But, in *criminal* trials, the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is, therefore, a rule of criminal law, that *the guilt of the accused must be fully proved.* Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt.[1] The oath

[3] *Ante,* Vol. I. § 573, n.; 4 Cruise's Dig. tit. 32, c. 2, §§ 77, 80, notes; and c. 29, § 1, n. See other examples in Brown *v.* Thornton, 6 Ad. & El. 185, and cases there cited; British Linen Co. *v.* Drummond, 10 B. & C. 903; Clark *v.* Mullick, 3 Moore P. C. 252, 279, 280.

[4] Story, Confl. Laws, §§ 620–625; *ante,* Vol. I. § 378. {Where an accessory in one State procures a crime to be committed in another, he cannot be tried in the latter State for the offence of procuring the crime to be committed: State *v.* Moore, 26 N. H. 448.}

[1] 1 Stark. Evid. 478. "Quod dubitas, ne feceris." 1 Hale P. C. 300. And see Giles *v.* State, 6 Ga. 276. In Dr. Webster's case, the learned Chief Justice explained this degree of proof in the following terms: "Then what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal; for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty, — a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether:" Com. *v.* Webster, 5 Cush. 320. [See Vol. I. §§ 81 *c*, 81 *d*.]

administered to the jurors, according to the common law, is in accordance with this distinction. In civil causes, they are sworn "well and truly to try the issue beween the parties according to law and the evidence given" them; but in criminal causes their oath is, "you shall well and truly try, *and true deliverance make*, between" (the King or State) "and the prisoner at the bar, according," etc.[2] It is elsewhere said, that the persuasion of guilt ought to amount to a moral certainty, or "such a moral certainty as convinces the minds of the tribunal as reasonable men, *beyond all reasonable doubt.*"[3] And this degree of conviction ought to be produced when the facts proved coincide with and are legally sufficient to establish the truth of the hypothesis assumed, namely, the guilt of the party accused, and are inconsistent with any other hypothesis. For it is not enough that the evidence goes to show his guilt; it must be inconsistent with the reasonable supposition of his innocence. "Tutius semper est errare in acquietando, quàm in puniendo; ex parte misericordiæ, quàm ex parte justitiæ.[4]

[2] 2 Hale P. C. 293.

[3] Per Parke, B., in R. *v.* Sterne, Surrey Sum. Ass. 1843, cited in Best, Prin. Evid. p. 100. The learned and acute reviewer of Dr. Webster's trial thinks that reasonable doubt "may, perhaps, be better described by saying, that all reasonable hesitation in the mind of the triers, respecting the truth of the hypothesis attempted to be sustained, must be removed by the proof:" The North American Review, for Jan., 1851, p. 201. Reasonable certainty of the prisoner's guilt is described by Pollock, C. B., as being that degree of certainty upon which the jurors would act in their own grave and important concerns. See Wills on Circumst. Evid., p. 210; R. *v.* Manning, 13 Jur. 962. If the guilt of the prisoner is to be established by a chain of circumstances, and the jurors have a reasonable doubt in regard to any one of them, that one ought not to have any influence in making up their verdict: Sumner *v.* State, 5 Blackf. 579. In order to warrant a conviction of crime, on circumstantial evidence, each fact, necessary to the conclusion sought to be established, must be proved by competent evidence, beyond a reasonable doubt; all the facts must be consistent with each other, and with the main facts sought to be proved; and the circumstances taken together must be of a conclusive nature, and leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offence charged: Com. *v.* Webster, 5 Cush. (Mass.) 296, 313, 317–319.

[4] 2 Hale P. C. 290; Sumner *v.* State, 5 Blackf. 579. This sentiment of Lord Hale, as to the importance of extreme care in ascertaining the truth of every criminal charge, especially where life is involved, may be regarded as a rule of law. It is found in various places in the Mosaic code, particularly in the law respecting idolatry; which does not inflict the penalty of death until the crime "be *told* thee" (viz., in a formal accusation), "and thou hast *heard* of it" (upon legal *trial*), "and inquired *diligently*, and behold it be *true*" (satisfactorily proved), "and the thing *certain*" (beyond all reasonable doubt): Deut. xvii. 4. It was a law of Agesilaus, the Spartan king, "ut *æqualibus* votis, super vindicando facinore, in diversa trahentibus, *pro reo judicium staret quod videbatur æquissimum.*" The same rule was adopted in Athens: Mascardus, De Probat. vol. i. p. 87, concl. 36, n. 3. The rule of the Roman law was in the same spirit. "Satius est, impunitum relinqui facinus nocentis, quam innocentem damnare:" Dig. lib. 48, tit. 19, l. 5. By the same code prosecutors were held to the strictest proof of the charge. "Sciant cuncti accusatores eam se rem

§ 30. **Proof; Identity — Corpus Delicti.** The proof of the charge in criminal causes involves the proof of two distinct propositions: first, that the act itself was done; and, secondly, that it was done by the person charged, and by none other; — in other words, proof of *the corpus delicti*, and of the *identity of the prisoner*. It is seldom that either of these can be proved by direct testimony; and therefore the fact may lawfully be established by circumstantial evidence, provided it be satisfactory.[1] Even in the case of homicide, though ordinarily there ought to be the testimony of persons who have seen and identified the body, yet this is not indispensably necessary in cases where the proof of the death is so strong and intense as to produce the full assurance of moral certainty.[2] But it must not be forgotten that the books furnish deplorable cases of the conviction of innocent persons from the want of sufficiently certain proofs either of the *corpus delicti* or of the identity of the prisoner.[3] It is obvious

deferre in publicam notionem debere, quæ munita sit idoneis testibus, vel instructa apertissimis documentis, vel *indiciis ad probationem indubitatis et luce clarioribus* expedita:" Cod. lib. 4, tit. 19, l. 25. The reason given by the civilians is one of public expediency. "In dubio, reum magis [est] absolvendum quàm condemnandum; quod absolutio est favorabilis, condemnatio vero odiosa; et favores ampliandi sunt, odia vero restringenda:" Mascard. *ubi supra*, n. 7–10. The rule in the text, quoted from Lord Hale, was familiarly known in the ancient common law of England. The *Mirror*, written at a very early period, reckons it among the abuses of the common law, "that justices and their officers, who kill people by false judgment, be not destroyed as other murderers; which King *Alfred* caused to be done, who caused forty-four justices in one year to be hanged for their false judgment." And in the recital which follows, of their names and offences, it is said that "he hanged *Freburne* because he judged *Harpin* to die whereas the jury were in doubt of their verdict; for, *in doubtful causes one ought rather to save than to condemn*:" Mir. pp. 239, 240, c. 5, § 1; Ab. 108, No. 15. See Best, Prin. Evid. pp. 100, 101. In the spirit of the maxim in the text, it is enacted in Connecticut, that "no person shall be convicted of any crime, by law punishable with death, without the testimony of at least two witnesses, or that which is equivalent thereto:" Rev. Stat. 1849, tit. 6, § 159.

[1] See Mittermaier, Traité de la Preuve en Matière Criminelle, c. 53, p. 416. {A photograph of a person killed, and proof of his habits, are admissible on the question of identity: Udderzook's Case, 76 Pa. St. 340.} [See Vol. I. § 439 *h*.]

[2] Wills on Circumst. Evid. pp. 157, 162. An example of this is in R. *v.* Hindmarsh, 2 Leach C. C. 751; {People *v.* Alviso, 55 Cal. 230. In Ruloff *v.* People, 18 N. Y. 179, it was held that, in order to warrant a conviction of murder, there must be direct proof, — either of the death, as by the finding and identification of the corpse, or of criminal violence adequate to produce death, and exerted in such a manner as to account for the disappearance of the body — that the *corpus delicti*, in murder, has two components, — death as the result, and the criminal agency of another as the means. It is only where there is direct proof of one that the other can be established by circumstantial evidence. In State *v.* German (54 Mo. 526), the court refused to sustain a conviction wherein the only proof of the *corpus delicti* was the extra-judicial confession of the prisoner. See also Blackburn *v.* State, 23 Ohio St. 146; State *v.* Williams, 7 Jones (N. C.) 446; McCulloch *v.* State, 48 Ind. 109; Lowell's Case, Supreme Judicial Court, Maine, 1875, Pamphlet.}

[3] Mr. Wills mentions several instances of this kind, in his interesting Essay on Circumstantial Evidence, c. 4, 7. See also Wharton's Am. Crim. Law, pp. 284, 285 (2d ed.).

that on this point no precise rule can be laid down, except that the evidence "ought to be strong and cogent,"[4] and that innocence should be presumed until the case is proved against the prisoner, in all its material circumstances, beyond any reasonable doubt.

§ 31. **Presumption from Unexplained Possession of Stolen Property.** The *caution* necessary to be observed on this point applies with more or less force in all criminal trials; but from the nature of the case is more *frequently* and *urgently demanded* in prosecutions for *homicide* and for *larceny*. We have heretofore[1] adverted to the possession of the instruments or of the fruits of a crime as affording ground to presume the guilt of the possessor: but on this subject no certain rule can be laid down of universal application; the presumption being not conclusive but disputable, and therefore to be dealt with by the jury alone, as a mere inference of fact.[2] Its force and value will depend on several considerations. In the first place, if the fact of possession stands alone, wholly *unconnected with any other circumstances*, its value or persuasive power is *very slight;* for the real criminal may have artfully placed the article in the possession or upon the premises of an innocent person, the better to conceal his own guilt; whether it be the instrument of homicide, burglary, or other crime, or the fruits of robbery or larceny; or it may have been thrown away by the felon, in his flight, and found by the possessor, or have been taken away from him, in order to restore it to the true owner; or otherwise have come lawfully into his possession.[3] It will be necessary, therefore, for the prosecutor to add the proof of other circumstances indicative of guilt, in order to render the naked possession of the thing available towards a conviction; such as the previous denial

[4] Per Best, J., in R. *v.* Burdett, 5 B. & Ald. 123.

[1] See *ante*, Vol. I. § 34.

[2] [This presumption is, as Prof. Greenleaf says, *supra*, and as has been previously shown (*ante*, Vol. I. § 34), in reality an inference of fact which the jury may draw from the fact of possession of the stolen property, if it is sufficiently recent and is unexplained. It has been held that this fact alone is not sufficient to make out a *prima facie* case, and shift the burden of proof to the defendant in a trial for larceny: State *v.* Hodge, 50 N. H. 510. But it is more commonly held that, upon proof of possession, recent and unexplained, by the defendant of stolen goods, the jury, in the absence of other evidence, must convict: 2 East P. C. 656; Rosc. Cr. Evid. 18; State *v.* Adams, 1 Hayw. 463. Proof of concealment (State *v.* Bennett, 2 Const. R. 692) or of false statements in regard to the property (Pennsylvania *v.* Meyers, Addis. 320), strengthens this presumption greatly. A very able discussion of this presumption is given in State *v.* Hodge, 50 N. H. 510.]

[3] Best on Presump. §§ 224–226; Wills on Circumst. Evid. c. 3, § 4.

of the possession by the party charged, or his refusal to give any explanation of the fact, or giving false or incredible accounts of the manner of the acquisition; or that he has attempted to dispose of it, or to destroy its marks; or that he has fled or absconded, or was possessed of other stolen property or pick-lock keys, or other instruments of crime; or was seen, or his footprints or clothes or other articles of his property were found, near the place, and at or near the time when the crime was committed; or other circumstances naturally calculated to awaken suspicion against him, and to corroborate the inference of guilty possession.[4]

§ 32. **Same Subject.** In the next place, in order to justify the inference of guilt from the possession of the instruments or fruits of crime, it is important that it be a *recent possession*, or so soon after the commission of the crime as to be at first view not perfectly consistent with innocence. In the case of larceny, the nature of the goods is material to be considered; since if they are such as pass readily from hand to hand, the possession, to authorize any suspicion of guilt, ought to be much more recent than though they were of a kind that circulates more slowly or is rarely transmitted. Thus, the possession was held sufficiently recent to hold the prisoner to account for it, where the property stolen consisted of two unfinished ends of woollen cloth, of about twenty yards each, found with the prisoner two months after they were missed by the owner.[1] But where the subject of larceny was an axe, a saw, and a mattock, found in the possession of the prisoner three months after they were missed, the learned judge directed an acquittal;[2] and where a shovel, which had been stolen, was found six months afterwards in the house of the prisoner, who was not then at home, the learned judge refused to put the prisoner upon his defence.[3] An acquittal was also directed where sixteen months had elapsed since the loss of the goods.[4] But in other cases the whole matter has properly been left at large to the jury, it being their

[4] Wills on Circumst. Evid. c. 3, § 4; Alison's Crim. Law of Scotland, pp. 320–322.

[1] R. *v.* Partridge, 7 C. & P. 551. And see State *v.* Bennett, 3 Brevard 514; Const. 692; Cockin's Case, 2 Lewin C. C. 235; State *v.* Jones, 3 Dev. & Bat. 122.

[2] R. *v.* Adams, 3 C. & P. 600; Hall's Case, 1 Cox C. C. 231.

[3] R. *v.* Cruttenden, 6 Jur. 267.

[4] Anon., 7 Monthly Law Mag. 58. {So where eighteen months had elapsed (Sloan *v.* People, 23 Ill. 76); and in Jones *v.* State, 26 Miss. 247, where only six months had elapsed, and the article stolen was a saddle.}

province to consider what weight, if any, ought to be given to the evidence;[5] the general rule being this, that where a man in whose possession stolen property is found gives a reasonable account of how he came by it, it is incumbent on the prosecutor to show that the account is false.[6]

§ 33. **Same Subject.** But, to raise the presumption of guilt from the possession of the fruits of the instruments of crime by the prisoner, it is necessary that they be found in his *exclusive possession.* A constructive possession, like constructive notice or knowledge, though sufficient to create a *civil* liability, is not sufficient to hold the party responsible to a *criminal* charge. He can only be required to account for the possession of things which he actually and knowingly possessed; as, for example, where they are found upon his person, or in his private apartment, or in a place of which he kept the key. If they are found upon premises owned or occupied as well by others as himself, or in a place to which others have equal facility and right of access, there seems no good reason why he, rather than they, should be charged upon this evidence alone.[1] If the prisoner is charged as a receiver of stolen goods, which he admits that he bought, and they are subsequently found in his house, and are proved to have been stolen, this evidence has been held sufficient to justify the jury in convicting him, without proof of his having actually received them, or of his having been at the house from which they were taken.[2]

[5] R. *v.* Hewlett, 2 Russ. on Crimes, 728, n. by Greaves; and see State *v.* Brewster, 7 Vt. 122; State *v.* Weston, 9 Conn. 527; Com. *v.* Myers, Addis. 320.

[6] R. *v.* Crowhurst, 1 C. & K. 370; [Bellamy *v.* State, 35 Fla. 242.] {But see R. *v.* Wilson, 1 Dears. & Bell 157. Where the circumstances attending recent possession forbid the inference that the prisoner committed the larceny, the possession, if unexplained, is evidence that he received the stolen property knowing it to have been stolen: R. *v.* Langmead, 9 Cox C. C. 464. This presumption applies as well to a person charged with unlawfully receiving as to one charged with its original taking: Knickerbocker *v.* People, 43 N. Y. 179; Stover *v.* People, 56 id. 316. The presumption grows weaker as the time of possession recedes from the time of the original taking; but the fact itself is one for the consideration of the jury under all the circumstances of the case: People *v.* Weldon, 111 id. 576.

Declarations made after coming into possession of stolen property, explanatory of the possession, are inadmissible: State *v.* Pettis, 63 Me. 124. Appleton, C. J., and Barrows, J., dissenting. And, as supporting the dissenting opinion, see Com. *v.* Rowe, 105 Mass. 590. A full discussion of this species of evidence is given by Pollock, C. B., in R. *v.* Exall, 4 F. & F. 922 and notes.} It is sufficient for the prisoner to raise a reasonable doubt of his guilt: State *v.* Merrick, 19 Me. 398; 1 Leading Crim. Cases, 360.

[1] *Ante,* Vol. I. § 34, n.

[2] R. *v.* Matthews, 1 Denison C. C. 596; 14 Jur. 513. {See R. *v.* Smith, 33 Eng. L. & Eq. 531; and R. *v.* Hobson, ib. 527. On an indictment for receiving goods, knowing them to have been stolen, the mere fact that they were found on the

§ 34. **Suppression and Fabrication of Evidence.** In regard to the *suppression*, *fabrication*, or *destruction of evidence*, the common law furnishes no conclusive rule. The presumption, as we have seen in a former volume,[1] is in such cases strong against the party, for the motive of so doing is generally a consciousness of guilt; but the presumption of guilt is not conclusive, because innocent persons, under the influence of terror from the danger of their situation, or induced by bad counsel, have sometimes been led to the simulation or destruction of evidence, or to prevarication and other misconduct, the usual concomitants of crime.[2] But the burden of proof in these cases is on the prisoner, to explain his conduct to the satisfaction of the jury.[3]

prisoner's premises is not sufficient to confirm the evidence of the theft, so far as to make it proper to convict: R. *v.* Pratt, 4 F. & F. 315. So in California it has been held that the mere fact of goods recently burglariously stolen from a house being found in the possession of the prisoner is not sufficient evidence of the burglary: People *v.* Beaver, 49 Cal. 57.]

[1] *Ante*, Vol. I. § 37.

[2] [The introduction of false or fabricated evidence in defence is always regarded as an inferential admission of guilt, although not of a conclusive character. A case is named in the books where one was indicted for the murder of a girl nine years of age, and, to make out his defence, did attempt to substitute another girl of similar appearance, and on the detection of this fraud was, by its force, convicted and executed, when it subsequently turned out that the supposed murdered girl was still living. And such testimony must always be liable to more or less uncertainty in its intrinsic weight. But it seems to be admissible as a circumstance tending to show the guilt of the accused. But like other evidence of the admissions, and the conduct of the prisoner in regard to the main charge, their force depends so much upon the temperament, education, and habits of life and business of the accused, that no very great reliance is to be placed upon this kind of evidence, as it has no direct tendency to establish the main charge. And if the evidence in regard to the alleged falsehood or fabrication be doubtful, it is entitled to no weight. Whether any inference could be fairly drawn from the failure of a defendant to produce the testimony of a witness who may be supposed to be familiar with the circumstances of the case, is for the jury to determine. The court cannot rule, as matter of law, that it was the duty of either side to produce the witness: Com. *v.* Haskell, 140 Mass. 129. To be entitled to any force, as it is only circumstantial and collateral to the main issue, its truth should be established beyond all question or cavil: State *v.* Williams, 27 Vt. 724. The suppression or destruction of documentary evidence always tells against the one who does it: Atty.-General *v.* Windsor, 24 Beav. 679. The fact that a person has endeavored to avoid arrest, or to escape therefrom, is to be considered by the jury as bearing upon the question of his guilt, and is of greater or less weight as the time when, or the circumstances under which it takes place, may reveal, or fail to do so, an intention to evade justice. Thus it has been held that it would be for the jury to say whether the defendant was not acquainted with the charge made against him when he was arrested upon a *capias* issued by the court he having recognized to appear before the court to answer for the same offence, and a previous indictment, although in a different form, having been found against him, even if it did not distinctly appear that the officers at the time informed him of the nature of the indictment; and it was held not to be without relevancy that the defendant was found an hour or two after his escape in the company of the person with whom the offence charged was alleged to have been committed, and that he then again ran away: Com. *v.* Brigham, 147 Mass. 415.]

[3] See on this subject, Wills on Circumst. Evid. c. 3, § 7; Best on Presumptions, §§ 145–149. Mr. Best well suggests, that cases have probably occurred, where the ac-

§ 35. **Former Conviction and Acquittal.** It may here be added, as a further preliminary consideration, that, by the Constitution of the United States, *no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb."*[1] A similar provision exists in the constitutions of most of the States. But this rule has a deeper foundation than mere positive enactment; it being, as Mr. Justice Story remarked, imbedded in the very elements of the common law, and uniformly construed to present an insurmountable barrier to a second prosecution, where there has been a verdict of acquittal or conviction, regularly had upon a sufficient indictment. It is upon the ground of this universal maxim of the common law, that the pleas of *autrefois acquit*, and of *autrefois convict*, are allowed in all criminal cases.[2] If the former acquittal was for want of substance in setting forth the offence, or for want of jurisdiction in the court, so that for either of these causes no valid judgment could have been rendered, it is no bar to a second prosecution;[3] but though there be error, yet if it be in the process only, the acquittal of the party is nevertheless a good bar. The sufficiency of the bar is tested by ascertaining whether he could legally have been convicted upon the previous indictment; for if he could not, his life or liberty was not in jeopardy.[4]

cused, though innocent, could not avail himself of his real defence without criminating others whom he is anxious not to injure, or criminating himself with respect to other transactions: ib. § 149, n. (*a*).

[1] Const. U. S. Amendm. art. 5.

[2] U. S. *v.* Gibert, 2 Sumn. 42. And see Vaux's Case, 4 Rep. 44; 4 Bl. Comm. 335; 1 Russ. on Crimes, 837, n. by Greaves; Wharton, Am. Crim. Law, 205 *et seq.* (2d ed.); 1 Chitty, Crim. Law, 452; Com. *v.* Cunningham, 13 Mass. 245; Com. *v.* Goddard, ib. 455; Com. *v.* Roby, 12 Pick. (Mass.) 496, 502; People *v.* Goodwin, 18 Johns. 187, 201. The rule in civil cases is the same. "Nemo debet bis vexari, pro una et eadem causa:" Broom's Maxims, 135. And see *ante*, Vol. I. §§ 522–539.

[3] In Massachusetts, it has been held, that where an illegal sentence has been *served out*, it shall have at least the effect to protect the defendant from another punishment for the very same thing, although imposed according to more accurate formalities: Com. *v.* Loud, 3 Met. (Mass.) 328. The judgment that the defendant was guilty, said Putnam, J., although upon proceedings which were erroneous, is good until reversed. This rule of criminal law is well settled. It was the right and privilege of the defendant to bring a writ of error, and reverse that judgment. But he well might waive the error, and submit to and perform the sentence, without danger of being subjected to another conviction and punishment for the same offence.

[4] Ibid.; 2 Hawk. P. C. c. 35, § 8; ib. c. 36, §§ 1, 10, 15; 2 Hale P. C. 246–248; Com. *v.* Goddard, *supra;* Whart. Amer. Crim. Law, 190–204; People *v.* Barrett, 1 Johns. 66; R. *v.* Emden, 9 East 437; Com. *v.* Peters, 12 Met. (Mass.) 387; R. *v.* Drury, 18 Law Journal, 189; 3 Car. & Kir. 190; 3 Cox C. C. 544. [*Contra*, U. S. *v.* Ball, 163 U. S. 662.] {Selling intoxicating liquors may be evidence of the offence of maintaining a tenement used for the illegal keeping and selling of liquor, but is not the same offence, and the person may be guilty of the former without being guilty of the latter. Therefore an acquittal of the latter is not a bar to a prosecution for the former,

§ 36. **Same Subject.** The former judgment, in these cases, is pleaded with an averment that the offence charged in both indictments is the same; and the *identity of the offence*, which may be shown by parol evidence, is to be proved by the prisoner.[1] This may generally be done by producing the record, and showing that the same evidence, which is necessary to support the second indictment, would have been admissible and sufficient to procure a legal conviction upon the first.[2] A *prima facie* case on this point being made out by the prisoner, it will be incumbent on the prosecutor to meet it by proof that the offence, charged in the second indictment, was not the same as that charged in the first.[3] It is not necessary that the two charges should be precisely alike in form, or should correspond in things which are not essential and not material to be proved; the variance, to be fatal to the plea, must be in matter of substance. Thus, if one is indicted for murder committed on a certain day, and be acquitted, and afterwards be indicted for the murder of the same person on a different day, the former acquittal may be pleaded and shown in bar, notwithstanding the diversity of days; for the day is not material; and the offence can be committed but once.[4] But if one be indicted of an offence against the peace of the *late* king, and acquitted, and afterwards be indicted of the same offence against the peace of the *now* king, the former acquittal cannot be shown in bar of the second indictment; for evidence of an offence against the peace of one king cannot be

even if it appears that the sale now relied on was given in evidence in the prosecution for maintaining the tenement: Morey *v.* Com., 108 Mass. 433, 435; Com. *v.* Sullivan, 150 id. 317.}

[1] Duncan *v.* Com., 6 Dana 295. An approved form of this plea is given at large in R. *v.* Sheen, 2 C. & P. 634; and in R. *v.* Bird, 5 Cox C. C. 11; 2 Eng. Law & Eq. 439; 1 Temple & Mew C. C. 438, n.; Train & Heard's Precedents of Indictments, 481, 484.

[2] Archbold on Crim. Pl. 87; R. *v.* Emden, 9 East 437; R. *v.* Clark, 1 B. & Bing. 473; R. *v.* Taylor, 3 B. & C. 502; 1 Russ. on Crimes, 832; Com. *v.* Roby, 12 Pick. (Mass.) 496; R. *v.* Vandercomb, 2 Leach C. C. (4th ed.) 768. The counsel in the case may be examined, to show from his notes, taken at the former trial, what was the evidence then given: R. *v.* Bird, *ubi supra.*

[3] R. *v.* Bird, 5 Cox C. C. 11; 2 Eng. Law & Eq. 439.

[4] 2 Hale P. C. 244. {In order that the first of two indictments for keeping a gaming-house should bar the other, it must appear in proof that the keeping alleged in the two was without intermission; that the dates set out in the indictment show no intermission is not sufficient, as under neither need the time be proved as laid, and it may be that there was an interval between the times laid: State *v.* Lindley, 14 Ind. 431.} [Where the same act results in the death of two persons, an acquittal on a trial for the murder of one of them is a bar to a subsequent prosecution for killing the other: Gunter *v.* State, 20 S. 632, Ala.; but see State *v.* Robinson, 12 Wash. 491. Where money is stolen from two persons at the same time, acquittal on a charge of theft from the one is no bar to prosecution for the theft from the other: State *v.* Bynum 117 N. C. 749; but see Ackerman *v.* State, 54 P. 228, Wyo.]

admitted in proof of the like charge against the peace of another king.[5] Thus, also, in regard to the person slain or injured, if he be described by different names in the two indictments, and the identity of the person be averred and proved, he being known as well by the one name as the other, it is a good bar.[6] So, if one be indicted for murdering another, by compelling him to take, drink, and swallow down a certain poison called oil of vitriol, whereof he is acquitted; and he be again indicted for murdering the same person by administering to him the oil of vitriol, and forcing him to take it into his mouth, so that by the disorder, choking, suffocating, and strangling occasioned thereby he languished and died, — the former acquittal is a good bar; for the substance of the charge in both cases is poisoning.[7] The same principle applies to all other criminal charges, the rule being universal, that if the first indictment were such that the prisoner *could* have been legally convicted upon it, by any evidence legally admissible, though sufficient evidence was not in fact adduced, his acquittal upon that indictment is a bar to a second indictment for the same offence.[8] This rule also applies wherever the first indictment was for a greater offence, and the second is for a less offence, which was included in the greater. Thus, if the first indictment, of which the prisoner was acquitted, was for burglary and larceny, and he be afterwards indicted for the larceny only; or if he were indicted of any other compound offence, such as robbery, murder, or the like, and acquitted, and afterwards he be indicted of any less offence which was included in the greater, such as larceny from the person, manslaughter, or the like, — he may show the acquittal upon the first indictment, in bar of the second; for he might have been convicted of

[5] R. *v.* Taylor, 3 B. & C. 502 ; 2 Hawk. P. C. c. 25, § 92.

[6] R. *v.* Sheen, 2 C. & P. 634 ; 2 Hale P. C. 244.

[7] R. *v.* Clark, 1 Brod. & Bing. 473 ; and see *ante*, Vol. I. § 65. {A party was indicted for stealing a pair of boots, laid as the property of A, and acquitted. She was then indicted again for stealing the same property, laid as the property of B, and she pleaded the former acquital. Held, not a good defence : R. *v.* Green, 37 Eng. Law & Eq. 597. An acquittal of a charge of being a common seller of intoxicating liquors from a certain day to a certain other day, is no bar to a prosecution for a single unlawful sale of intoxicating liquors on a day between these two, notwithstanding this single sale may have been in evidence before the tribunal that heard and determined the alleged offence of being a common seller : Com. *v.* Hudson, 14 Gray (Mass.) 11. [And conversely, Com. *v.* Brelsford, 161 Mass. 61.] And so, a conviction of keeping a shop open on the Lord's Day is no bar to an indictment for a nuisance in keeping the same shop at the same time for the illegal sale and keeping of intoxicating liquors : Com. *v.* Shea, 14 Gray (Mass.) 386 ; Com. *v.* Bubser, ib. 83.}

[8] R. *v.* Clark, *supra;* R. *v.* Sheen, 2 C. & P. 634. And see State *v.* Ray, 1 Rice 1.

the less offence, upon the indictment for the greater.[9] But if, upon the first indictment, he could not have been convicted of the offence described in the second, then an acquittal upon the former is no bar to the latter. Thus, it has been held, that a conviction upon an indictment for an assault with intent to commit murder, is no bar to an indictment for the murder; for the offences are distinct in their legal character, the former being a misdemeanor, and the latter a felony; and in no case could the party, on trial for the one, be convicted of the other.[10]

§ 37. **Jeopardy.** The *constitutional provision*, that no person shall be subject, for the same offence, to be *twice put in jeopardy of life or limb*, has been variously interpreted by different tribunals; for while some have held that it means nothing more than the common-law maxim, that no man shall be tried twice for the same offence, others have held, that, whenever the jury are charged with the prisoner upon a good indictment, he is put in jeopardy; and that he cannot be again put on trial, unless the verdict was prevented by the act of God, such as the sudden illness or death of a juror, or the illness of the prisoner or by some other case of urgent and imperious necessity, arising without the fault or neglect of the government. Whether the impossibility of agreement by the jury, unless by the physical coercion

[9] 1 Russ. on Crimes, 838, n.; 2 Hale P. C. 246; 1 Chitty, Crim. Law, 455; State *v.* Standifer, 5 Port. 523; People *v.* McGowan, 17 Wend. 386; [People *v.* Defoor, 100 Cal. 150.] {Provided the lesser was part of the greater: R. *v.* Bird, 2 Eng. Law & Eq. 448. A prosecution for any part of a single crime — as for the larceny of part only of the articles taken at one time — will bar any further prosecution for the larceny of the remaining articles: Jackson *v.* State, 14 Ind. 327. And when one is indicted for murder in the first degree, and on trial is convicted of murder in the second degree, and a new trial is ordered at his instance, he cannot be legally tried again upon the charge of murder in the first degree, but only upon the charge of murder in the second degree: State *v.* Ross, 29 Mo. 32; State *v.* Tweedy, 11 Iowa 350; [State *v.* Helm, 92 id. 540; State *v.* Steeves, 29 Or. 85; Mixon *v.* State, 35 Tex. Cr. App. 458; State *v.* Murphy, 13 Wash. 229; Golding *v.* State, 31 Fla. 262; *contra,* State *v.* Bradley, 67 Vt. 465; Waller *v.* State, 104 Ga. 505;] and *quære* in Livingston's Case, 14 Gratt. (Va.) 592. And where an indictment contained nine counts for embezzlement, and fourteen for larceny, it was held, that a general verdict "guilty of embezzlement" acted as an acquittal upon the charge of larceny, and was a bar to any subsequent prosecution therefor, Selden, J., dissenting: Guenther *v.* People, 24 N. Y. 100.} [A verdict of grand larceny on an indictment for burglary only is an acquittal of the burglary: Bowen *v.* State, 106 Ala. 178. Acquittal on a charge of assault with intent to kill is a bar to prosecution for assault with intent to rob: State *v.* Climault, 55 Kan. 326.]

[10] 1 Russ. 838, n. This distinction is clearly stated and illustrated upon principle and authority in Com. *v.* Roby, 12 Pick. (Mass.) 496. But in State *v.* Shepard, 7 Conn. 54, it was held, that a former conviction on an indictment for an assault with intent to commit a rape, was a good bar to an indictment for a rape; for otherwise the party might be punished twice for a part of the facts charged in the second indictment. In this case, the case of Com. *v.* Cooper, 15 Mass. 187, was cited and relied on by the court; but it has since been overruled in 12 Pick. 507. *Ideo quære.*

of famine or exhaustion, constitutes such a case of urgent necessity, justifying the court, in the exercise of its discretion, to discharge the jury, and hold the prisoner for a second trial, is also a point on which there has been much diversity of opinion; but the affirmative, being held by the Supreme and Circuit Courts of the United States, as well as by several of the State courts, may be now regarded as the better opinion.[1]

§ 38. **Fraud; Former Acquittal; Judgment.** Though the general rule is thus strongly held against a second trial in criminal cases, yet it has always been held, that, to the plea of *autrefois acquit*, or *autrefois convict*, in prosecutions for misdemeanors, it is a sufficient answer, that the former acquittal or conviction was procured by the fraud or evil practice of the prisoner himself.[1] It is not necessary to the validity of these pleas in any criminal case, that a judgment should have been entered upon the verdict;[2] but if the judgment have been arrested, the plea cannot be supported.[3]

[1] U. S. *v.* Perez, 9 Wheat. 579; U. S. *v.* Coolidge, 2 Gall. 364; U. S. *v.* Gibert, 2 Sumner 19, 52–62; U. S. *v.* Shoemaker, 2 McLean 114; U. S. *v.* Haskell, 4 Wash. 408; Com. *v.* Bowden, 9 Mass. 494; Com. *v.* Purchase, 2 Pick. 521; People *v.* Olcott, 3 Johns. Cas. 301; People *v.* Goodwin, 18 id. 187, 200–205; Com. *v.* Olds, 5 Lit. 140; Moore *v.* State, 1 Walk. 134; State *v.* Hall, 4 Halst. 256. In England, very recently, in a well-considered case, the same doctrine was held: R. *v.* Newton, 13 Jur. 606; 13 Q. B. 716; 3 Cox C. C. 489. See also Conway *v.* R., 7 Irish Law Rep. 149; [Com. *v.* Cody, 165 Mass. 133; Penn *v.* State, 36 Tex. Cr. App. 140; Thompson *v.* U. S., 155 U. S. 271.] See *contra*, Com. *v.* Cook, 6 S. & R. 577; Com. *v.* Clue, 3 Rawle 498; State *v.* Garrigues, 1 Hayw. 241; Spier's Case, 1 Dev. 491; Mahala *v.* State, 10 Yerg. 532; State *v.* Ned, 7 Port 188. See Wharton's Am. Crim. Law, p. 205–215, where this subject is fully considered. *Quære*, if, after the jury have retired to deliberate upon their verdict, one of them escapes, through the officer's negligence, so that a verdict cannot be rendered, can the prisoner be again tried? Guenther *v.* People, 24 N. Y. 100. {If the court adjourned for the term, leaving the jury out, and without an order for their discharge, the trial will be a good plea in bar to another trial: People *v.* Cage, 48 Cal. 323. See also 1 Bishop Cr. Law, § 873. And so, even if an order of discharge is made, unless a strict necessity exists therefor: Com. *v.* Fitzpatrick, 121 Pa. St. 115; Hilands *v.* Com., 111 id. 1. A nol. pros. without defendant's consent acts as a bar: Com. *v.* Hart, 149 Mass. 7; Com. *v.* McCormick, 130 id. 61. If a defendant, convicted, seeks and obtains a new trial he waives his plea of jeopardy, as to the crime of which he was convicted, but not as to one of higher grade: Smith *v.* Com., 104 Pa. St. 340; People *v.* Cignarale, 110 N. Y. 28.} [Withdrawal of the case from the jury for absence of a witness was held a bar to subsequent prosecution in State *v.* Richardson, 47 S. C. 166. The substitution of one juror for another after the trial had begun was allowed in Roberts *v.* State, 72 Miss. 728.]

[1] 1 Chitty, Crim. Law 657; R. *v.* Bear, 1 Salk. 646; R. *v.* Furser, Sayer 90; R. *v.* Davis, 1 Show. 336; R. *v.* Coke, 12 Mod. 9; Anon., 1 Lev. 9; R. *v.* Mawbey, 6 T. R. 619; State *v.* Brown, 16 Conn. 54; State *v.* Little, 1 N. H. 257; Com. *v.* Kinney, 2 Va. Cas. 139; [State *v.* Smith, 57 Kan. 673; Thomas *v.* State, 21 S. 784, Ala.]

[2] State *v.* Norvell, 2 Yerg. 24; Mount *v.* State, 14 Ohio 295. The text is to be taken, perhaps with the qualification that the *judgment be properly arrested*. The case of R. *v.* Reid, as reported in 1 Eng. Law & Eq. 600, per Jervis, C. J., would seem

[3] Com. *v.* Purchase 2 Pick. 526.

§ 39. **Admissions.** In trials for felony, *admissions of fact*, which the government is bound to prove, are not permitted, unless when made at the trial, in open court, by the prisoner or his counsel. Thus, where, before the trial, which was for perjury, it had been agreed by the attorneys on both sides, that the formal proofs on the part of the prosecution should be dispensed with, and that this part of the case for the prosecution should be admitted, Lord Abinger, C. B., refused to allow the admission unless it were repeated in court; and this being declined, the prisoner was acquitted.[1] But where in a previous case, upon a trial for counterfeiting, it was proposed by the counsel for the prosecution that the testimony just before given on the trial of the same prisoner on another indictment for the same offence should be admitted without calling the witnesses again, and this was consented to by the prisoner's counsel, Patteson, J., doubted whether it could be done in cases of felony, though in cases of misdemeanor it might; and therefore he directed the witnesses to be called and resworn, and then read over his own notes of their testimony, to which they assented.[2]

to establish a different proposition, that a judgment must be entered on the verdict to maintain the plea. But the *dictum* of the Chief Justice thus construed would not be law; but if rendered in connection with the case then at bar, is well enough supported. And it is to be remarked that the case as reported in 5 Cox C. C. 111, 112, contains no expression from which such conclusion may be drawn. See also this case as reported in Temple & Mew C. P. 431.

[1] R. *v.* Thornhill, 8 C. & P. 575.

[2] R. *v.* Foster, 7 C. & P. 495. {But admission cannot be used so as to shut out evidence by the prosecution. Thus a defendant in a criminal case cannot, by filing a written admission of a fact, in a cautious and guarded way, which is consistent with the theory of a motive to do the criminal act in question, shut out all the Commonwealth's testimony proving, or tending to prove, the existence of the motive, with all the attending circumstances. The question is for the jury, and they have a right to know what the real facts are, as well upon the question of motive as upon the principal act of crime itself: Com. *v.* Spink, 137 Pa. St. 267.} [See Vol. I. § 170.]

ACCESSORY.

§ 40. **Principals.** Persons participating in a crime are either *Principals* or *Accessories.* If the crime is a felony, they are alike felons. Principals are such either in the first or second degree. *Principals* in the *first degree*, are those who are the immediate perpetrators of the act. *Principals* in the *second degree*, are those who did not with their own hands commit the act, but were present, aiding and abetting it. It is not necessary, however, that this presence be strict, actual, and immediate, so as to make the person an eye or ear witness of what passes; it may be a constructive presence. Thus, if several persons set out in concert, whether together or apart, upon a common design which is unlawful, each taking the part assigned to him, some to commit the act, and others to watch at proper distances to prevent a surprise, or to favor the escape of the immediate actors; here, if the act be committed, all are in the eye of the law present and principals; the immediate perpetrators in the first degree, and the others in the second.[1] But if the design is only to commit a small and inconsiderable trespass, such as robbing an orchard, or the like, and one of them on a sudden affray, without the knowledge of the others, commits a felony, such, for example, as killing a pursuer, the others are not guilty of this felony.[2] So, where one did beat a constable, in the execution of his office, and, after he had been parted from him and had entirely desisted, a friend of the party renewed the assault and killed the constable, the other party was held innocent of the killing, he having been not at all engaged after they were first separated.[3] But if, in the former case,

[1] Foster, Crown Law, 349, 350; 1 Russ. on Crimes, pp. 26, 27; 1 Hawk. P. C. c. 32, § 7; Burr's Case, 4 Cranch 492, 493; 1 Hale P. C. 439; Com. *v.* Bowen, 13 Mass. 359; [State *v.* Cannon, 49 S. C. 550; State *v.* Pearson, 119 N. C. 871; Cotter *v.* State, 37 Tex. Cr. App. 284; Dixon *v.* State, 46 Neb. 298; State *v.* O'Keefe, 23 Nev. 197; People *v.* Repke, 103 Mich. 459; State *v.* Paxton, 126 Mo. 500.] And see, on the subject of accessories, Wharton's Am. Crim. Law, c. 3 (2d ed.).

[2] [State *v.* May, 142 Mo. 135.]

[3] [Although the original design may have been to carry out the scheme by violence

there had been a general resolution against all opposers; or, in the latter, a previous agreement to obstruct the constable in the execution of his office, — all would have been alike guilty as principals.[4] The principal in the second degree must *be in a situation* in which he *might render his assistance*, in some manner, to the commission of the offence; and this, by agreement with the chief perpetrator.[5] But the fact of conspiracy is not alone sufficient to raise a presumption that all the conspirators were constructively present at the commission of the crime; though it may be considered by the jury as tending to prove their presence.[6] If, however, it is proved that the prisoner was one of the conspirators, and was in a situation in which he might have given aid to the perpetrator at the time of the act done, it will be *presumed* that he was there for that purpose, unless he shows satisfactorily that he was there for another purpose, not connected with the crime.[7] If the conspirators are alarmed, and

if that should become necessary, yet if the defendant has abandoned the scheme before violence becomes necessary, and before the actual violence is committed, and *signifies* his withdrawal to his fellow-conspirators, he is not answerable for the subsequent violence. And his intention to withdraw may be proved by *acts* as well as by words spoken to his fellows. Thus if a prisoner in the State prison, while engaged with two other conspirators in a deadly conflict with the watchman of the prison in an attempt to escape from the prison, suddenly abandons the enterprise, leaves his fellow-conspirators, and goes to his cell without saying a word to them to the effect that he has abandoned the enterprise, and his companions, thinking he is still acting with them, and has gone to his cell for an instrument to carry on the encounter, persist in the attempt, and one of them fires a shot which kills the watchman, it is error for the judge to charge the jury that the fact of the withdrawal from the conflict and retirement to the cell is of no importance: it is competent evidence that the prisoner has withdrawn from the enterprise, and has done acts which were intended to signify his withdrawal to his comrades. The *weight* of such facts to prove a notification by the prisoner to his comrades of his withdrawal from the enterprise must be left to the jury, and may be very slight, but it is *competent evidence*, and should be left to the jury: State *v.* Allen, 47 Conn. 121.]

[4] Foster, 351, 352, 353; R. *v.* Howell, 9 C. & P. 437; U. S. *v.* Ross, 1 Gall. 624. [As to what is sufficient evidence of such agreement, see People *v.* Wilson, 145 N. Y. 628.]

[5] Foster, 350; 1 Hawk. P. C. b. 2, c. 29, § 8; Knapp's Case, 9 Pick. 518; [State *v.* Valwell, 66 Vt. 558; Tittle *v.* State, 35 Tex. Cr. App. 96; Hicks *v.* U. S., 150 U. S. 442.]

[6] Ibid.; R. *v.* Bostwick, 1 Doug. 207; Harden's Case, 2 Dev. & Bat. 407.

[7] Knapp's Case, 9 Pick. 519. The friends of duellists, who go out with them, are present when the shot is fired, and return with them, though not acting as seconds, are principals in the second degree: R. *v.* Young, 8 C. & P. 644. [The actual distance is not conclusive proof that the prisoner is or is not a principal in the second degree: State *v.* Hamilton, 13 Nev. 386. In McCarney *v.* People, 83 N. Y. 408, there was proof that twelve barrels of whiskey were stolen from a warehouse; that the prisoner had part in planning the theft, and in spying out the lay of the premises where the property was stored, and in learning the ways of the keeper; also that one who was in fact engaged in the taking of the property sent the porter of the warehouse to the house of the keeper of the goods with a letter, and promised the porter a reward on his calling, after the delivery of it, at a given number and street. On his reaching that street, and looking for the number, he met the prisoner, who spoke to him, and they talked about the keeper of the property and his whereabouts. There was no proof that the prisoner

flee in different directions, and one of them maim a pursuer, to avoid being taken, the others are not to be considered as principals in that maiming.[8]

§ 41. **Aiding, Abetting, Assenting.** The presence alone of the party is not sufficient to constitute him a principal in the second degree, unless he was *aiding and abetting* the perpetrator. This implies *assent* to the crime; and mere bodily presence, without any attempt to prevent the crime, though it will not of itself constitute guilty participation, is evidence from which a jury may infer his consent and concurrence.[1] And though constructive presence consists in this, that it encourages the principal actor with the expectation of immediate aid, yet it is not necessary to prove that the party charged as principal in the second degree was actually present, at the place assigned, during the whole transaction; it being sufficient if he was there at the consummation of the offence.[2] Thus, if one counsel another to

was at or in close proximity to the warehouse at the time of the theft. It was held that these facts were sufficient to authorize an inference by the jury that the prisoner was at the place to which the porter had been directed, with the purpose of learning the whereabouts and movements of the warehouseman, and of acting upon that knowledge as would best aid his comrade in the theft, and that the latter was aware of that support in the undertaking, and this was proof of his being a principal in the second degree. In Mitchell *v.* Com., 33 Gratt. (Va.) 845, the confession of the prisoner was that he, with two others, went to rob a store; that he was told by one of the other two to stand in the road and watch, which he did, the others going over to the store and knocking at the door; the door was opened by the owner of the store, and the two conspirators went in, and the door was closed. The prisoner then heard a scuffle, and shortly afterwards the others came out, bringing the money drawer, and gave him some money out of it, and said they had killed the deceased, and would kill the prisoner if he did not keep quiet. This was held sufficient proof that the prisoner was a principal in the second degree. In Breese *v.* State, 12 Ohio St. 146, it is held that if two or more persons confederate together to break open a store in the night season and steal the goods therein, and it is agreed between them, in order to facilitate the burglary and lessen the danger of detection, that one of them shall, on the night agreed on, entice the owner to a house a mile distant from the store and detain him there, while the others break into the store and remove the goods, and the confederates perform their respective parts of the agreement, the person who thus entices the owner away and detains him is constructively present at the burglary, and may be indicted as a principal offender.]

[8] R. *v.* White, Russ. & Ry. 99.

[1] Foster, 350; 1 Hale P. C. 438; [State *v.* Maloy, 44 Iowa 104; State *v.* Jones, 83 N. C. 605; Lamb *v.* People, 96 Ill. 73. [*Contra*, Jones *v.* People, 166 id. 264.] "The true rule is this: Any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal; and proof that a person is present at the commission of a trespass, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same." By Bigelow, C. J., in Brown *v.* Perkins, 1 Allen (Mass.) 98.]

[2] R. *v.* Dyer, 2 East P. C. 767; R. *v.* Atwell, ib. 768. If he only assists in disposing of the subject of the offence, after the crime is completed, as in further carrying away stolen goods, he is but an accessory after the fact: R. *v.* King, Russ. & Ry. 332; People *v.* Norton, 8 Cowen 137.

commit suicide, and is present at the consummation of the act, he is principal in the murder; for it is the presumption of law, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise, as, for example, that it was received with scoff, or manifestly rejected and ridiculed at the time it was given.[3]

§ 42. **Accessory before the Fact.** An *accessory before the fact* is he who, being absent at the time of the felony committed, does yet procure, counsel, or command another to commit a felony.[1] Words amounting to a bare permission will not alone constitute this offence.[2] Neither will mere concealment of the design to commit a felony.[3] It is not necessary to this degree of crime that the connection between the accessory and the actor be immediate; for if one procures another to cause a felony to be committed by some third person, and he does so, the procurer is accessory before the fact, though he never saw or heard of the individual finally employed to commit the crime.[4]

§ 43. **None in Treason, Misdemeanor, or Manslaughter.** There are no accessories before the fact *in treason* nor in crimes *under the degree of felony*, all persons concerned in them being considered principals;[1] nor in *manslaughter*, because the offence is considered in law sudden and unpremeditated.[2]

[3] Com. *v.* Bowen, 13 Mass. 359; R. *v.* Dyson, Russ. & Ry. 523; R. *v.* Alison, 8 C. & P. 418.

[1] 1 Hale P. C. 615. See R. *v.* Tuckwell, C. & M. 215. [This does not apply to one who joins a conspiracy for the purpose of procuring the punishment of the others: Com. *v.* Hollister, 157 Pa. 13.] {Where one was indicted as accessory before the fact to a murder, it was held that evidence that he had said to the murderer, three days previously to the murder, that he would give him a month's whiskey if he would kill the deceased, was sufficient to justify a conviction: *Ex parte* Willoughby, 14 Nev. 451.}

[2] Hawk. P. C. b. 2, c. 29, § 16; R. *v.* Soares, Russ. & Ry. 25; People *v.* Norton, 8 Cowen 137.

[3] 1 Hale P. C. 374; {Noftsinger *v.* State, 7 Tex. App. 301; Rucker *v.* State, ib. 549.}

[4] Foster, 125, 126; MacDaniel's Case, 19 How. St. Tr. 804; Earl of Somerset's Case, 2 id. 965; {R. *v.* Cooper, 5 C. & P. 535. A stakeholder who takes no part in the arrangements for a prize-fight, and is not present at the fight, and does nothing more than hold the money and pay it over to the winner, is not an accessory before the fact to the manslaughter of one of the combatants: Queen *v.* Taylor, 2 Cr. Cas. Res. 147.} [Where two are concerned in a crime, one cannot be an accessory unless the other is a principal: Moore *v.* State, 37 Tex. Cr. App. 552.]

[1] People *v.* Davidson, 5 Cal. 133; {R. *v.* Greenwood, 16 Jur. 390; 2 Denison C. C. 453; 9 Eng. Law & Eq. 535; 5 Cox C. C. 521; R. *v.* Moland, 2 Moody C. C. 276; Ward *v.* People, 6 Hill (N. Y.) 144; State *v.* Goode, 1 Hawks 463; Williams *v.* State, 12 Sm. & M. 58; Com. *v.* McAtee, 8 Dana 28; Com. *v.* Ray, 3 Gray (Mass.) 441; [Atkins *v.* State, 95 Tenn. 474; State *v.* DeBoy, 117 N. C. 702; Wainard *v.* State,

[2] 1 Hale P. C. 613, 615; 4 Bl. Comm. 35. But see R. *v.* Gaylor, 40 Eng. Law & Eq. 556–558. [*Contra*, State *v.* Steeves, 29 Or. 85.]

§ 44. **Accessory; Instructions.** Where the principal *acts under instructions* from the accessory, it is not necessary, in order to affect the latter, that the instructions be proved to have been literally or precisely followed; it will be sufficient if it be shown that they have been *substantially complied with.*[1] Thus, if one instructs another to commit a murder by poison, and he effects it with a sword, the former is accessory to the murder, for that was the principal thing to be done, and the substance of the instructions.[2] So, if the person employed *goes beyond his instructions*, in the circumstances of the transaction, as, if the design be to rob, and in doing this he kills the party, whether upon resistance made, or for concealment of the robbery; or, if the instructions be to burn the house of A, and the flames extend to the house of B, and burn that also, — the person counselling and directing is accessory to the murder, in the former case, and to the burning of the second house, in the latter; because the second crime was a probable consequence of the first, and every sane man is presumed to foresee and assume the probable consequences of his own acts.[3] So, if the party employed to commit a felony on one person, perpetrates it, *by mistake*, upon another, the party counselling is accessory to the crime actually committed.[4] But if the principal *totally and substantially departs from his instructions*, as if, being solicited to burn a house, he moreover commits a robbery while so doing, he stands single in the latter crime, and the other is not held responsible for it as accessory.[5]

§ 45. **Accessory; Countermanding Instructions.** If the acces-

Tex. Cr. App., 30 S. W. 555; Wagner *v.* State, 43 Neb. 1; Com. *v.* Ahearn, 160 Mass. 300.] And *quære* whether the accessories before the fact to petty statutory offences are punishable at all: Com. *v.* Willard, 22 Pick. (Mass.) 476, 478. In [many States,] by statute, no distinction exists between a principal and an accessory before the fact: People *v.* Davidson, 5 Cal. 133;] [State *v.* Smith, 100 Iowa 1; Noble *v.* People, 23 Col. 9; State *v.* Steeves, 29 Or. 85; State *v.* Schuchman, 133 Mo. 111; State *v.* Glein, 17 Mont. 17; Wagner *v.* State, 43 Neb. 1; State *v.* Kent, 4 N. D. 577; Fixmer *v.* People, 153 Ill. 123; People *v.* McKane, 143 N. Y. 455; State *v.* Patterson, 52 Kan. 335; State *v.* Phelps, 5 S. D. 480; State *v.* Duncan, 7 Wash. 336; Com. *v.* Carter, 94 Ky. 527.]

[1] *Ante*, Vol. I. § 65; [U. S. *v.* Sykes, 58 F. 1000.]

[2] Foster, 369, 370.

[3] Foster, 370; 1 Russ. on Crimes, 35; *ante*, Vol. I. § 18; *supra*, §§ 13, 14; [Isaacs *v.* State, 36 Tex. Cr. App. 505.] Where a servant wrongfully placed his master's goods in a position to enable the prisoner, from whom they had been purchased, to obtain payment for them a second time, he was adjudged an accessory before the fact: R. *v.* Manning, 17 Jur. 28; 14 Eng. Law & Eq. 548; 1 Pearce C. C. 21.

[4] 1 Hale P. C. 617; 1 Russ. on Crimes, 36; Foster, 370–372.

[5] 1 Hale P. C. 616, 617; Foster, 369.

sory *repents* and *countermands* the order before it is executed, and yet the principal persists and commits the crime, the party is not chargeable as accessory. But if, though repenting, he did not actually countermand the principal before the fact was done, he is guilty.[1]

§ 46. **When Accessory may be tried.** By the common law, an accessory *cannot be put upon his separate trial*, without his consent, *until conviction of the principal;*[1] for the legal guilt of the accessory depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself.[2] But an accessory to a felony committed by several, some of whom have been convicted, may be tried as accessory to a felony committed by these last; but if he is indicted and tried as accessory to a felony committed by them all, and some of them have not been proceeded against, it is error.[3] If the principal be dead, the accessory cannot, by the common law, be tried at all.[4] The conviction of the principal is sufficient, without any judgment, as *prima facie* evidence of his guilt, to warrant the trial of the accessory;[5] but the latter may

[1] 1 Hale P. C. 618.

[1] 1 Hale P. C. 623; Phillips's Case, 16 Mass. 423; 2 Burr's Trial, 440; 4 Cranch App. 502, 503; Barron *v.* People, 1 Parker Cr. 246. [In Texas the principal must have been sentenced: Kingsbury *v.* State, 37 Tex. Cr. App. 259.] By Stats. 7 Geo. IV. c. 64, § 9, the accessory before the fact is deemed guilty of a substantive felony, for which he may be indicted and tried, whether the principal has or has not been previously convicted. Similar statutes have been passed in several of the United States: [State *v.* Whitt, 113 N. C. 716; State *v.* Bogue, 52 Kan. 79.] {But he must be indicted as accessory. As to form of indictment, see Com. *v.* Smith, 11 Allen (Mass.) 241; State *v.* Ricker, 29 Me. 84. In State *v.* Chapin, 17 Ark. 561, it is held that an accessory before the fact in one State to a felony committed in another State is guilty of a crime in the State where he became accessory, and punishable there, the principal being indictable in the State where the felony was committed. In Adams *v.* People, 1 Comst. 173, it is held that, where an offence is committed in the State of New York, the offender being at the time without the State, and perpetrating the crime by means of an innocent agent, he can be tried in New York whenever he is brought into court; and the fact that he owed allegiance to another State is not material unless the crime alleged be treason.}

[2] {The record of the conviction of the principal is conclusive evidence of the *fact* that the principal has been convicted, but it is, as Mr. Greenleaf says, *prima facie* evidence of his guilt: Levy *v.* People, 80 N. Y. 327; Anderson *v.* State, 63 Ga. 675, where the court cites 1 Russ. Cr. 41; 2 id. 253; Roscoe's Cr. Evid. 870, 877.}

[3] Stoops's Case, 7 S. & R. 491.

[4] Phillips's Case, 16 Mass. 423. On a similar question, Hullock, B., doubted, but would not stop the case; but the party being acquitted, the point was no further considered: Quinn's Case, Lewin C. C. 1. See State *v.* Ricker, 29 Me. 84.

[5] {It has been held in New York that the accessory may be indicted and put upon trial before the conviction of the principal, and if the fact of such conviction is proved during the trial of the accessory, he may be convicted as accessory to the crime: Jones *v.* People, 20 Hun (N. Y.) 545; Starin *v.* People, 45 N. Y. 335.

And in Pennsylvania it has been held that the accessory may be indicted, but not put on trial, before the conviction of the principal: Holmes *v.* Com., 25 Pa. St. 221. But

rebut it by showing, clearly, that the principal ought not to have been convicted.[6] And it seems that in every case of the trial of an accessory, he may controvert the guilt of the principal.[7] He may also require the production of the record of his conviction, notwithstanding he has himself pleaded to the indictment; for the waiver of a right, in criminal cases, is not to be presumed.[8] If the principal is indicted for murder, and another is indicted as accessory to that crime after the fact, and upon trial the offence of the principal is reduced to manslaughter, the other may still be found guilty of being accessory to the latter crime.[9]

§ 47. **Accessories after the Fact.** *Accessories after the fact*, by the common law, are those who, *knowing* a felony to have been committed by another, *receive*, *relieve*, *comfort*, or *assist the felon.*[1] If one opposes the apprehension of a felon, or voluntarily and intentionally suffers him to escape, or rescues him, he becomes an accessory after the fact.[2] So, if he receives or aids an accessory before the fact, it is the same as if he received or aided the principal felon.[3] But the felony must have been completed at the time, or the party is not an accessory after the fact. Thus, if the aid is given after the infliction of a mortal stroke, but before death ensues, he is not accessory to the death.[4] There must be evidence that the party charged did some act, personally, to assist the felon;[5] but it is sufficient, if it appear that he did so by employing another person to assist him.[6]

now in that State by statute he may be indicted just as if he were principal: Com. *v.* Hughes, 11 Phila. (Pa.) 430.] [In Kansas the accessory may be convicted of an offence of a higher degree than that of which the principal has been convicted: State *v.* Gray, 55 Kan. 135.]

[6] Knapp's Case, 10 Pick. 484; Williamson's Case, 2 Va. Cas. 211; Foster, 364–368; Cook *v.* Field, 3 Esp. 134.

[7] Foster, 367, 368; Macdaniel's Case, 19 Howell St. Tr. 808; 1 Russ. on Crimes, 39, 40.

[8] Andrews's Case, 3 Mass. 132, 133. And see Briggs's Case, 5 Pick. 429.

[9] Greenacre's Case, 8 C. & P. 35.

[1] 1 Hale P. C. 618, 622; 4 Bl. Comm. 37. So if he employs another to receive and assist the principal felon: R. *v.* Jarvis, 2 M. & Rob. 40. [Advising the victim of a rape to charge some one else than the defendant with the crime is insufficient: State *v.* Doty, 57 Kan. 835.]

[2] 1 Hale P. C. 619; 2 Hawk. P. C. c. 29, § 27; R. *v.* Greenacre, 8 C. & P. 35.

[3] 2 Hawk. P. C. c. 29, § 1; 1 Hale P. C. 622.

[4] 1 Hale P. C. 622; 2 Hawk. P. C. c. 29, § 35; 4 Bl. Comm. 38.

[5] R. *v.* Chapple, 9 C. & P. 355.

[6] R. *v.* Jarvis, 2 M. & Rob. 40. The reason on which the common law makes the party in these cases criminal is, that the course of public justice is hindered, and justice itself evaded, by facilitating the escape of the felon. Therefore, to buy or receive stolen goods, knowing them to be stolen, does not, at common law, make the party accessory to the theft, because he receives the goods only, and not the felon; but he is guilty of a misdemeanor: 4 Bl. Comm. 38; [Street *v.* State, 45 S. W. 577, Tex. Cr. App.]

§ 48. **Husband and Wife.** A *feme covert* cannot be an accessory after the fact for receiving her husband; for it was her duty not to discover him.[1] But it is generally said that the husband may be an accessory after the fact by the receipt of his wife.[2] And though this has been questioned, because the obligations of husband and wife are reciprocal, the husband owing protection to the wife;[3] yet it seems that it is still to be received as the rule of law. If the wife receive stolen goods, or receive a felon, of her own separate act, and without the knowledge of the husband; or if he, knowing thereof, abandon the house, refusing to participate in the offence, — she alone is guilty as an accessory.[4] And if she be guilty of procuring the husband to commit a felony, this, it seems, will make her an accessory before the fact, in the same manner as if she were sole.[5] So, also, the wife may sometimes commit the principal felony, and the husband be accessory before the fact; as, if she utter forged documents, in his absence, but by his direction.[6]

§ 49. **Indictment; Allegations.** In the *indictment* of an *accessory before the fact*, it does not seem necessary to state the manner of committing the offence; it is sufficient to charge, generally, that he "feloniously abetted, incited, and procured" the principal to commit it.[1] In the case of an *accessory after the fact*, it is sufficient, after stating the principal offence, to charge that he did afterwards "feloniously receive, comfort, harbor, and maintain" the principal offender.[2] And in either

[1] 1 Hale P. C. 621; 4 Bl. Comm. 38. {But she may be an accessory before the fact in her husband's crime: R. *v.* Manning, 2 C. & K. 903.}

[2] Ibid.; 2 Hawk. P. C. c. 29, § 34.

[3] 1 Deacon, Crim. Law, 15.

[4] 1 Russ. on Crimes, 21; 1 Hale P. C. 621.

[5] 2 Hawk. P. C. c. 29, § 34. See also 1 Hale P. C. 516.

[6] R. *v.* Morris, Russ. & Ry. 270.

[1] 2 Hawk. P. C. c. 29, § 17. "To cause," says Lord Coke, "is to procure or counsel: —— To assent, is to give his assent or agreement afterwards to the procurement or counsel of another: —— To consent is to agree at the time of the procurement or counsel; and he in law is a procurer:" 3 Inst. 169.

[2] 1 Deacon, Crim. Law, 17; 2 Chitty, Crim. Law, 5; Archb. Crim. Pl. 820. In the indictment of an accessory, whether before or after the fact, the charge against the principal felon is first stated, with all the formality necessary in charging him alone; after which, the offence of the accessory is alleged. The body of the indictment at common law is usually after the following manner: —

1. *Against an Accessory to a Larceny, before the Fact.*

The jurors for the (State *or* Commonwealth) of M., upon their oath present, that (*naming the principal felon*), of ———, in the county of ———, (*addition*) on the ——— day of ———, in the year of our Lord ———, at ———, in said county of ———, one silver cup, of the value of ——— dollars, of the goods and chattels of one

case, if he is indicted as accessory to two or more, and is found guilty of being accessory to one only, the conviction is good.[3] If, being indicted as accessory *before the fact*, the proof is that he was *present*, aiding and abetting, he cannot be convicted of the charge in the indictment; for the proof is of a different crime, namely, of the present felony.[4] But if two are indicted together, one being charged with larceny, and the other with the substantive felony of receiving the same goods, the latter may be convicted, though the former is acquitted.[5] And if two

(*naming the owner*), then and there in the possession of the said (*owner*) being found, feloniously did steal, take, and carry away, against the peace of the (State *or* Commonwealth) aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that (*naming the accessory*) of ———, in the county of ———, (*addition*) before the committing of the larceny aforesaid, to wit, on the ——— day of ———, in the year ———, at ———, in the county aforesaid, did knowingly and feloniously incite, move, procure, aid, abet, counsel, hire, and command the said (*principal felon*) to do and commit the said felony and larceny, in manner and form aforesaid, against the peace of the (State *or* Commonwealth) aforesaid. {See Com. *v.* Mullen, 150 Mass. 396.}

The words "and against the form of the statute (or statutes) in that case made and provided," are necessary to be added only when the indictment is founded upon a statute; otherwise, they are mere surplusage, in the case of offences at common law: 2 Hale P. C. 190; 1 Chitty, Crim. Law, p. 289 (Perkins's ed.); Com. *v.* Shattuck, 4 Cush. 141–143; Com. *v.* Hoxey, 16 Mass. 385. {It was held sufficient, when an indictment, after alleging that an abortion had been committed by some person unknown, charged that the defendant, before the abortion was committed, "did feloniously and maliciously incite, move, and procure, aid, counsel, and hire, and command the said person as aforesaid unknown, the said felony and abortion, in manner and form aforesaid, to do and commit: Com. *v.* Adams, 127 id. 15.}

2. *Against an Accessory to any Felony, after the Fact.*

[The indictment is first framed in the usual form against the principal felon, after which it proceeds to charge the accessory as follows: —]

And the jurors aforesaid, upon their oath aforesaid, do further present, that (*naming the accessory*) of ———, in the county of ———, (*addition*) well knowing the said (*principal felon*) to have done and committed the felony and (murder *or* robbery, etc., *as the case may be*) aforesaid, in manner and form aforesaid, afterwards, to wit, on the ——— day of ———, in the year ———, at ———, in the county aforesaid, him the said (*principal felon*) did then and there knowingly and feloniously receive, harbor, conceal, and maintain, in the felony and (murder, etc.) aforesaid, against the peace of the (State *or* Commonwealth) aforesaid.

3. *Against joint Accessories to a Murder, before the Fact.*

[After alleging the murder, in the usual form, against the principal, the indictment proceeds thus:—]

And the jurors (etc.) do further present, that J. K., of ———, etc., and G. C., of ———, etc., before the said felony and murder was committed, in manner and form aforesaid, to wit, on ———, at ———, were accessory thereto before the fact, and then and there feloniously, wilfully, and of their malice aforethought, did counsel, hire, and procure the said (*naming the principal felon*) the felony and murder aforesaid, in manner and form aforesaid, to do and commit, against the peace of the (State *or* Commonwealth) aforesaid. See Com. *v.* Knapp, 9 Pick. 496; 10 id. 477.

[3] Lord Sanchar's Case, 9 Co. 119; 1 Hale P. C. 624.

[4] R. *v.* Winfred Gordon *et al.*, 2 Leach C. C. (4th ed.) 515; 1 East P. C. 352; 7 Russ. on Crimes, 30, 31; R. *v.* Perkins, 12 Eng. Law & Eq. 587; 5 Cox C. C. 554; 2 Denison C. C. 459.

[5] R. *v.* Pulham, 9 C. & P. 280. This, it is supposed, can arise only where, by statute, the offence of receiving is made a substantive felony.

are indicted together, the one of murder and the other as accessory after the fact, and the former be convicted of manslaughter only, the latter may also be convicted as accessory to the latter offence.[6]

§ 50. **Proof.** In *proof of the offence* of being accessory *before the fact*, it is necessary to show that the prisoner instigated and incited the principal to commit the crime. With respect to the degree of incitement, and the force of the persuasion used, no rule seems to have been laid down. If it was of a nature tending to induce the commission of the crime, and was so intended, it will be presumed to have led to that result, if the crime is proved.[1] It does not seem necessary to prove, substantially, that the persuasion employed actually produced any effect, in order to maintain the indictment; nor is it a good defence that the crime would have been committed had no persuasion or incitement been employed.[2] The cases where one crime was advised, and another was perpetrated upon that advice, are all governed by one and the same principle. If the crime, committed by the principal felon, was committed under the influence of the flagitious advice of the other party, and the event, though possibly falling out beyond the original intention of the latter, was, nevertheless, in the ordinary course of things, a probable consequence of that felony, he is guilty of being accessory to the crime actually committed. But if the principal, following the suggestions of his own heart, wilfully and knowingly committed a felony of another kind, on a different subject, he alone is guilty.[3]

[6] Per Tindal, C. J., in R. *v.* Greenacre, 8 C. & P. 35.

[1] {So where there was evidence that two were standing together, and a man approached, and one of the two commanded him to stop or he would shoot him, and the other of the two did actually shoot and kill him, it was held that this was proof that the one who commanded the deceased to stop was present aiding and abetting the murder. This is not conclusive proof, however, and it is error to instruct the jury that it is: People *v.* Leith, 52 Cal. 251. See *Ex parte* Willoughby, 14 Nev. 451, where A said to B that he would give him a month's whiskey if he would whip or kill C, and B afterwards killed C. It was held that A was accessory before the fact to the murder.

Where the fact relied on to prove the defendant an accessory to a burglary is that he furnished the tools for the burglary, it need not be shown that the tools were actually used for that purpose: State *v.* Tazwell, 30 La. An. Pt. II. 884.}

[2] 2 Stark. Ev. 8. And see Com. *v.* Bowen, 13 Mass. 359.

[3] Foster, 370, 371, 372; *supra*, § 44.

ARSON.

§ 51. **Indictment.** The *indictment* at common law, for this crime, charges that the prisoner, "with force and arms, on, etc., at, etc., feloniously, wilfully, and maliciously did set fire to and burn a certain dwelling-house[1] of one J. S., there situate," etc.[2] To support the indictment, therefore, four things must be proved: namely, first, that the offence was committed upon a dwelling-house;[3] secondly, that it was the house of the person named as the owner;[4] thirdly, that it was burnt; and, fourthly, that this was done with a felonious intent.

§ 52. **Dwelling-house.** The term *dwelling-house*, in the common law, comprehends not only the very mansion-house, but all out-houses which are parcel thereof, though not contiguous to it, nor under the same roof, such as the barn, stable, cow-house, sheep-house, dairy-house, mill-house, and the like;[1] so that if

[1] It is not necessary to allege it to be a *dwelling*-house; the word "house" alone is sufficient: 3 Inst. 67; 1 Hale P. C. 567; Com. *v.* Posey, 4 Call 109; R. *v.* Connor, 2 Cox C. C. 65; 2 East P. C. 1033. See State *v.* Sutcliffe, 4 Strobh. 372.

[2] The omission of the words "there situate" is not fatal to the indictment. Where the place is material, the place alleged in the venue, taken in connection, that the defendant then and there did the act, sufficiently designate the locality of the building set on fire. The principle is, that if it is not expressly stated where the building is situated, it shall be taken to be situated at the place named in the indictment by way of venue: Com. *v.* Lamb, 1 Gray 493; R. *v.* Napper, 1 Moody C. C. 46; {Com. *v.* Barney, 10 Cush. (Mass.) 480.}

[3] The burning of other property, of various descriptions, is made punishable by statutes of the different American States, the consideration of which does not fall within the plan of this treatise.

[4] See *supra*, § 10; Com. *v.* Wade, 17 Pick. 395; {Com. *v.* Barney, *supra;* Hooker *v.* State, 13 Gratt. (Va.) 763.} The charge for this offence, at common law, is in the following form: —

The jurors, etc., on their oath present, that A. B., of etc., on, etc., at, etc., the dwelling-house of one C. D., there situate, feloniously, wilfully, and maliciously did set fire to, and the same house then and there, by such firing as aforesaid, feloniously, wilfully, and maliciously did burn and consume, against the peace of the (State *or* Commonwealth) aforesaid.

The words *wilfully* (or *voluntarily*) and *maliciously*, as well as *feloniously*, are indispensable in charging this crime: 2 East P. C. 1033; 1 Gabbett, Crim. Law, 78; 1 Hawk. P. C. c. 39, § 5; R. *v.* Reader, 4 C. & P. 245. But it seems that the allegation that the act was done "wilfully" is unnecessary, as the term "maliciously" sufficiently imports that the offence was committed wilfully: Chapman *v.* Com., 5 Wharton 427. See Train and Heard's Precedents of Indictments, 29.

[1] 3 Inst. 67; 1 Hale P. C. 567; 4 Bl. Comm. 221; 2 East P. C. 1020; 2 Russ. on Crimes, 548; {Com. *v.* Barney, *supra;* Gage *v.* Shelton, 3 Rich. 242.} In Massachu-

the evidence be of the burning of one of these, the averment is proved. But if the barn be no part of the mansion-house, the burning is said not to be felony, unless it have corn or hay in it.[2] If the out-house be within the same curtilage or common fence, it is taken to be parcel of the mansion-house; but no distant barn or other building is under the same privilege; nor is any out-house, however near, and though it be occupied by the owner of the mansion-house, if it be not parcel of the messuage, and so found to be.[3] No common enclosure is necessary, if the building be adjoining the mansion-house, and occupied as parcel thereof.[4]

§ 53. **Burning one's own House.** The *burning of one's own house*, the owner being also the occupant, does not amount to this crime;[1] though it is a great misdemeanor, if it be so near

setts, the Stat. 1804, c. 31, § 1, refers to the dwelling-house strictly: Com. *v.* Buzzell, 16 Pick. 161.

[2] Ibid.; 4 Com. Dig. 471, tit. Justices, P. 1; Sampson *v.* Com., 5 Watts & Serg. 385; 1 Gabbett, Crim. Law, 75. [Burning a corn-crib outside the curtilage is not arson; State *v.* Jeter, 46 S. C. 2.]

[3] Ibid.; 2 East P. C. 493, 1020; State *v.* Stewart, 6 Conn. 47; R. *v.* Haughton, 5 C. & P. 555. {The term "curtilage" has been described in Massachusetts to mean "a fence or enclosure of a small piece of ground around a dwelling-house, usually including the buildings occupied in connection with the use of the dwelling-house; and this fence enclosure might be either a separate fence or might consist partly of a fence and partly of the exterior of the buildings so within the enclosure." The question what is a curtilage is one of law for the court; but when the court has defined the term, it is for the jury to say upon the evidence in the case whether the building which was burnt was within the curtilage as described by the court: Com. *v.* Barney, 10 Cush. (Mass.) 480. In Curkendall *v.* People, 36 Mich. 309, it was held that proof that the barn, for the burning of which the defendant was indicted, was situated some fifteen rods from the house, with a public highway passing between them, and a yard between the barn and the highway, would not sustain the indictment; though in People *v.* Taylor, 2 id. 250, a barn five rods from the house, and immediately connected with the house by a lane, was held to be within the curtilage.}

[4] 2 East P. C. 493, 494; State *v.* Shaw, 31 Me. 523. A common jail is a dwelling-house, if the keeper's house adjoin it, and the entrance to the prison is through the house of the keeper; and it may be averred to be the house of the county or corporation to which it belongs: Donnevan's Case, 2 W. Bl. 682; 2 East P. C. 1020; 1 Leach C. C. (4th ed.) 69; People *v.* Cotteral, 18 Johns. 115; R. *v.* Connor, 2 Cox C. C. 65. See Stevens *v.* Com., 4 Leigh 683. [Burning a jail is arson: State *v.* Collins, 2 Idaho 1182.] {In Elsmore *v.* Hundred of St. Briavells, 8 B. & Cress. 461, it was held that a building intended for a dwelling-house, but being unfinished and never having been occupied, was not a house in respect of which burglary or arson could be committed. [See People *v.* Handley, 93 Mich. 46.] But the law is otherwise with regard to a dwelling-house once inhabited as such, and from which the occupant is but temporarily absent: State *v.* McGowan, 20 Conn. 245. See also Com. *v.* Squire, 1 Met. (Mass.) 260.}

[1] See Erskine *v.* Com., 8 Gratt. (Va.) 624; [State *v.* Sarvis, 45 S. C. 668; changed by statute: State *v.* Daniel, 28 S. E. 255, N. C.] {It seems that a wife who burns her husband's house is not guilty of arson: R. *v.* March, 1 Moody 182; [*contra*, Emig *v.* Daum, 1 Ind. App. 146;] nor is a husband who sets fire to his wife's house, though secured to her by statute as her separate property: Snyder *v.* People, 26 Mich. 106. Under the New York statute, describing arson in the first degree as "wilfully setting fire to or burning in the night-time *a* dwelling," etc., it is held that one who sets fire to his own house may be indicted for that crime: Shepherd *v.* People, 19 N. Y. 537.}

other houses as to create danger to them.[2] But if the house be insured, and the owner purposely set it on fire with intent to defraud the underwriters, and thereby the adjoining house of another person be burnt, the burning of this latter house will be deemed felonious.[3]

§ 54. **Title to Property.** As to the *ownership* of the house, it must be laid and proved to be the house of some other person than the prisoner himself;[1] but it is not necessary that the reversionary interest be in the occupant; it is the right of present possession, *suo jure* at the time of the offence, which constitutes the ownership required by the common law.[2] Therefore, this crime may be committed by one entitled to dower in the house, which has not been assigned;[3] or, by the reversioner, who maliciously burns the house in the possession of his tenant.[4]

[2] 1 Hale P. C. 567, 568; 4 Bl. Comm. 221; 2 East P. C. 1027, 1030; 1 Deacon, Crim. Law, 56; Bloss *v.* Tobey, 2 Pick. 325. [It is only a misdemeanor: People *v.* De Winton, 113 Cal. 403.]

[3] Probert's Case, 2 East P. C. 1030, 1031. {In most States, by statute, burning with intent to defraud the insurer is a crime, whether the building belongs to the defendant or not: Mass. Pub. Stat. c. 203, § 7; Vermont Gen. Stat. c. 113, § 5; Connecticut Gen. Stat. tit. 20, c. 4, § 3; Indiana Rev. Stat. 1881, § 1927. Cf. Com. *v.* Bradford, 126 Mass. 42; Johnson *v.* State, 65 Ind. 204; State *v.* Byrne, 45 Conn. 273. In New York it is arson in the third degree for the owner of a house which is insured to set it on fire with the intent to prejudice the insurers; but the indictment must allege that the house is insured, and that it was set on fire to injure the insurers: People *v.* Henderson, 1 Parker C. R. 560. Excessive insurance is evidence of the fact of burning, to show a motive: State *v.* Cohn, 9 Nev. 179. [Evidence that the owner burned the building shows an intent to defraud: People *v.* Vasalo, 52 P. 305, Cal.] An indictment for burning the dwelling-house of another is not supported by proof that the defendant burned the house by the procurement of the owner, to enable him to obtain money from an insurer: Com. *v.* Makely, 131 Mass. 421.}

[1] [State *v.* Keena, 63 Conn. 329.]

[2] 2 East P. C. 1022, 1025; 2 Russ. on Crimes, 564, 565; People *v.* Van Blarcum, 2 Johns. 105; [Burger *v.* State, 34 Neb. 397; State *v.* Carter, 49 S. C. 265; Com. *v.* Fitzgerald, 164 Mass. 587;] {State *v.* Bradley, 1 Houst. C. R. (Del.) 164. As is stated by Mr. Bishop, 2 Cr. Law, § 24, arson of a dwelling-house is in the nature of an offence against the *security* of the habitation rather than against the right of property, and therefore any *rightful possession* is sufficient to show the ownership that is necessary: Adams *v.* State, 62 Ala. 177; Tuller *v.* State, 8 Tex. App. 501; Fairchild *v.* People, 11 N. W. Rep. 773; State *v.* Taylor, 45 Me. 322.

Where the house was called in the indictment "the house of Isaac Koenigsberg," and the evidence was that the house contained many rooms, which were let out in suites, Koenigsberg occupying some rooms, and the prisoner other rooms, and the occupants of all the rooms using the same hall and stairways, this evidence was held sufficient to support the indictment, although the fire was actually set in the prisoner's rooms: Levy *v.* People, 80 N. Y. 327. But this depends on the peculiar statute of New York, which enacts that "every edifice which shall have been usually occupied by persons lodging there at night shall be deemed a dwelling-house of *any person* so lodging therein:" 2 Rev. Stat. 657. Generally, different suites or flats, if wholly occupied in severalty, would be considered different houses, though under the same roof: State *v.* Toole, 29 Conn. 342. The building may be alleged to be the building of a corporation; *e. g.* that it is "The jail of Talladega County:" Lockett *v.* State, 63 Ala. 5.}

[3] R. *v.* Harris, Foster, 113–115.

[4] Ibid.; 2 East P. C. 1024, 1025.

On the other hand, if the lessee or the mortgagor burns the house in his own possession, it is not arson.[5] But where a parish pauper maliciously burned the house in which he had been placed rent-free by the overseers of the poor, who were the lessees, he was adjudged guilty of arson; for he had no interest in the house, but was merely a servant, by whom the overseers had the possession.[6]

§ 55. **Actual Burning essential.** There must also be proof of an *actual burning* of the house. It is not necessary that the entire building be destroyed; it is sufficient that fire be set to it, and that some part of it, however small, be decomposed by the fire, though the fire be extinguished or go out of itself.[1] But an attempt to set fire to the house, by putting fire into it, if it do not take, and no part of the house be burnt, though the combustibles themselves are consumed, is not arson, at the common law.[2]

§ 56. **Intent.** There must also be proof of a *felonious intent.* This allegation is not supported by any evidence of mere negli-

[5] R. *v.* Holmes, Cro. Car. 376; W. Jones 351; R. *v.* Pedley, 1 Leach C. L. (4th ed.) 242; R. *v.* Scholfield, Cald. 397; 2 East P. C. 1023, 1025–1028; 2 Russ. on Crimes, 550, 551. [Changed by statute: Lipschitz *v.* People, 53 P. 1111, Cal.] {It seems that even at common law, as well as under the Ohio statutes, the tenant may be accessory before the fact to arson of the building he occupies: Allen *v.* State, 10 Ohio St. N. S. 287.}

[6] R. *v.* Gowen, 2 East P. C. 1027; R. *v.* Rickman, ib. 1034.

[1] [Blanchette *v.* State, 24 S. W. 507, Tex. Cr. App.] Whether a building has been so affected by fire as to constitute a burning within the legal meaning of the term, is a question of fact to be determined by the jury upon the evidence: Com. *v.* Betton, 5 Cush. 427. {Proof that a wooden partition in a building, and annexed to it, was charred and burned through in one place will support a charge of arson: People *v.* Simpson, 50 Cal. 304. In an indictment upon the statute providing for the punishment of any person who shall burn any building, it is sufficient to allege that he "set fire to" such building, — the terms being equivalent: State *v.* Taylor, 45 Me. 322. In Vermont it is sufficient if fire be applied to, or in immediate contact with, the building, with the intent to burn it, though such intent be not carried out: State *v.* Dennin, 32 Vt. 158.} [If the building is simply scorched or smoked the offence is incomplete: Woolsey *v.* State, 30 Tex. Cr. App. 346.]

[2] 3 Inst. 66; 4 Bl. Comm. 222; 1 Hale P. C. 568; 1 Gabbett, Crim. Law, 75; 2 East P. C. 1020; R. *v.* Taylor, 1 Leach C. C. (4th ed.) 58; Com. *v.* Van Schaack, 16 Mass. 105; People *v.* Butler, 16 Johns. 203; 1 Hawk. P. C. c. 39, § 17. Where the witness testified that, "the floor near the hearth had been scorched; it was charred in a trifling way; it had been at a red heat, but not in a blaze;" this was thought by Parke, B., to be sufficient proof of arson. But the witness, on further examination, having stated that he had not examined the floor, to ascertain how deep the charring went in, neither could he at all form a judgment as to how long it had been done, the court (per Bosanquet, J.) told the jury that this evidence was much too slight, and that they ought to acquit: R. *v.* Parker, 9 C. & P. 45. But where, a small fagot having been set on fire on the boarded floor of a room, the boards were thereby "scorched black but not burnt," and no part of the wood was consumed, that was held not sufficient: R. *v.* Russell, C. & M. 541. And see State *v.* Sandy, 3 Ired. 570. Where fire was placed in a roof composed of wood and straw, producing smoke and burnt ashes in the straw, this was held a setting on fire, though there was no appearance of fire itself: R. *v.* Stallion, 1 Moody C. C. 398.

gence or mischance;[1] nor by proof of an intent to do some other unlawful act, without malice, such as if one, in shooting with a gun, in violation of the game laws, or in shooting at the poultry of another, should happen to set fire to the thatch of the house,[2] or the like. But if he intended to steal the poultry, the intent being felonious, he is liable criminally for all the consequences.[3] It is not necessary, however, that the burning should correspond with the precise intent of the party; for if, intending to burn the house of A, the fire should, even against his will, burn the house of B, and not that of A, it is felony.[4] It is a general rule of penal law, that where a felonious design against one man misses its aim, and takes effect upon another, it shall have the like construction as if it had been directed against him who suffers by it.[5] Therefore, it has been said that if one command another to burn the house of A, and by mistake

[1] 3 Inst. 67; 4 Bl. Comm. 222: [State *v.* Millmeier, 102 Iowa 692.] But see R. *v.* Cooper, 5 C. & P. 535.

[2] 1 Hale P. C. 569. And see State *v.* Mitchell, 5 Ired. 350. {Setting fire to and burning a hole through a prison door with intent to escape, and without intent to burn the building, is arson within a statute against wilfully setting fire to or burning a building: Luke *v.* State, 49 Ala. 30.} [*Contra*, Washington *v.* State, 87 Ga. 12.]

[3] 2 East P. C. 1019; 2 Russ. on Crimes, 549. {The intent of the prisoner may be proved by showing that the prisoner had, at a previous day, attempted to set fire to the same house: People *v.* Shainwold, 51 Cal. 468. This evidence is admissible on the grounds stated in Kramer *v.* Com., *infra*, either that it tends to show the existence at some time of the criminal purpose or design which was fully carried out by the completion of the crime in the later attempt, or to show the identity of the person who committed the crime, as there is a natural tendency to believe that probably the one who attempted to set the fire previously was the one who actually committed the crime. So it was held that subsequent or prior criminal acts may be proved on a trial for arson, if it is shown that they are connected with the act for which the prisoner is indicted by a common purpose or design, and form part of the same general plan; or if they are introduced to identify the prisoner as the person who set the fire, as was stated above: Kramer *v.* Com., 87 Pa. St. 299; State *v.* Miller, 47 Wis. 530. On the same grounds, evidence of the formation of a company or association, having for its general design the burning and robbing of houses, is admissible, though the selection of the house for the burning of which the defendant is indicted was made at a subsequent day: Hall *v.* State, 3 Lea (Tenn.) 552. So a larceny may be proved if it is proved that the fire was set in order to give an opportunity to commit the larceny: Jones *v.* State, 63 Ga. 395. On trial of an indictment charging the defendant with burning a building, the fact that there were two other fires in the same vicinity which the defendant contended "were of incendiary origin," was held to have no tendency to prove either that the defendant did or did not set fire to the building named in the indictment. The court could not be called upon to try in one case the questions whether the two previous fires occurred, whether they were incendiary, and, if they were, whether they were set by the defendant or by some other person. These questions were collateral and immaterial, as, whichever way they might be settled, they could not aid in determining whether the defendant was guilty of the offence charged: Com. *v.* Gauvin, 143 Mass. 135.}

[4] 2 East P. C. 1019; 2 Russ. on Crimes, 549; 1 Hawk. P. C. c. 39, § 19. [So if A sets fire to a building intending to secure the insurance on his personal property, but without intending to burn the entire building: People *v.* Fanshawe, 137 N. Y. 68.]

[5] See *supra*, §§ 17, 18.

or accident the servant burns the house of B, the principal is guilty of felony for this latter burning.[6] And if one, by wilfully setting fire to his own house, burn the house of his neighbor, which was so near that the burning of it would be the natural and probable consequence of burning his own house, it is felony.[7]

§ 57. **Evidence; Ownership.** The *evidence of ownership* must correspond with the allegation in the indictment, or it will be fatal.[1] If the indictment charges the burning of an *out-house*, it is proved by evidence of the burning of such a building, though for some purposes it were part of the dwelling-house.[2] If the offence be laid to have been done in the *night-time*, this allegation needs not to be proved if the indictment is at common law; for it is not material unless made so by statute.[3] Actual participation in the crime may be shown by the guilty possession of goods proved to have been in the house at the time of the act done, even though such possession may amount to another felony.[4]

[6] Lamb. Eirenar. b. 2, c. 7, fol. 282; Plowd. 475; 2 East P. C. 1019.

[7] 2 East P. C. 1031; R. *v.* Isaac, ib.; R. *v.* Probert, ib. 1030, per Grose, J.; *supra*, § 44. {So if one sets fire to a storehouse not his own, with the intent that the fire should spread to a dwelling-house adjacent: Grimes *v.* State, 63 Ala. 166;} [Combs *v.* Com., 93 Ky. 313.]

[1] R. *v.* Rickman, 2 East P. C. 1034; R. *v.* Pedley, ib. 1026; People *v.* Slater, 5 Hill (N. Y.) 401; Com. *v.* Wade, 17 Pick. 395; State *v.* Lyon, 12 Conn. 487; *supra*, § 10; *ante*, Vol. I. § 65. In Massachusetts it is provided by statute, that in the prosecution of any offence, committed upon or in relation to, or in any way affecting any real estate, it shall be sufficient, and shall not be deemed a variance, if it be proved on the trial, that at the time when the offence was committed, either the actual or constructive possession, or the general or special property in the whole, or in any part of such real estate, was in the person or community alleged in the indictment or other accusation to be the owner thereof: Rev. Stats. c. 133, § 11. Thus, where an indictment alleged the ownership of a building to be in one W., and the proof was, that said W. was joint lessee with another person, it was held, that the statute entirely obviated the objection of a variance: Com. *v.* Harney, 10 Met. 422. {It seems that in California any allegation of *ownership*, in addition to the allegation of occupancy, is surplusage, and the evidence need not support it, the proof of the occupancy being the main point, on the principle stated by Mr. Bishop, and referred to before, § 54, note *b*. Thus where the indictment laid the building as "the property of Pearce, and the same building occupied and used by Vanarsdale & Co. as a store," and the evidence showed that the building was occupied and used as alleged, but there was no proof of it being the property of Pearce, it was held that there was no variance between the allegation and the proof: People *v.* Shainwold, 51 Cal. 468; [People *v.* Handley, 100 id. 370.] It may be questioned whether in any case the allegation of ownership is meant to do anything more than *identify* the building burned, and whether any allegation and proof of ownership or occupancy which properly performs that duty would not be held to be sufficient. See the opinion of the court in People *v.* Shainwold, *supra*. If the indictment contains but one count, and charges the burning of a dwelling-house, the averment that a dwelling-house was burned must be proved as laid. The description of what was burned is essential to fix the identity of the offence, and no part of it can be rejected as surplusage: Com. *v.* Hayden, 150 Mass. 333.}

[2] R. *v.* North, 2 East P. C. 1021, 1022.

[3] R. *v.* Minton, 2 East P. C. 1021.

[4] R. *v.* Rickman, 2 East P. C. 1034; *supra*, §§ 31–33.

ASSAULT.

§ 58. **Indictment.** The *indictment* for a common assault charges that the offender, at such a time and place, "with force and arms, in and upon one C. D., in the peace of this (State or Commonwealth) then and there being,[1] an assault did make, and him the said C. D. then and there did beat, wound, and ill-treat, and other wrongs to the said C. D. then and there did, against the peace," etc. If there are circumstances of aggravation, not amounting to a distinct offence, they are alleged before the *alia enormia*.

§ 59. **Assault defined.** An *assault* is defined by writers on criminal law to be an intentional attempt by force to do an injury to the person of another.[1] This allegation, therefore, is proved by *evidence* of striking at another with or without a weapon, and whether the aim be missed or not; or of drawing a sword upon him;[2] or of throwing any missile at him;[3] or of presenting a gun or pistol at him; the person assaulted being within probable reach of the weapon or missile.[4] So, if one

[1] This allegation is unnecessary: Com. *v.* Murphy, 6 Monthly Law Reporter N. S. 460; State *v.* Elliott, 7 Blackf. 280.

[1] Whart. Am. Crim. Law, p. 460; 1 Russ. on Crimes, 750. And see *ante*, Vol. II. § 82. [The intent and apparent ability to inflict a battery constitute an assault: Thomas *v.* State, 99 Ga. 38.]

[2] {Where the evidence was that the defendant came on the ground of the prosecutor when he was at work, and when ordered off did not go, but cursed the prosecutor, and, when the prosecutor took hold of him to put him off, put his hand in his coat pocket and partly drew out what the prosecutor supposed to be a knife, and the prosecutor thereupon desisted from his attempt to put the defendant off the land, it was held that this drawing of a knife constituted a criminal assault: State *v.* Marsteller, 84 N. C. 726. Cf. State *v.* Shipman, 81 N. C. 513; People *v.* Lilley, 43 Mich. 521;} [Attebury *v.* State, 33 Tex. Cr. R. 88.]

[3] {It was held in State *v.* Milsaps, 82 N. C. 549, that to pick up a stone while using insulting and threatening language is not an assault if no offer to throw it against the prosecutor is proved: [Brown *v.* State, 95 Ga. 481.] Cf. Jarnigan *v.* State, 6 Tex. App. 465; Kief *v.* State, 10 id. 286. To pour, or attempt to pour, a mixture of spirits of turpentine and pepper upon the prosecutor is a criminal assault: Murdock *v.* State, 65 Ala. 522. Proof of language, however threatening, does not support an indictment for a criminal assault. There must be evidence of some actual movement towards physical violence: Cutler *v.* State, 59 Ind. 300; People *v.* Lilley, 43 Mich. 521. If one, being about twenty steps from another, advance towards him, holding a knife and stick in his hands, and threatening to whip him, it is an assault: State *v.* Martin, 85 N. C. 508.}

[4] 1 Russ. on Crimes, 750; 1 Hawk. P. C. c. 62, § 1; U. S. *v.* Hand, 2 Wash. C. C. 435; Johnson *v.* State, 35 Ala. 363; {State *v.* Taylor, 20 Kan. 643. Evidence that

rushes upon another, or pursues him with intent to strike, and in a threatening attitude, but is stopped immediately before he was within reach of the person aimed at, it is an assault.[5] Whether it be an assault to present a gun or pistol not loaded, but doing it in a manner to terrify the person aimed at, is a point upon which learned judges have differed in opinion.[6] So, an assault is proved by evidence of indecent liberties taken with a female, if it be taken without her consent;[7] and such consent a child under ten years of age is incapable of giving;[8] but above that age she may be capable.[9] So, if possession of a married

the defendant fired a gun at the prosecutor, at a distance of twenty feet, will support an indictment, though it is proved that the gun was loaded only with powder: Crumbley *v.* State, 61 Ga. 582.} [Or that the gun was fired with mere intent to frighten: State *v.* Baker, 38 A. 653, R. I.; State *v.* Triplett, 52 Kan. 678. Firing a gun in the direction of a crowd is an assault on each person in the crowd: People *v.* Raher, 92 Mich. 165.]

[5] Stephen *v.* Myers, 4 C. & P. 349. So if the distance be such as to put a man of ordinary firmness under the apprehension of a blow: State *v.* Davis, 1 Ired. 125. See further, *ante*, Vol. II. §§ 82, 84. [And see State *v.* Reavis, 113 N. C. 677.] {Or if the other party retreat so as to avoid the blow or attack: State *v.* Shipman, 81 N. C. 513; Kief *v.* State, 10 Tex. App. 286. It has been held to be an assault for one holding a gun in his hands to raise the muzzle till it is aimed at the prosecutor's hips, with a threat, at the same time, of taking the prosecutor's life, though the muzzle of the gun is immediately depressed again by a bystander: State *v.* Painter, 67 Mo. 84.}

[6] In R. *v.* St. George, 9 C. & P. 483, Parke, B., held it to be an assault. So it was held in State *v.* Smith, 2 Humph. 457; [State *v.* Lightsey, 43 S. C. 114.] And see 3 Sm. & Marsh. 553; State *v.* Benedict, 11 Vt. 236; {Com. *v.* White, 110 Mass. 407; Morison's Case, 1 Broun 394, 395; Beach *v.* Hancock, 27 N. H. 223; State *v.* Davis, 1 Ired. (N. C.) 125; *post*, § 215, n.} But see *contra*, Blake *v.* Barnard, 9 C. & P. 626. See also R. *v.* Baker, 1 C. & K. 254; R. *v.* James, ib. 530, which, however, were cases upon the statute of 1 Vict. c. 85, § 3. {Mr. Green, in his note to Com. *v.* White (2 Green, Cr. Law), very sharply criticises that case; and, after an elaborate and critical examination of all the authorities cited by the author, denies that it is an assault to threaten with an unloaded pistol, and holds that while a threat, without intent to injure, is an *actionable* assault, it is not an *indictable* assault. He cites in favor of his views, in addition to the case cited *post*, Tarver *v.* State, 43 Ala. 353; Robinson *v.* State, 31 Tex. 170. Upon the general question see also *post*, § 215. In Richels *v.* State, 1 Sneed (Tenn.), 606, it is held that the intent to injure is of the essence of an assault; and pointing a loaded pistol is evidence, but not conclusive, of such intent. The drawing a pistol, without pointing or cocking it, is no assault: Lauson *v.* State, 30 Ala. 14.} [*Contra*, State *v.* Sullivan, 43 S. C. 205.]

[7] {Veal *v.* State, 8 Tex. App. 474.}

[8] R. *v.* Banks, 8 C. & P. 574; R. *v.* Day, 9 id. 722. There is a difference between *consent* and *submission;* every *consent* involves submission; but it by no means follows that a mere *submission* involves consent. It would be too much to say that an adult, submitting quietly to an outrage of this description, was not *consenting;* on the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. Ibid., per Coleridge, J. {It is held in England that a child under ten years of age is capable of giving such consent, and that the question of consent must be put to the jury: R. *v.* Reed, 3 Cox Cr. Cas. 266; R. *v.* Roadley, 49 L. J. N. S. M. C. 88. But in the United States the rule as stated by the author seems to obtain: Hardwick *v.* State, 6 Lea (Tenn.) 103.}

[9] R. *v.* Meredith, 8 C. & P. 589; R. *v.* Martin, 9 id. 213; see R. *v.* Read, 1 Denison C. C. 377; 3 Cox C. C. 266; 2 Car. & Kir. 957; Temple & Mew C. C. 52.

woman's person is indecently and fraudulently obtained in the night, by one falsely assuming to be her husband, it is an assault; and her submission under such mistake is no evidence of consent.[10] It is the same if a medical man indecently remove the garments from the person of a female patient, under the false and fraudulent pretence that he cannot otherwise judge of the cause of her illness.[11] So, if a schoolmaster take indecent liberties with the person of a female scholar without her consent, though she do not resist, it is an assault.[12] So, to cut off the hair of a pauper in an almshouse against her consent, though under a rule of the house, is an assault, the rule being illegal; and if it be done with intent to degrade her, and not for the sake of personal cleanliness, it is an aggravation of the offence.[13] Evidence that the party knowingly put into another's food a deleterious drug, to cause him to take it, and it be taken, is sufficient to support the charge of an assault.[14]

§ 60. **Battery.** A *battery* is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person. Every battery, therefore, includes an assault, though an assault does not necessarily imply a battery. But in treating of this offence, no further notice needs to

Where the prisoners, having been convicted of a common assault on a girl of nine years of age, she having been an assenting party to the connection which took place, though, from her tender years, she did not know what she was about, the conviction was held wrong, upon the authority of R. *v.* Martin, 2 Moody C. C. 123. See the grounds of that case explained by Patteson, J., 9 C. & P. 215; {People *v.* Special Sessions Justices, 18 Hun (N. Y.) 330; R. *v.* Laprise, 3 Leg. News, 139 (Quebec Queen's Bench). "Against the will," or "without the consent," means an active will. Submission, therefore, by a child of tender years, ignorant of its nature, to an indecent assault, without any active sign of dissent, is no consent: R. *v.* Lock, 12 Cox C. C. (Ct. of Cr. App.) 244. So, submission by an idiot (R. *v.* Fletcher, 8 Cox C. C. 131; R. *v.* Barrett, 12 id. 498); or by a woman asleep (R. *v.* Mayer, ib. 331); or extorted by fear (R. *v.* Woodhurst, ib. 443), — is no consent.}

[10] R. *v.* Saunders, 8 C. & P. 265; R. *v.* Williams, ib. 286; R. *v.* Clarke, 6 Cox C. C. 412; 1 Leading Crim. Cases, 232, affirming R. *v.* Jackson, Russ. & Ry. C. C. 487; 1 Leading Crim. Cases, 234.

[11] R. *v.* Rosinski, 1 Moody C. C. 12; 1 Russ. on Crimes, 606. Where a medical man had connection with a girl fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance, solely from the *bona fide* belief that such was the case, this was held to be certainly an assault, and probably a rape: R. *v.* Case, 4 Cox C. C. 220; 1 Denison C. C. 580; Temple & Mew C. C. 31; 1 Eng. Law & Eq. 544. {Cf. R. *v.* Flattery, L. R. 2 Q. B. D. 410; R. *v.* Barrow, L. R. 1 C. C. Res. 156.}

[12] R. *v.* M'Gavaran, 6 Cox C. C. 64; R. *v.* Nichol, Russ. & Ry. C. C. 130; R. *v.* Day, 9 C. & P. 722.

[13] Forde *v.* Skinner, 4 C. & P. 239.

[14] [State *v.* Monroe, 28 S. E. 547, N. C.;] R. *v.* Button, 8 C. & P. 660. This case has been overruled. See R. *v.* Dilworth, 2 M. & Rob. 53; R. *v.* Hanson, 2 C. & K. 912; R. *v.* Walkden, 1 Cox C. C. 282. [If the poison is taken it is a battery: Carr *v.* State, 135 Ind. 1.]

be taken of this distinction, as its effect ordinarily is only upon the degree of punishment to be inflicted.[1]

§ 61. **Intent to injure.** It is to be observed that although an *unintentional injury*, done with force to the person of another, may support a *civil action* of trespass for damages;[1] yet to constitute the *criminal offence* of an assault, the *intention to do injury* is essential to be proved.[2] If, therefore, though the attitude be threatening, it is so explained by the simultaneous language as to negative any present intention to do harm, as, for example, that "he would strike if it were not assize-time,"[3] or "if he were not an old man,"[4] or the like, it is not an assault. Though it is difficult in practice to draw the precise line which separates violence menaced from violence actually commenced, yet the rule seems to be this, that where the purpose of violence is accompanied by an act which, if not prevented, would cause personal injury, the violence is begun, and of course the offence is committed.[5] And it seems not to be necessary that the violence should be menaced absolutely; it may be conditionally threatened; for if one raise a weapon against another, within striking distance, threatening to strike unless the other performs a certain act, which he thereupon performs, and so the violence proposed is not actually inflicted, — it is nevertheless an assault.[6]

[1] {The beating of a horse is no battery of the driver. The battery must be upon the person, or something so identified with it for the time being, as to become part of it, and partake of its inviolability: Kirland *v.* State, 43 Ind. 146.}

[1] See *ante*, Vol. II. § 94.

[2] [State *v.* Carver, 89 Me. 74.]

[3] Anon., 1 Mod. 3; Turbeville *v.* Savage, 2 Keb. 545.

[4] Com. *v.* Eyre, 1 S. & R. 347; State *v.* Crow, 1 Ired. 375. And see *ante*, § 59; Vol. II. § 83.

[5] State *v.* Davis, 1 Ired. 128.

[6] State *v.* Morgan, 3 Ired. 186; [State *v.* Dooley, 121 Mo. 591.] {And see U. S. *v.* Myers, 1 Cranch C. C. 310; U. S. *v.* Richardson, 5 id. 348; Bloomer *v.* State, 3 Sneed 66; Read *v.* Coker, 24 Eng. Law & Eq. 213. Of course, if the pistol be fired without intent to hit, but with the justifiable purpose of frightening an assailant, and thereby to prevent personal injury to the party who fires the pistol, it is no assault: Com. *v.* Mann, 116 Mass. 58.

An important branch of the subject of criminal assaults is the class of assaults with intent to kill, or rape, or rob, or, as they are sometimes called, aggravated assaults. In such cases evidence must be given of the intent as laid, and it must be proved beyond a reasonable doubt: Irving *v.* State, 9 Tex. App. 66; House *v.* State, ib. 53; State *v.* Seymour, 1 Houst. Cr. C. (Del.) 508. If such intent is not proved, but a less aggravated assault, or a simple assault, is proved, the defendant may be convicted of that assault: People *v.* Odell, 1 Dak. Terr. 197; Territory *v.* Conrad, ib. 363; Harrison *v.* State, 10 Tex. App. 93; State *v.* Graham, 51 Iowa 72; State *v.* Delaney, 28 La. Ann. 431. *Contra*, Young *v.* People, 6 Ill. App. 434. But if one is indicted for a simple assault, and the proof is of an aggravated assault, he cannot be convicted of the simple assault: State *v.* Hattabough, 66 Ind. 223.}

§ 62. **Same Subject; Accident.** The *intention to do harm is negatived* by evidence that the injury was the result of *mere accident;* as, if one soldier hurts another by the discharge of his musket in military exercise;[1] or, if one's horse, being rendered ungovernable by sudden fright, runs against a man;[2] or, if a thing which one is handling in the course of his employment be carried by the force of the wind against another man, to his hurt.[3] But in these cases, as we have heretofore shown in civil actions, it must appear that the act in which the defendant was engaged was lawful, and the necessity or accident inevitable and without his fault.[4] If the act were done by *consent*, in a *lawful athletic sport* or *game*, not dangerous in its tendency, it is not an assault; but if it were done in an *unlawful sport*, as a boxing-match, or prize-fight, it is otherwise.[5]

[1] Weaver *v.* Ward, Hob. 134.

[2] Gibbons *v.* Pepper, 4 Mod. 405.

[3] R. *v.* Gill, 1 Stra. 190.

[4] Dickenson *v.* Watson, T. Jones 205; 1 Russ. on Crimes, 754; [Weaver *v.* State, 24 S. W. 648, Tex. Cr. App.] See *ante*, Vol. II. §§ 85, 94, and cases there cited.

[5] See *ante*, Vol. II. § 85, and cases there cited; 1 Russ. on Crimes, 753. [For a general discussion of the question of criminal assaults in sparring matches, the recent case of R. *v.* Coney, 15 Cox Cr. Cas. 46, is in point. It appeared in this case, from the evidence, that at the close of the Ascot Races, a witness who was proceeding along the highroad had his attention directed to some persons coming out of a plantation by the side of the road. He went into the plantation on private ground, and there saw, a few yards from the road, a ring of cord supported by four blue stakes. The prisoners, Burke and Mitchell, took off their coats and waistcoats, stripped and went into the ring. Six other persons, of whom a prisoner named Symonds was one, went into the ring, three into each combatant's corner. Burke and Mitchell fought from three-fourths of an hour to one hour. Bets were offered by some of the persons in the crowd, which consisted of from 100 to 150 people. There was no evidence that the fight was for money or reward, or that any one tried to interrupt it. Witnesses deposed to seeing Coney and Tully and Gilliam (three of the prisoners), in the crowd which surrounded the ring. They were not speaking, and were not seen to be betting, or taking any part in the fight, or doing anything. One of the witnesses said that the crowd was so closely packed that it would not have been possible for Coney to push his way out when he saw him hemmed in. The judge instructed the jury that they were to determine whether or not this was a prize-fight, and said: "There is no doubt that prize-fights are illegal, indeed just as much as that persons should go out to fight with deadly weapons, and it is not at all material which party strikes the first blow; and all persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so, are in point of law guilty of an assault, and if they were not casually passing by, but stayed at the place, they encouraged it by their presence, though they did not do or say anything." The court also quoted the opinion of Littledale, J., in R. *v.* Murphy, cited in Russ. on Crimes, 5th ed. vol. i. p. 818. The jury found the principals in the fight guilty, and the bystanders, Coney, Tully, and Gilliam, guilty, but added that it was in consequence of the judge's direction, as they found that Coney, and Tully, and Gilliam were not *aiding or abetting.* A verdict of guilty was thereupon directed, and the case reserved for the opinion of the Court of Criminal Appeals. It was held that the conviction could not stand, Cave, J., holding that a blow struck in anger, or which is likely or intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and that an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial; that a blow struck in a prize-fight is clearly an assault, but playing with singlesticks or wrestling does not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity

§ 63. **Same Subject; Lawfulness.** The *criminality* of this charge may also be disproved by evidence showing that the *act was lawful;* as, if a parent in a reasonable manner corrects his child;[1] or, a master his apprentice; or, a schoolmaster his scholar;[2] or, if one, having the care of an imbecile or insane person, confines him by force;[3] or, if any one restrains a madman; in these, and the like cases, it is not a criminal assault.[4] So, if a shipmaster corrects a seaman for negligence or misconduct in any matter relating to his duty as one of the ship's crew, or tending directly to the subversion of the discipline and police of the ship.[5] But in all these cases the correction or restraint must be reasonable, and not disproportionate to the requirements of the case at the time.[6]

§ 64. **Self-defence.** The act may also be justified by evidence that it was done in *self-defence.*[1] There is no doubt that any

and severe punishment to the boxers deposed to in R. *v.* Orton, 14 Cox Cr. Cas. 226. And on the question whether presence at a prize fight is aiding and abetting the fight he held that when the presence may be entirely accidental, it is not even evidence of aiding and abetting; but when the presence is *prima facie* not accidental, it is evidence, but no more than evidence, for the jury that the person so present was aiding and abetting; or, in other words, mere presence unexplained is evidence of encouragement and so of guilt; but mere presence unexplained is *not* conclusive proof of encouragement and so of guilt. Cf. R. *v.* Perkins, 4 C. & P. 537.}

[1] {The father is entitled to the custody of his child, but he may not try to obtain such custody by violence. If he uses force he must see to it at his peril that the force used is reasonable and justifiable. Thus, when a father attempted to remove his daughter, about sixteen years of age, from one house to another, against her will, and against the opinion of two physicians that it was dangerous for her to be so removed in her sick state, it was held that the force used was excessive: Com. *v.* Coffey, 121 Mass. 66. Where the defendant was authorized by the father of an infant to take the infant from New York, where he was staying, to Cuba, the residence of the father, and to use secrecy and despatch, held, that he could not be indicted for an assault for secretly carrying off the child, no undue violence having been used: Hernandez *v.* Carnobeli, 4 Duer (N. Y.) 642.}

[2] State *v.* Pendergrass, 2 Dev. & Battle 365; [State *v.* Stafford, 113 N. C. 635.] {A schoolmaster is liable criminally, if, in inflicting punishment upon his pupil, he goes beyond the limit of reasonable castigation, and, either in the mode or degree of correction, is guilty of any unreasonable and disproportionate violence or force; and whether the punishment was excessive under the circumstances of any case is a question for the jury: Com. *v.* Randall, 4 Gray (Mass.) 36;} [Whitley *v.* State, 33 Tex. Cr. R. 172.]

[3] {Or a pauper: State *v.* Neff, 58 Ind. 516.}

[4] 1 Hawk. P. C. b. 1, c. 30, § 23. And see *ante,* Vol. II. § 97; 1 Russ. on Crimes, 755. One servant has no right to beat another servant, and if an under servant misconducts himself, an upper servant is not justified in striking him: R. *v.* Huntley, 3 C. & K. 142.

[5] Turner's Case, 1 Ware 83; Bangs *v.* Little, ib. 506; Hannen *v.* Edes, 15 Mass. 347; Sampson *v.* Smith, ib. 365; {Broughton *v.* Jackson, 11 Eng. L. & Eq. 386; Wilkes *v.* Dinsman, 7 How. (U. S.) 89.}

[6] [As to what is reasonable, see Hinkle *v.* State, 127 Ind. 490. The presumption is that the punishment was lawful: Turner *v.* State, 35 Tex. Cr. R. 369.]

[1] [Where the defendant provoked the difficulty he cannot plead self-defence: State *v.* White, 18 R. I. 473. The burden is on the State to show beyond a reasonable doubt that the act was not in self-defence: State *v.* Shea, 74 N. W. 687, Iowa.]

man may protect his person from assault and injury by opposing force to force; nor is he obliged to wait until he is struck; for if a weapon be lifted in order to strike, or the danger of any other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow and disabling the assailant.[2] But here, also, the opposing force or measure of defence must not be unreasonably disproportionate to the exigency of the case; for it is not every assault that will justify every battery. Therefore, if A strikes B, this will not justify B in drawing his sword and cutting off A's hand.[3] But where, upon an assault by A, a scuffle ensued, in the midst and heat of which A's finger was bitten off by B, the latter was held justified.[4] If the violence used is greater than was necessary to repel the assault, the party is himself guilty.[5]

§ 65. **Justification.** In *justification* of an assault and battery it is also competent for the defendant to prove that it was done to prevent a breach of the peace, suppress a riot, or prevent the commission of a felony;[1] to defend the possession of one's house,

[2] Bull. N. P. 18; Weaver *v.* Bush, 8 T. R. 78; Anon., 2 Lewin C. C. 48; 1 Russ. on Crimes, 756; State *v.* Briggs, 3 Ired. 357.

[3] Cooke *v.* Beal, 1 Ld. Raym. 177; Bull. N. P. 18.

[4] Cockcroft *v.* Smith, 1 Ld. Raym. 177, per Holt, C. J.; 11 Mod. 43; s. c. 2 Salk. 642, cited and expounded by Savage, C. J., in Elliott *v.* Brown, 2 Wend. 499.

[5] R. *v.* Mabel, 9 C. & P. 474. And see R. *v.* Whalley, 7 id. 245. The law on this point was thus stated by Coleridge, J.: "If one man strike another a blow, that other has a right to defend himself, and to strike a blow in his defence; but he has no right to revenge himself; and if, when all the danger is past, he strikes a blow not necessary for his defence, he commits an assault and a battery. It is a common error to suppose that one person has a right to strike another who has struck him, in order to revenge himself:" R. *v.* Driscoll, Car. & Marshm. 214. See also State *v.* Wood, 1 Bay 351; Hannen *v.* Edes, 15 Mass. 347; Sampson *v.* Smith, ib. 365; State *v.* Lazarus, 1 Rep. Const. c. 34; State *v.* Quin, 2 Const. 694; s. c. 3 Brev. 515; {Bartlett *v.* Churchill, 24 Vt. 218; Scribner *v.* Beach, 4 Denio 448; Brown *v.* Gordon, 1 Gray (Mass.) 182. Thus, in a trial for an assault, the defendant at the trial offered evidence to show that he was not the aggressive party, and that, at the time of the alleged assault, he was acting in self-defence. He also offered testimony that he was severely beaten by the person alleged to have been assaulted, and that he was laid up and confined to his bed for weeks. This evidence was apparently admitted without objection: Com. *v.* Jardine, 143 Mass. 567. The defendant then attempted to show that, during his confinement, he made complaints of pain and suffering in his limbs and body. This was in the same line of testimony already introduced and was admitted. It was offered for the purpose of showing the extent and amount of his injuries. It was held competent for the purpose for which it was offered. The complaints of pain and suffering did not include statements of facts, nor narrations of past occurrences, but exclamations of pain and suffering, and nothing more: Hatch *v.* Fuller, 131 id. 574. In Com. *v.* Jardine, it was also held that the fact that the wife of the defendant was the witness by whom the exclamations of pain were to be proved, does not exclude her from testifying to these facts. She is not brought within the limitation of the Pub. Sts. c. 169, § 18, cl. 1, as the inquiry did not call upon her to testify to private conversations with her husband.}

[1] 1 Hawk. P. C. c. 60, § 23; 1 Russ. on Crimes, 755–757; Bull. N. P. 18; [Patterson *v.* State, 91 Ala. 58.]

lands, or goods;[2] to execute process;[3] or, to defend the person of one's wife, husband, parent, child, master, or servant.[4] But in all these cases, as we have seen in others, no more force is to be used than is necessary to prevent the violence impending;[5] nor is any force to be applied in the defence of the possession of property until the trespasser has been warned to desist, or requested to depart;[6] except in cases of violent entry or taking by a trespasser, or the like;[7] for otherwise the party interfering to prevent wrong will himself be guilty of an assault.

[2] 1 Hawk. P. C. c. 60, § 23; 1 Russ. on Crimes, 755–757; Bull. N. P. 18; Green *v.* Goddard, 2 Salk. 641; Weaver *v.* Bush, 8 T. R. 78; Simpson *v.* Morris, 4 Taunt. 821; State *v.* Hooker, 17 Vt. 658. And see *ante*, Vol. II. § 98; 2 Roll. Abr. 548, 549. [This includes immediate recaption: State *v.* Dooley, 121 Mo. 591.] In Massachusetts, it has been recently held, that one tenant in common of a barn-floor has no right to use force and violence to prevent his co-tenant from entering the door leading to the floor, though such entry is with the declared purpose of removing the wagon of the owner then standing on the floor; and such declared purpose affords no justification of the assault: Com. *v.* Lakeman, 4 Cush. 597.

[3] 2 Roll. Abr. 546; 1 Russ. on Crimes, 757; Harrison *v.* Hodgson, 10 B. & C. 445. {The owner of personal property is not justified in assaulting and obstructing an officer who attempts in good faith to attach the same upon a process against a third person, although such assault and obstruction be necessary to protect the property from being taken by the officer: State *v.* Richardson, 38 N. H. 208.} [And see State *v.* Black, 109 N. C. 856. *Contra*, if the defendant uses no more than necessary force: Smith *v.* State, 105 Ala. 136.]

[4] 3 Bl. Comm. 3; 1 Russ. on Crimes, 756; 1 Hawk. P. C., *supra*. It has sometimes been held, that a master could not justify an assault in defence of his servant; because, having an interest in his service, he might have his remedy by a civil action. But it was otherwise held at a very early period: 19 H. VI. 31 *b*; 2 Roll. Abr. 546; and it seems now the better opinion, that the obligation of protection and defence is mutual, between master and servant: 1 Russ. on Crimes, *supra*, cites Tickell *v.* Read, Lofft 215.

[5] {People *v.* Gulick, Hill & Den. 229; Brown *v.* Gordon, 1 Gray 182; Com. *v.* Ford, 5 id. 475; Com. *v.* Cooley, 6 id. 350; State *v.* Hooker, 17 Vt. 658; [Ramsey *v.* State, 92 Ga. 53; Wallace *v.* State, 21 S. 662, Miss.] An instruction to the jury, that the fact of the defendant using a deadly weapon to expel an intruder from his premises is of itself enough to show excessive violence, is not sound: Wharton *v.* People, 8 Ill. App. 232. It is for the jury to say, under instructions from the court, whether the force used to expel the intruder is reasonable or excessive: State *v.* Taylor, 82 N. C. 554.}

[6] {State *v.* Burke, 82 N. C. 551.}

[7] Russ. on Crimes, 757; *ante*, Vol. II. § 98; Mead's Case, 1 Lewin C. C. 185; Tullay *v.* Reed, 1 C. & P. 6; Com. *v.* Clark, 2 Met. 23; Imason *v.* Cope, 5 C. & P. 193; {State *v.* Taylor, 82 N. C. 554. The idea embraced in the expression that *a man's house is his castle*, is not that it is his property, and that as such he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is, that it is sacred, for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person only in case the purpose of such assault be injury to the person of the occupant, or members of his family, and in order to accomplish it the assailant attacks the castle in order to reach the inmate. In this view, it is said and settled that in such case the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason, that one may defend himself in peril of life or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault: State *v.* Patterson, 45 Vt. 308. The ques-

tion of using force to regain possession of property was thoroughly discussed in a recent case in Massachusetts: Com. *v* Donahue, 148 Mass. 529. This was an indictment for robbery, on which the defendant was found guilty of an assault. The defendant had bought clothes of one Mitchelman, who called at the defendant's house, by appointment, for his pay; discussion arising about the bill, the defendant put the clothes on a chair, and put the money on the table, and told Mitchelman that he could have the money or the clothes; that Mitchelman took the money and put it in his pocket, and told the defendant he still owed him one dollar and fifty cents, whereupon the defendant demanded his money back, and on Mitchelman refusing, attacked him, threw him on the floor, and choked him until Mitchelman gave him a pocketbook containing twenty-nine dollars. The defendant's counsel denied the receiving of the pocketbook, and said that he could show that the assault was justifiable, under the circumstances of the case, as the defendant believed that he had a right to recover his money by force if necessary. The presiding justice stated that he should be obliged to rule that the defendant would not be justified in assaulting Mitchelman to get his money, and that he should rule as follows: "If the jury are satisfied that the defendant choked and otherwise assaulted Mitchelman, they would be warranted in finding the defendant guilty, although the sole motive of the defendant was by this violence to get from Mitchelman by force money which the defendant honestly believed to be his own."

Upon exceptions the court said: —

"It is settled by ancient and modern authority, that under such circumstances, a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon: Com. *v.* Lynn, 123 Mass. 218; Com. *v.* Kennard, 8 Pick. 133; State *v.* Elliot, 11 N. H. 540, 545. To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned: Baldwin *v.* Hayden, 6 Conn. 453."

"There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defence, but involve other considerations of policy. It has been held, that, even where a considerable time has elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession, in like manner as he might have protected it, without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the Civil and the Criminal Law: Blades *v.* Higgs, 10 C. B. N. S. 713; 12 id. 501; 13 id. 844; and 11 H. L. Cas. 621; Com. *v.* McCue, 16 Gray 226, 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted, through the fraud of the latter: Hodgeden *v.* Hubbard, 18 Vt. 504. See Johnson *v.* Perry, 56 Vt. 703. On the other hand a distinction has been taken between the right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful; Bobb *v.* Bosworth, Litt. Sel. Cas. 81. See Barnes *v.* Martin, 15 Wis. 263; Andre *v.* Johnson, 6 Blackf. 375; Davis *v.* Whitridge, 2 Strobh. 232; 3 Bl. Com. 4."

BARRATRY.

§ 66. **Definition; Indictment.** A barrator is a common mover, exciter or maintainer of suits or quarrels, in courts or in the country. The indictment charges the accused, in general terms, with being a common barrator, without specifying any particular facts or instances; but the court will not suffer the trial to proceed unless the prosecutor has seasonably, if requested, given the accused a note of the particular acts of barratry intended to be proved against him;[1] and to these alone the proof must be confined.[2]

[1] R. *v.* Wylie, 1 New Rep. 95, per Heath, J.; Com. *v.* Davis, 11 Pick. 432.

[2] Goddard *v.* Smith, 6 Mod. 262; 1 Russ. on Crimes, 184. "It is now a general rule," said Merrick, J., in Com. *v.* Giles, 1 Gray 469, "perfectly well established, that in all legal proceedings, civil and criminal, bills of particulars or specifications of facts may and will be ordered by the court whenever it is satisfied that there is danger that otherwise a party may be deprived of his rights, or that justice cannot be done. Whether such an order shall be made is a question within the discretion of the court where the cause in which it is asked for is pending, to be judged of and determined upon the peculiar facts and circumstances attending it. We are inclined to think that such a determination is final in the court where it is made, and is not open to re-examination or revision. But whether this be so or not, when it is once made, it concludes the rights of all parties who are to be affected by it; and he, who has furnished a bill of particulars under it, must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration: Com. *v.* Snelling, 15 Pick. 321.

The indictment for this offence is as follows: —

The jurors (etc.) upon their oath, present, that ———, of ———, in the county of ———, on ———, and on divers other days and times, as well before as afterwards, was, and yet is, a common barrator, and that he the said ———, on the said ——— day of ———, and on divers other days and times, as well before as afterwards, at ——— aforesaid, in the county aforesaid, divers quarrels, strifes, suits, and controversies, among the honest and quiet citizens of said (State) then and there did move, procure, stir up, and excite, against the peace of the (State) aforesaid.

The following precedent is taken from Train & Heard's Precedents of Indictments, p. 58: —

Indictment for being a Common Barrator.

The jurors, etc., upon their oath present, that C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord ———, at B., in the county of S., and on divers other days and times between that day and the day of the finding of this indictment, at B. aforesaid, in the county aforesaid, divers quarrels, strifes, suits, and controversies among the honest and peaceable citizens of said Commonwealth then and there, on the days and times aforesaid, did move, procure, stir up, and excite. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., at B. aforesaid, in the county aforesaid, on said days and times, was and still is a common barrator; to the common nuisance, etc., and against the peace, etc.

The words "common barrator" are indispensably necessary to be used in an indict-

§ 67. **Evidence.** The offence is *proved* by evidence of the moving, exciting, and prosecuting of suits in which the party has no interest, or of false suits of his own, if designed to oppress the defendants; or, of the spreading of false rumors and calumnies, whereby discord and disquiet are spread among neighbors.[1] But proof of the commission of three such acts, at least, is necessary to maintain the indictment.[2] The bringing of an action in the name of a fictitious plaintiff is a misdemeanor;[3] but it does not amount to barratry unless it be thrice repeated.[4]

ment for this crime: 2 Saund. 308, n. (1); R. *v.* Hardwicke, 1 Sid. 282; R. *v.* Haunon, 6 Mod. 311; 2 Chitty, Crim. Law, 232.

[1] 1 Inst. 368 *a*; 1 Hawk. P. C. c. 81. For a copious description of this offence, see the case of Barrators, 8 Rep. 36.

[2] Com. *v.* Davis, 11 Pick. 432, 435. In Com. *v.* McCulloch, 15 Mass. 227, the defendant was held not to be guilty of barratry, because there was no oppression in bringing three writs before a justice of the peace, instead of one in the Court of Common Pleas, the costs of the three not being more than those of the one. See Briggs *v.* Raymond, 11 Cush. 274.

[3] 4 Bl. Comm. 134; 1 Russ. on Crimes, 184.

[4] See also *post*, § 180, tit. Maintenance.

BLASPHEMY.

§ 68. **Definition.** This crime, in a general sense, has been said to consist in speaking evil of the Deity, with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God.[1] Its mischief consists in weakening the sanctions and destroying the foundations of the Christian religion, which is part of the common law of the land, and thus weakening the obligations of oaths and the bonds of society. Hence, all contumelious reproaches of our Saviour Jesus Christ,[2] all profane scoffing at the Holy Bible, or exposing any part thereof to contempt and ridicule,[3] and all writings against the whole or any essential part of the Christian religion, striking at the root thereof, not in the way of honest discussion and for the discovery of truth, but with the malicious design to calumniate, vilify, and disparage it, are regarded by the common law as blasphemous. and punished accordingly.[4]

Com. *v.* Kneeland, 20 Pick. 213, per Shaw, C. J. For other and more particular descriptions of this offence, see 4 Bl. Comm. 59 ; People *v.* Ruggles, 8 Johns. 293, per Kent, C. J. ; 2 Stark. on Slander, pp. 129–151.

[2] State *v.* Chandler, 2 Harringt. (Del.) 553; Andrew *v.* New York Bible Society, 4 Sandf. 156 ; R. *v.* Woolston, 2 Stra. 834, more fully reported in Fitzg. 64 ; R. *v.* Waddington, 1 B. & C. 26 ; People *v.* Ruggles, 8 Johns. 290 ; 1 Russ. on Crimes, 230 ; R. *v.* Taylor, 1 Vent. 293.

[3] Updegraph *v.* Com., 11 S. & R. 394 ; 1 Russ. on Crimes, 230 ; 2 Stark. on Slander, pp. 138–143 ; Com. *v.* Kneeland, 20 Pick. 206, 224, 225.

[4] Updegraph *v.* Com., 11 S. & R. 394 ; R. *v.* Carlisle, 3 B. & Ald. 161 ; 2 Stark. on Slander, pp. 144–147 ; Com. *v.* Kneeland, 20 Pick. 220, 224, 225 ; People *v.* Ruggles, *supra.* The indictment for *verbal blasphemy* may be thus : —

The jurors (etc.) on their oath present, that ———, of ———, in the county of ———, intending the holy name of God [and the person and character of our Lord and Saviour Jesus Christ], to dishonor and blaspheme, and to scandalize and vilify the [Holy Scriptures and the] Christian religion, and to bring [them] into disbelief and contempt, on ———, at ———, in the county aforesaid, did,* wilfully, maliciously, and blasphemously, with a loud voice, utter and publish in the presence and hearing of divers good citizens of this (State), the following false, profane, scandalous, and blasphemous words, to wit : [*here state the words, verbatim, with proper innuendoes, if the case requires it*] * in contempt of the Christian religion and of good morals and government, in evil example to others, and against the peace of the (State) aforesaid.

The indictment for publishing a blasphemous libel omits the words between the two asterisks in the above precedent, and in their place charges as follows : —

——— unlawfully and wickedly print and publish, and cause to be printed and published, a false, scandalous, and blasphemous libel, of and concerning the Christian

§ 69. **When Statute and when Common-law Offence.** In most of the United States statutes have been enacted against this offence; but these statutes are not understood in all cases to have abrogated the common law; the rule being, that where the statute does not vary the class and character of an offence, as, for example, by raising what was a misdemeanor into a felony, but only authorizes a particular mode of proceeding and of punishment, the sanction is cumulative, and the common law is not taken away.[1]

§ 70. **Evidence.** The *proof* of the indictment for this crime will consist of evidence showing that the defendant uttered or published the words charged, and with the malicious and evil intent alleged. The intent is to be collected by the jury from all the circumstances of the case.[1]

religion, containing therein among other things, divers scandalous and blasphemous matters of and concerning the Christian religion, according to the tenor following, to wit: [*here set forth the libel* in hæc verba *with proper innuendoes*], in contempt, [etc., as above].

[1] Com. *v.* Ayer, 3 Cush. 150; R. *v.* Carlisle, 3 B. & Ald. 161, per Bayley, J.; R. *v.* Robinson, 2 Burr. 803, per Ld. Mansfield. And see R. *v.* Waddington, 1 B. & C. 26. {On the analogous misdemeanor of profanity, see State *v.* Brewington, 84 N. C. 783. Profanity is a misdemeanor only when it amounts to a public nuisance, and should be so alleged: Gaines *v.* State, 7 Lea (Tenn.) 410.}

[1] See further, *infra*, tit. Libel. {The prisoner's confession that he used the words charged will not authorize a conviction for blasphemy. The prosecutor must show that some one heard the words: People *v.* Porter, 2 Parker C. R. (N. Y.) 14.}

BRIBERY.[1]

§ 71. **Definition.** Bribery is generally *defined* to be the receiving or offering of any undue reward by or to any person whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office and incline him to act contrary to the known rules of honesty

[1] The indictment for bribing, or attempting to bribe, a judge may be thus : —

The jurors (etc.), on their oath present, that A. B., of ———, on ———, at ———, within the county aforesaid did unlawfully, wickedly, and corruptly give (*or* offer to give) to one C. D., of ———, he the said C. D. being then and there a judge (*or* one of the justices) of the (*here insert the style of the court*), duly and legally appointed and qualified to discharge the duties of that office, the sum of ——— dollars, as a bribe, present, and reward, to obtain the opinion, judgment, and decree of him the said C. D. in a certain suit (controversy *or* cause) then and there depending before him the said C. D. as judge as aforesaid (and others the associate justices of said court) to wit; (*here state the nature of the suit or proceeding*), the said office of judge (*or* justice) being then and there an office of trust concerning the administration of justice within the said (United States, *or* State, *or* Commonwealth), against the peace, etc.

This precedent was drawn upon the statute of the United States, of April 30, 1790, § 21, vol. i. p. 117, Peters's ed. (see Davis's Preced. p. 79), but is conceived to be equally good, being varied as above, in a prosecution at common law.

The following precedent is taken from Train & Heard's Precedents of Indictment, p. 62: —

Indictment for attempting to Bribe a Constable.

The jurors, etc., upon their oath present, that on the first day of June, in the year of our Lord ———, at B., in the county of S., one A. C., Esquire, then and yet being one of the justices of the peace within and for the said county of S., duly qualified to discharge and perform the duties of said office, did then and there under a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to all constables and other peace officers of the said county, and especially to J. N., thereby commanding them, upon sight thereof, to take and bring before the said A. C. so being such justice as aforesaid, or some other justice of the peace within and for the said county of S., the body of D. F., late of B. aforesaid, in the county aforesaid, to answer, *etc., as in the warrant;* and which said warrant afterwards, to wit, on the day and year aforesaid, at B. aforesaid, in the county aforesaid, was delivered to the said J. N., then being one of the constables of said B., to be executed in due form of law. And the jurors aforesaid, upon their oath aforesaid, do further present that J. S., well knowing the premises, afterwards, to wit, on the day and year aforesaid, at B. aforesaid, in the county aforesaid, unlawfully, wickedly, and corruptly did offer unto the said J. N., so being constable as aforesaid, and then and there having in his custody and possession the said warrant so delivered to him to be executed as aforesaid, the sum of fifty dollars, if the said J. N. would refrain from executing the said warrant, and from taking and arresting the said D. F. under and by virtue of the same, for and during fourteen days from that time, that is to say, from the time the said J. S. so offered the said sum of fifty dollars to the said J. N. as aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S. on the first day of June, in the year aforesaid, at B. aforesaid, in the county aforesaid, in manner and form aforesaid, did unlawfully attempt and endeavor to bribe the said J. N., so being constable as aforesaid, to neglect and omit to do his duty as such constable, and to refrain from taking and arresting the said D. F. under and by virtue of the warrant aforesaid; against the peace, etc.

and integrity.[2] But it is also taken in a larger sense, and may be committed by any person in an official situation, who shall corruptly use the power and interest of his place for rewards or promises; and by any person who shall give or offer or take a reward for offices of a public nature; or shall be guilty of corruptly giving or promising rewards, in order to procure votes in the election of public officers.[3] Thus it has been held bribery by the common law for a clerk to the agent for prisoners of war to take money in order to procure the exchange of some of them out of their turn;[4] or, for one to offer to a cabinet minister a sum of money to procure from the crown an appointment to a public office;[5] or, corruptly to solicit an officer of the customs, whose duty it was to seize forfeited goods, to forbear from seizing them;[6] or, to promise money to a voter for his vote in favor of a particular ticket or interest in the election of city officers,[7] or members of Parliament.[8]

§ 72. **When the Offence is complete.** The misdemeanor is complete by the *offer of the bribe*, so far as the offer is concerned.[1] If the offer is accepted, both parties are guilty. And though the person bribed does not perform his promise, but directly violates it, as, for example, if, in the case of an elec-

[2] 1 Inst. 145; 1 Russ. on Crimes, 154; 4 Bl. Comm. 139; 1 Hawk. P. C. c. 67; [State *v.* Miles, 89 Me. 142. See Com. *v.* Donovan, 49 N. E. 104, Mass.] {An offer of money to an arbitrator, in order to corruptly affect his decision, is criminal (State *v.* Lusk, 16 W. Va. 767); or a State senator to influence his vote on a question before the Senate (State *v.* Smalls, 11 S. C. 262; cf. Com. *v.* Petroff, 1 Crim. L. Mag. 716); or a jailer (O'Brien *v.* State, 7 Tex. App. 181); or a voter at a municipal election (State *v.* Jackson, 73 Me. 91;} [or a commissioner of the board of education (Honaker *v.* Pocatalico, 42 W. Va. 170); or a sheriff (Newman *v.* People, 23 Col. 300); or an examining surgeon of the pension bureau (U. S. *v.* Van Leuven, 65 F. 78).] {A promise to serve for less than the salary attached by law to the office, and a promise to give money or other valuable thing, to the public in consideration of votes, are within the spirit of the law against bribery: State *v* Purdy, 36 Wis. 213. For cases in the civil courts, showing the illegality of the promise of pecuniary consideration to influence votes, see Trist *v.* Child, 21 Wall. (U. S.) 441.}

[3] 1 Inst. 145; 1 Russ. on Crimes, 154; 4 Bl. Comm. 139; 1 Hawk. P. C. c. 67; [It is not bribery for a member of the legislature to keep open house for the entertainment of other members: Randall *v.* Evening News Ass'n, 97 Mich. 136.]

[4] R. *v.* Beale, cited 1 East 183.

[5] R. *v.* Vaughan, 4 Burr. 2494; Stockwell *v.* North, Noy 102; s. c. Moor 781. So where several persons mutually agreed to procure for another an appointment to a public office, for a sum of money, to be divided among them, it was held a misdemeanor at common law: R. *v.* Pullman *et al.*, 2 Campb. 229.

[6] R. *v.* Everett, 3 B. & C. 114.

[7] R. *v.* Plympton, 2 Ld. Raym. 1377.

[8] R. *v.* Pitt, 3 Burr. 1335, 1338. {An offer by a public officer, as, for instance, an alderman of a city, to accept a bribe, is a solicitation to commit an offence, and is itself indictable: Walsh *v.* People, 65 Ill. 58;} [State *v.* Durnam, 75 N. W. 1127, Minn.]

[1] [State *v.* Williams, 136 Mo. 293.]

tion, he votes for the opposing candidate or interest, the offence of the corruptor is still complete.[2] So, though the party never intended to vote according to his promise, yet the offerer is guilty.[3]

§ 73. **Proof of Right to Vote.** If it be alleged, in an indictment for corrupting a voter, that he had a *right to vote*, this allegation will be sufficiently proved by evidence that he actually did vote, without challenge or objection.[1] The allegation of the payment of money to that voter may be proved by evidence that it was under color of a loan, for which his note was taken, if it were at the same time agreed that it should be given up, after he had voted.[2] So, if the corruptor's own note were given for the money.[3] So, if the transaction were in the form of a wager or bet with the voter, that he would not vote for the offerer's candidate or ticket.[4] So, if the voter received from the offerer a card, or token, in one room, which he presented to another person in another room, and thereupon received the money, it is evidence of the payment of money by the former.[5]

[2] Sulston *v.* Norton, 3 Burr. 1235 ; Harding *v.* Stokes, 2 M. & W. 233 ; Henslow *v.* Fawcett, 3 Ad. & El. 51. The last two cases were actions upon the statute ; but the doctrine is that of the common law.

[3] Henslow *v.* Fawcett, *supra*, per Patterson, J., and Coleridge, J.

[1] Rigg *v.* Curgenven, 2 Wils. 395 ; Comb *v.* Pitt, cited ib. 398.

[2] Sulston *v.* Norton, 3 Burr. 1235.

[3] Ibid.

[4] 1 Hawk. P. C. c. 67, § 10 (*n*) cites Lofft 552.

[5] Webb *v.* Smith, 4 Bing. N. C. 373. {Under the Stats. 17 & 18 Vict. c. 102, making it indictable "to promise money to a voter in order to induce him to vote," a promise to a voter of his travelling expenses, on condition that he will come and vote for the promisor, is criminal; but such a promise without such condition is not: Cooper *v.* Slade, 36 Eng. Law & Eq. 152.

The offer to furnish land, buildings, etc., or to build a bridge between two towns, or the gift by individuals of their promissory notes to the county school company, as an inducement to the voters to vote in favor of a removal of the county seat, is not bribery within the meaning of the Iowa Code: Dishon *v.* Smith, 10 Iowa 212.

It is suggested in the foregoing case that the offer must be intended to affect the performance of a legal duty, and not a mere moral duty.}

BURGLARY.[1]

§ 74. **Definition.** This offence is usually defined in the words of Lord Coke, who says that a burglar is "he that, by *night*, *breaketh* and *entereth* into a *mansion-house*, with *intent* to commit a *felony*."[1] Evidence of all these particulars is therefore necessary, in order to maintain the indictment.

§ 75. **Time.** In regard to the *time*, the malignity of the offence consists in its being done in the *night*, when sleep has disarmed the owner, and rendered his castle defenceless. And it is night, in the sense of the law, when there is not *daylight* [*crepusculum* or *diluculum*] enough left or begun, to discern a man's face withal.[1] The light of the moon has no relation to the crime.[2] Both the breaking and entering must be done in

[1] The form of an indictment for burglary, at common law, is as follows: —

The jurors (etc.), upon their oath present, that (*naming the prisoner*), late of ——, on ——, about the hour of ——, in the night of the same day, with force and arms, at ——, in the county aforesaid, the dwelling-house of one —— (*naming the occupant*), there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said (*occupant*), in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take, and carry away [*if goods were actually stolen, add as follows:* and one (*here describe the goods, alleging the value of each article*), of the value of —— dollars, of the goods and chattels of the said (*occupant*), in the dwelling-house aforesaid then and there being found, then and there in the same dwelling-house feloniously and burglariously did steal, take, and carry away] against the peace of the State (*or* Commonwealth) aforesaid.

[1] 3 Inst. 63 ; 2 Russ. on Crimes, 5th (Eng.) ed. 1 ; Wilmot (Digest of the Law of Burglary, p. 3) defines this crime as follows: A burglar, at common law, is he that by night feloniously breaketh and entereth into the dwelling-house of another. Therefore, the breaking and entering a dwelling-house, with intent to cut off an ear of an inhabitant, is not a felony (Com. *v.* Newell, 7 Mass. 247) ; nor a breaking and entering, with intent to commit adultery (State *v.* Cooper, 16 Vt. 551). {Nor is a breaking and entering a dwelling-house with intent to have sexual intercourse with an unmarried woman therein: Robinson *v.* State, 53 Md. 151 ; People *v.* Soto, 53 Cal. 412.

If the indictment does not sufficiently charge a felony, without stating the value of the goods stolen, the value must be alleged to be sufficiently large to constitute a felony: People *v.* Murray, 8 Cal. 519.} [The indictment must specify the crime defendant intended : State *v.* Buchanan, 22 S. 875, Miss.]

[1] {See Com. *v.* Williams, 2 Cush. 582. In Massachusetts, by Stat. 1847, c. 13, Pub. Stat. c. 214, § 15, the night-time is declared to be, in all criminal cases, the time between one hour after sunset and one hour before sunrise. It must be proved directly or indirectly that the offence was committed in the night: State *v.* Whit, 4 Jones Law (N. C.) 349. On an indictment charging breaking and entering in the night-time, proof that there was breaking through a brick vault, begun in the night-time, though not completed, and the entry made, till daytime, will support the indictment: Com. *v.* Glover, 111 Mass. 395.}

[2] 4 Bl. Comm. 224 ; 1 Hale P. C. 550, 551; Com. *v.* Chevalier, 7 Dane's Abr. 134;

the night-time; but it is not essential that both be done in the same night.[3]

§ 76. **Breaking.** The *breaking* of the house may be *actual*, by the application of physical force; or constructive, where an entrance is obtained by fraud, threats, or conspiracy. An *actual breaking* may be by lifting a latch;[1] making a hole in the wall;[2] descending the chimney;[3] picking, turning back, or opening the

1 Gabbett, Crim. Law, 169; State *v.* Bancroft, 10 N. H. 105; [State *v.* McKnight, 111 N. C. 690.] {Nor the light from artificial lights, aided by the reflection from snow: State *v.* Morris, 47 Conn. 179.}

[3] 1 Hale P. C. 551; 2 Russ. on Crimes, 5th (Eng.) ed. 37; 1 Gabbett, Crim. Law, 176, 177; R. *v.* Smith, Russ. & Ry. 417. The breaking at a different period from the entering must clearly show an intent to commit felony. And a party present at the breaking, on the first night, but not present at the entering, on the second, is still guilty of the whole offence: R. *v.* Jordan, 7 C. & P. 432. "I should submit," says Wilmot (Dig. of the Law of Burglary, p. 9), "that a case might exist where such a principle would work great injustice. Suppose thieves to break together, and be disturbed, or find a formidable resistance likely to be made, and separate, leaving the burglary incomplete, and without any intention of resuming operations, and the next night some of the party, unknown to the rest, make an entry, this would be repugnant to the constituents of burglary, which require that there should be both a breaking and entering, and that one without the other renders the offence incomplete. Besides, in such a case, there would be no *locus pœnitentiæ*, which the indulgence of our law allows even in the worst offences. Again, suppose A and B break a dwelling-house on a certain night, intending on the following night to enter; A enters alone, and unknown to B, in the same night, hoping thereby to gain a greater share of the plunder, how would B be *particeps criminis* to that act of A? Or suppose that A and B break a dwelling-house on a certain night, intending on the following night to enter. On the following night B alone enters, and, being resisted, commits murder, would A be *particeps criminis* in the murder? On the whole, it is submitted, that this is a question deserving of further consideration." {By statute in most States, the same acts which would constitute a burglary if they were done in the night are made indictable and punishable if done in the daytime: Crim. Law and Practice of California, 1881 (White & George), § 460, p. 145; General Statutes of Connecticut, Revision of 1875, title 20, c. 4, § 8; Laws of Delaware, 1874, c. 128, § 10, p. 772; Code of Georgia, 1882, § 4386; Compiled Laws of Kansas, 1879, §§ 1798–1802; Revised Statutes of Kentucky, vol. 2, p. 382 (Stanton's ed.); Revised Statutes, Maine, c. 119, § 8 (1857); Pub. Stat. Mass. c. 203, §§ 10–18; Revised Code of Maryland, art. 72, § 36; General Laws of New Hampshire, § 628 (1878); Revision of New Jersey, vol. 1, p. 244; Penal Code of New York, c. ii.; Revised Statutes of Ohio, §§ 6835–6840; Brightly's Purdon's Digest, Pennsylvania, p. 353. The crime of feloniously breaking and entering has also been generally extended by statute to other buildings beside dwelling-houses, *i. e.* stores, warehouses, barns, etc., and also to railroad cars and steamboats, canal-boats, and vessels generally. See the statutes above referred to *passim*, and State *v.* Bishop, 51 Vt. 287; Hagar *v.* State, 35 Ohio St. 268. All the rules of evidence in other respects applicable to the crime of burglary are applicable to these statutory crimes, and these statutes do not, in general, abrogate the common-law crime, but are extensions of it, or afford cumulative remedies: State *v.* Branham, 13 S. C. 389.}

[1] [State *v.* Woods, 137 Mo. 6: Ferguson *v.* State, 72 N. W. 590, Neb.; or opening a screen-door hung on spring-hinges: State *v.* Conners, 95 Iowa 485.]

[2] 1 Hale P. C. 559; 2 East P. C. 488. See 1 Gabbett, Crim. Law, 169–172; State *v.* Wilson, Coxe 439; R. *v.* Jordan, 7 C. & P. 432.

[3] R. *v.* Brice, Russ. & Ry. 450; [or pushing aside the belt of a machine so as to enter through the hole used for the belt solely: Marshall *v.* State, 94 Ga. 589.] {An entry at night, through a chimney, into a log-cabin, in which the prosecutrix dwells, and stealing goods therein, will constitute burglary, although the chimney, made of logs and sticks, may be in a state of decay, and not more than five and a half feet high (Pearson, C. J., dissenting): State *v.* Willis, 7 Jones Law (N. C.) 190.} [Getting into the chimney is sufficient: Ohls *v.* State, 97 Ala. 81.]

lock, with a false key or other instrument;[4] removing or breaking a pane of glass, and inserting the hand or even a finger;[5] pulling up or down an unfastened sash;[6] removing the fastening of a window, by inserting the hand through a broken pane;[7] pushing open a window which moved on hinges and was fastened by a wedge;[8] breaking and opening an inner door, after having entered through an open door or window;[9] or other like acts; and even by escaping from a house by any of these or the like means, or by unlocking the hall-door, after having committed a felony in the house, though the offender were a lodger.[10] Whether it would be burglary, in a guest at an inn, to open his own chamber-door with a felonious intent, is greatly doubted.[11] The breaking must also be into some apartment of the house, and not into a cupboard, press, locker, or the like receptacle, notwithstanding these, as between the heir and executor, are regarded as fixtures.[12] It must also appear that the place

[4] 1 Hale P. C. 552 ; 2 Russ. on Crimes, 5th (Eng.) ed. 3. And see Pugh *v.* Griffith, 7 Ad. & El. 827.

[5] R. *v.* Davis, Russ. & Ry. 499 ; R. *v.* Perkes, 1 C. & P. 300 ; R. *v.* Bird, 9 id. 44. So putting the head out of the skylight is a sufficient breaking out : R. *v.* M'Kearney, Jebb 99. {Removing a grating from a storehouse : Com. *v.* Bruce, 1 Ky. L. J. Dec. p. 298 ; 3 Crim. L. Mag. p. 251.} [Removing a screen fastened with nails : Sims *v.* State, 136 Ind. 358.]

[6] R. *v.* Haines, Russ. & Ry. 451 ; R. *v.* Hyams, 7 C. & P. 441 ; Franco *v.* State, 42 Texas 276; [People *v.* Dupree, 98 Mich. 26.] So is cutting and tearing down a netting of twine, nailed over an open window : Com. *v.* Stephenson, 8 Pick. 354. See Hunter *v.* Com., 7 Gratt. 641 ; [or lifting a window clasp : State *v.* Moore, 117 Mo. 395.]

[7] R. *v.* Robinson, 1 Moody C. C. 327. And see R. *v.* Bailey, Russ. & Ry. 341. Breaking open a shutter-box adjoining the window was held no burglary : R. *v.* Paine, 7 C. & P. 135.

[8] R. *v.* Hall, Russ. & Ry. 355.

[9] R. *v.* Johnson, 2 East P. C. 488. [Opening a closed door : Wagner *v.* State, 47 S. W. 372, Tex. Cr. App.]

[10] R. *v.* Wheeldon, 8 C. & P. 747; R. *v.* Lawrence, 4 id. 231. Whether raising a trap or flat door, which is kept down by its own weight, is a sufficient breaking of the house, is a question upon which there has been some diversity of opinion. See 1 Russ. on Crimes, 5th (Eng.) ed. 6 ; 1 Hale P. C. 554. In R. *v.* Brown, 2 East P. C. 487, in 1790, Buller, J., held that it was. In R. *v.* Callan, Russ. & Ry. 157, in 1809, the point was reserved for the consideration of the twelve judges, and they were equally divided upon it. And in 1830, in R. *v.* Lawrence, 4 C. & P. 231, it was held by Bolland, B., to be not sufficient. In this last case, that of R. *v.* Brown was referred to. R. *v.* Lawrence seems to have been overruled by R. *v.* Russell, 1 Moody C. C. 377, where it was held that lifting up the flap of a cellar, which was kept down by its own weight, is a sufficient breaking, although such flap may have been occasionally fastened by nails, but was not so fastened at the time the entry was made. Removing loose planks in a partition wall, they not being fixed to the freehold, has been held not a breaking : Com. *v.* Trimmer, 1 Mass. 476. {A breaking may be by fire, and burning a hole through which to escape from a prison : Luke *v.* State, 49 Ala. 30;} [or by digging under the wall of a log cabin : Pressley *v.* State, 111 *id.* 34.]

[11] 2 East P. C. 488 ; 1 Hale P. C. 554.

[12] Foster, 109 ; 2 East P. C. 489. This point seems never to have been solemnly decided. Wilmot suggests as a reason why such a breaking should not be burglarious,

through which the thief entered was closed; for if he entered through a door or window left open by the carelessness of the occupant, it is not burglary.[13]

§ 77. **Same Subject.** The offence of breaking the house is also *constructively* committed, when admission is obtained by threats, or by fraud; as, if the owner is compelled to open the door by fear, or opens it to repel an attack, and thieves rush in;[1] or, if they raise a hue and cry, and rush in when the constable opens the door;[2] or, if entrance is obtained by legal process fraudulently obtained;[3] or, under pretence of taking lodgings;[4] or, if lodgings be actually taken, with an ultimate felonious intent;[5] or, if the entrance is effected by any other fraudulent artifice; or, if the house be opened by the servants within,[6] by conspiracy with those who enter.[7]

§ 78. **Entry.** There must be some proof of actual *entry* into the house; but it is not always necessary to show an entrance of the person; for if the intent be to commit a felony in the stealing of goods in the house, the insertion of any instrument for that purpose, through the broken aperture, will be sufficient to complete the offence. But if the instrument were inserted, not for the purpose of abstracting the goods, but for the purpose of completing the breaking and thereby effecting an entrance to commit the intended felony, it is not sufficient. Thus, to break the window or door, and thrust in a hook to steal, or weapon to rob or kill, is burglary, though the hand of the felon be not within the house; but to thrust an auger through, in the act of

that, as a general principle, the actual breaking of the dwelling-house has reference to the entry at common law, and to the escape of the intruder by breaking out under the statute. Whereas the breaking of a cupboard is a distinct and independent act. This question is fully discussed in Wilmot, Dig. of the Law of Burglary, pp. 30–35. And see State *v.* Wilson, Coxe 439, 441.

[13] 3 Inst. 64; 1 Hale P. C. 551, 552; State *v.* Wilson, Coxe 439; 2 Russ. on Crimes, 5th (Eng.) ed. 2; R. *v.* Lewis, 2 C. & P. 628; R. *v.* Spriggs, 1 M. & Rob. 357; State *v.* Boon, 13 Ired. 244. {Entering an open door, and breaking out at another door, is not "breaking and entering into:" White *v.* State, 51 Ga. 285.}

[1] 2 East P. C. 486. See State *v.* Henry, 9 Ired. 463.

[2] Ibid. 485.

[3] R. *v.* Farr, J. Kelyng, 43; 2 East P. C. 485; 2 Russ. on Crimes, 5th (Eng.) ed. 8.

[4] Ibid.

[5] Ibid.

[6] [Or by an accomplice who pretends to wish to buy goods: Com. *v.* Lowrey, 158 Mass. 18.]

[7] 2 East P. C. 486. And it is burglary in both: R. *v.* Cornwall, ib.; s. c. 2 Stra. 881; 2 Russ. on Crimes, 5th (Eng.) ed. 9; 1 Gabbett, Crim. Law, 173; R. *v.* Johnson, 1 Car. & Marshm. 218. But if the servant is faithful, and intended only to entrap the thief, it is not a burglarious entry: ib.

effecting an entrance by boring, does not amount to burglary.[1] So, if, after breaking the house, the thief sends in a child of tender age to bring out the goods, he is guilty of burglary.[2]

§ 79. **Dwelling-house.** The building into which the entry is made must be proved to be a *mansion* or *dwelling-house*,[1] for the habitation of man, and actually inhabited, at the time of the offence. It is not necessary, however, that the inhabitants be within the house at the moment; for burglary may be committed while all the family are absent for a night or more, if it be *animo revertendi*.[2] But if the owner or his family resort to the house only in the daytime, or if he employ persons only to sleep there, who are not of his family nor in his domestic service and

[1] 2 East P. C. 490; R. *v.* Hughes, 1 Leach C. C. (4th ed.) 406; R. *v.* Rust, 1 Moody C. C. 183. {So, under the extension of the crime by statute, which includes other places besides dwelling-houses, it is a sufficient proof of breaking and entering if it is proved that one, with intent to steal, bores a hole with an auger through the floor of a corn-crib, so that the corn runs through the hole into a sack, which he then feloniously takes away: Walker *v.* State, 63 Ala. 49. Lifting a window by so placing the hand that the fingers reach the inside of the window is an entry: Franco *v.* State, 42 Tex. 276.} Whether the act of discharging a bullet into the house, with intent to kill, is a burglarious entry into the house, is doubted. Lord Hale thought it was not: 1 Hale P. C. 555. Serjeant Hawkins states it as an example of a constructive entry: 1 Hawk. P. C. c. 38, § 11. And Mr. East thinks it difficult to distinguish between this case and that of an instrument thrust through a window for the purpose of committing a felony, unless it be that the one instrument is held in the hand at the time, and the other is discharged from it: 2 East P. C. 490. See 1 Gabbett, Crim. Law, 174, 175, where this difference is said to be material. There is a distinction between the two cases. It is submitted, says Wilmot (Dig. of Law of Burglary, 58), that the only possible way in which the discharging a loaded gun or pistol into the dwelling-house from the outside could be held burglary, would be by laying the intent to commit felony by killing or wounding, or generally, to commit felony; and *quære*, whether the breaking and entry requisite to complete the burglary would be satisfied by such discharge.

[2] 1 Hale P. C. 555, 556.

[1] Burglary may be committed in a church at common law: R. *v.* Baker, 3 Cox C. C. 581 (1849). In this case, Alderson, B., said, "I take it to be settled law that burglary may be committed in a church, at common law, and so held lately on circuit." An indictment for burglary in a church need not lay the offence as committed in a dwelling-house; it should charge that the defendant feloniously and burglariously broke and entered the parish church of the parish to which it belongs, with intent, etc., according to the circumstances of the case: 2 East P. C. 512; Wilmot, Dig. of the Law of Burglary, 198. In some of the United States, the offence is now punished by statute, which makes it a distinct felony to break and enter any church or chapel, and steal any chattel therein. But in R. *v.* Baker, *supra*, Alderson, B., ruled that the acts of Parliament which particularly relate to offences respecting churches, do not destroy the offence at common law. [As to what is a house, see Williamson *v.* State, 44 S. W. 1107, Tex. Cr. App.; Favro *v.* State, 46 S. W. 932, Tex. Cr. App.]

[2] 1 Hale P. C. 556; 4 Bl. Comm. 225; 1 Gabbett, Crim. Law, 181, 182; {Com. *v.* Barney, 10 Cush. (Mass.) 479. The question whether burglary could be committed on a tomb, was fully discussed, and the law as to what characterizes a structure as a "building" on which burglary may be committed, in People *v.* Richards, 108 N. Y. 143.} Breaking a house in town, which was shut up, while the family were spending the summer in the country, has been held burglary: Com. *v.* Brown, 3 Rawle 207. [And see State *v.* Williams, 21 S. E. 721, W. Va.]

employment, though it be to protect the property from thieves, this is not sufficient proof of habitancy by the owner.[3] Nor does habitancy commence with the putting of *furniture* into the house, before the actual residence there of the owner or his family.[4] Neither will the casual occupancy of a tenement as a lodging-place suffice of itself to constitute it a dwelling-house; as, if a servant be sent to lodge in a *barn*, or a porter to lodge in a *warehouse*, for the purpose of watching for thieves.[5] But the actual occupancy of the owner will not alone constitute the place his dwelling-house, unless it is a permanent and substantial edifice; and therefore to break open a tent or booth erected in a fair or market, though the owner sleep in it, is not burglary.[6]

§ 80. **Same Subject.** The term "mansion," or "dwelling-house," comprehends all the out-buildings which are *parcel thereof*, though they be not contiguous to it. All buildings within the same curtilage or common fence, and used by the same family, are considered by the law as parcel of the mansion. If they are separated from the dwelling-house, and are not within the same common fence, though occupied by the same owner, the question, whether they are parcel of the mansion or not, is a question for the jury, upon the evidence.[1] And here

[3] See *ante*, note 2; 2 East P. C. 497–499; R. *v.* Flannagan, Russ. & Ry. 187; R. *v.* Lyons, 1 Leach C. C. (4th ed.) 185; R. *v.* Fuller, ib. 222, n.; 2 Russ. on Crimes, 5th (Eng. ed. 21–24).

[4] R. *v.* Lyons, 1 Leach C. C. (4th ed.) 185; 2 East P. C. 497, 498; R. *v.* Thompson, 1 Leach C. C. (4th ed.) 771; 1 Gabbett, Crim. Law, 480. But see *contra*, Com. *v.* Brown, 3 Rawle 207.

[5] R. *v.* Smith, 2 East P. C. 497; R. *v.* Brown, ib. 493, 497, 501.

[6] 1 Hale P. C. 557; 4 Bl. Comm. 226.

[1] 1 Hale P. C. 558, 569; 3 Inst. 64; 1 Hawk. P. C. c. 38, §§ 21–25; 1 Gabbett, Crim. Law, 178; 2 East P. C. 492, 495; Devoe *v.* Com., 3 Met. (Mass.) 325; 2 Russ. on Crimes, 5th (Eng.) ed. 15–20; Parker's Case, 4 Johns. 424; State *v.* Ginns, 1 Nott & M'C. 583; State *v.* Langford, 1 Dev. 253; State *v.* Wilson, 1 Hayw. 242; State *v.* Twitty, ib. 102; R. *v.* Westwood, Russ. & Ry. 495; R. *v.* Chalking, ib. 334; [State *v.* Johnson, 45 S. C. 483.] Thus, an out-house within an enclosed yard, has been held part of the dwelling-house of the occupying owner, though he has another tenement opening into the same yard, in the occupancy of a tenant having an easement there: R. *v.* Walters, Ry. & M. 13. So, a permanent building, used and slept in only during a fair: R. *v.* Smith, 1 M. & Rob. 256. So, a house occupied only by the servants of the owner, the burglary being in his shop adjoining, and communicating with the house by a trap-door and ladder: R. *v.* Stock, Russ. & Ry. 185; s. c. 2 Taunt. 339. [So, a room used as a shop and connected with a dwelling: People *v.* Dupree, 98 Mich. 26.] So, a building within the same enclosure, used with the dwelling-house, but accessible only by an open passage: R. *v.* Hancock, Russ. & Ry. 170. Though no person sleeps in such building: R. *v.* Gibson, 2 East P. C. 508. Apartments let to lodgers, as tenants, are the dwelling-houses of the lodgers, if the owner do not dwell in the same house, or if the lodger has a separate entrance for himself, from the street; but if the owner, by himself or his servants, occupies a part of

it becomes material to inquire whether the apartment or building which was broken had a separate door of entrance of its own, or was approachable only through the common door of the dwelling-house. For if the owner of a dwelling-house should let part of it for a shop, and the tenant should occupy it for his trade only, without sleeping there, and it should have a door of its own, distinct from that of the dwelling-house; here, though it be under the roof of the mansion, yet it is not a place in which burglary can be committed.[2] But if there is only one common door of entrance to both, it is still part of the dwelling-house of the owner of the mansion.[3]

§ 81. **Ownership.** And in regard to the *ownership* of the dwelling-house, if the general owner of the mansion, in which he resides, should let a room in it to a lodger, who enters only by the common door, and his apartment is feloniously broken and entered, it is burglary in the house of the general owner.[1] But if the lodger's room has a separate outer entrance of its own, and no other, the room is the house of the lodger.[2] And where rooms in a house are let to several tenants, who enter by a common hall-door; if the general owner does not inhabit the house, then each apartment is the separate dwelling-house of its own tenant.[3] Such is the case of chambers in the Inns of Court,

the same house, the whole is his dwelling-house: R. *v.* Gibbons, Russ. & Ry. 422; R. *v.* Carrell, 2 East P. C. 506; R. *v.* Turner, ib. 492; R. *v.* Martin, Russ. & Ry. 108.

[2] 1 Hale P. C. 557, 558; 4 Bl. Comm. 225; J. Kelyng, 83, 84. {As a general rule, when there is internal communication between the room or apartment broken into, and the room or building in which the accused is charged to have feloniously entered, such entry is completed by entering the room broken into: Com. *v.* Bruce, 3 Cr. L. Mag. 252; 1 Ky. L. T. Dec. p. 298.}

[3] R. *v.* Gibson, 1 Leach C. C. (4th ed.) 357; 2 East P. C. 507, 508. In the case of a large manufactory in the centre of a pile of buildings, the wings of which were inhabited, but without any communication with the manufactory in the centre, it was held that burglary could not be committed in the latter place, though the whole pile was enclosed within a common fence: R. *v.* Eggington, 2 East P. C. 494. {In People *v.* Snyder, 2 Parker C. R. (N. Y.) 23, it was held that burglary may be committed in a shop which is under the same roof with, and nearly surrounded by rooms occupied by the family, though there be no communication from the latter to the former, without going out of doors.} [*Contra*, People *v.* Van Dam, 107 Mich. 425.]

[1] 1 Hale P. C. 556; 4 Bl. Comm. 225; 2 East P. C. 499, 500; Lee *v.* Gansell, Cowp. 8; J. Kel. 84.

[2] Ibid.; 2 Russ. on Crimes, 5th (Eng.) ed. 34.

[3] {People *v.* Bush, 3 Parker C. R. 552; Mason *v.* People, 26 N. Y. 200. It was held in People *v.* Rogers, 13 W. Dig. 147, by the New York Court of Appeals, that in an indictment for attempting a burglary in the room of a guest at a hotel, the dwelling-house should be described as that of the landlord. The evidence was that S., a resident of Albany, was a guest at the Astor House, in New York, that a room had been assigned him, in which he slept, and of which he had the key. The court said, in such a case the dwelling-house is, in contemplation of law, the dwelling-house of the landlord and not of the guest, and actual residence by an owner is not necessary to constitute the

rooms in colleges, and the like.[4] If two have the title to two contiguous dwelling-houses, in common, paying rent and taxes for both out of their common fund, yet if their dwellings be separately inhabited, and one be feloniously broken and entered, it is burglary in the dwelling-house of the occupant of that one only, and not of both; but if in such case the occupancy also is joint, the entrance for both families being by the same common door, it is the dwelling-house of both.[5] In all these cases, the offence must be laid accordingly, or the variance will be fatal.[6]

§ 82. **Intent.** The *felonious intent*, charged in the indictment, is sufficiently proved by evidence of a felony actually committed in the house; it being presumed that the act was done pursuant to a previous intention.[1] If none was committed, then the

house his dwelling-house; but where the house is occupied by a servant, as the house of the master and in his master's business, it is the master's dwelling-house, and an indictment for burglarious entry must so describe it; and the same rule applies to the room of a guest at a hotel. It may be doubted whether this rule would be generally followed.}

[4] See *ante*, notes 1 and 2; 2 East P. C. 505; Evans *v.* Finch, Cro. Car. 473; R. *v.* Rogers, 1 Leach C. C. (4th ed.) 89; 2 Hale P. C. 358.

[5] R. *v.* Jones, 2 Leach P. C. (4th ed.) 537; 2 East P. C. 504.

[6] {The allegation of ownership of a railroad-car, which has been feloniously entered, may be supported by proof that it was on the track of the railroad company attached to its train, and in its possession, occupancy, and control, though such company is not the real owner: State *v.* Parker, 16 Nev. 79.} [*Contra*, Johnson *v.* State, 111 Ala. 66. And see State *v.* Lee, 95 Iowa 427. Proof of ownership is now, by statute or otherwise, not very strictly required. See State *v.* Jelinek, ib. 420; State *v.* La Croix, 8 S. D. 369; Tidwell *v.* State, 45 S. W. 1015, Tex. Cr. App. As to what constitutes "occupancy" under statutes, see Lamater *v.* State, 42 S. W. 304, Tex Cr. App.; Daggett *v.* State, 44 S. W. 148, Tex. Cr. App.; Favro *v.* State, 46 S. W. 932, Tex. Cr. App.]

[1] 1 Hale P. C. 560. But the actual commission of felony in the house, says Wilmot (Dig. of the Law of Burglary, p. 11), is not conclusive proof that the entry was made with intent to commit that felony. Murder might ensue, where there existed only the intent to steal; or a person might open a door and enter to commit a trespass, or to recover his own property, and afterwards, on an opportunity offered, commit larceny. In the first instance, however, he who should commit murder would not be excused, on account of an entry with no such intention; for, as East says, "It is a general rule, that a man who commits one sort of felony, in attempting to commit another, cannot excuse himself upon the ground that he did not intend the commission of that particular offence." A servant who was intrusted by his master, sold goods, and concealed the money in the house; and after he was discharged from the service, broke the house, and took the money which he had concealed. This was holden to be no burglary, because the first taking of the money was not felony, but only a breach of trust. "Although the money was the master's in right, it was the servant's money in possession." The subsequent entry, therefore, was only a trespass: 2 East P. C. 510; 1 Russ. by Greaves 823; 1 Shower 53. {It has been said by courts and text-writers, that the possession of stolen goods, which were the fruits of a burglary, has no tendency to prove the commission of the crime of burglary. But in one aspect of the case it is difficult to see how such evidence could be rejected on a trial for burglary. As Mr. Greenleaf states in the text, the felonious *intent* charged in the indictment is sufficiently proved by evidence of a felony actually committed in the house. If, then, the commission of the felony may be proved (and when the charge is of breaking and entering with intent to commit larceny, the commission of larceny must be the fact to be proved), any evidence which would be admissible on a trial for that larceny, to prove the fact of the larceny, seems admissible to prove the same fact, when it is a

intent to commit the felony charged must be distinctly proved.[2] And it is not necessary that it be a felony at common law; for if the act has been created a felony by statute, it is sufficient.[3]

§ 83. **Time.** The *time of the breaking* may be inferred by the jury from the circumstances of the case; as, for example, if the goods stolen were seen in the house after dark, and at daylight in the morning were missing.[1] And the *fact of breaking* a *closed*

relevant fact in a trial for burglary; and this has been held in many cases: State *v.* Bishop, 51 Vt. 287; State *v.* Snell, 46 Wis. 524; Neubrandt *v.* State, 9 N. W. Rep. p. 824; People *v.* Ah Sing, 8 Pac. C. L. J. p. 40; People *v.* Tetherington, 3 Crim. L. Mag. p. 418. The strongest opposition on this point is in Michigan, where it is said that such possession has no tendency to prove the burglary: Stuart *v.* People, 42 Mich. 255. But in most of the cases where this ruling has been given, the evidence offered was such as would not have been admissible on a trial for larceny. As has been said in that regard, the possession must be *recent* and *unexplained*, before it will support an inference of guilt; and what will constitute such *recent* possession is a question for the court. See *ante*, §§ 31–33, and notes, and Vol. I. § 34.}

[2] [Bergeron *v.* State, 74 N. W. 253, Neb. The intent must exist at the time of the breaking and entering: Jackson *v.* State, 102 Ala. 167. Assisting a detective in entering a house and taking money in pursuance of a plan arranged by him with the owner for the purpose of entrapping the others is not burglary: Love *v.* People, 160 Ill. 501; but see State *v.* Stickney, 53 Kan. 308.]

[3] 2 East C. C. 511; Wilmot, Dig. of the Law of Burglary, 16. {On the trial of an information for burglary, which charges that the breaking and entering were with intent to steal the goods of B, such particular intent must be proved. But this intent is proved by evidence that personal property of C, a boarder, left in B's saloon or barroom during the night, while the boarder was sleeping in some other part of the house, was in the actual possession of B during that time, and that the intent of the prisoner was to steal this property: Neubrandt *v.* State, 9 N. W. Rep. p. 824. But if B had no title, custody, or possession of the property of C, proof of such an entry and felony will not support the indictment: Com. *v.* Moore, 130 Mass. 45. The commission of the felony, and thus the intent of the burglar, may be proved by evidence that the stolen property was found in the recent and unexplained possession of the defendant, just as larceny may be proved from such possession: State *v.* Bishop, 51 Vt. 287; State *v.* Snell, 46 Wis. 524; People *v.* Ah Sing, 8 Pac. C. L. J. p. 40; Neubrandt *v.* State, *supra;* People *v.* Tetherington, 3 Crim. Law Mag. p. 418; [State *v.* Owsley, 111 Mo. 450;] *contra*, Stuart *v.* People, 42 Mich. 255. [That mere possession of stolen goods is not *prima facie* evidence of burglary, but simply a fact to be considered in connection with other facts, see Ryan *v.* State, 83 Wis. 486; People *v.* Sansome, 98 Cal. 235; State *v.* Yohe, 87 Iowa 33. See *ante*, Vol. I. § 34.]

Where no felony has been actually committed, the prisoner, indicted for breaking and entering at night with intent to steal, may offer evidence to show that he broke in with some intention not felonious; and the refusal to admit this evidence will be held to be error: Robinson *v.* State, 53 Md. 151. Cf. People *v.* Soto, 53 Cal. 412.

The intent with which one charged with burglary entered one store may be shown by proof tending to show a felony, committed by him at the same time, in an adjoining store: Osborne *v.* People, 2 Parker C. R. (N. Y.) 583; *ante*, § 19.

In New York, it is not necessary to specify in the indictment what kind of felony was intended: Mason *v.* People, 26 N. Y. Ct. Ap. 200.}

[1] State *v.* Bancroft, 10 N. H. 105; [State *v.* Munson, 7 Wash. 239.] {The following facts were held sufficient evidence that the entry was in the night-time; the defendant was found in possession of goods recently stolen from a tailor's shop, and made contradictory statements of the manner by which he got them, and was also in possession of a key, freshly filed down so as to fit the door of the shop exactly. The goods stolen were in the shop at dusk when the tailor locked the door, and when the tailor returned at sunrise they were gone, and no window or other mode of access to the shop was open or broken into; and the inference was thus raised that the thief must have

door may also be inferred from evidence that it was found open in the morning, and that marks of violent forcing were found upon it.[2]

gone in by the door during the night: Smith *v.* State, 62 Ga. 663. Cf. Brown *v.* State, 59 id. 456.}

[2] Com. *v.* Merrill, Thacher's Crim. Cases, 1. [And see State *v.* Munson, 7 Wash. 239; People *v.* Curley, 99 Mich. 238; Metz *v.* State, 46 Neb. 547.]

CHEATING.

§ 84. **Indictable Cheating.** The indictment for this offence, *at common law*, must show, and of course the prosecutor must prove, *first*, that the offence was of a nature to affect not only particular individuals, but *the public at large*, and *against which common prudence and care are not sufficient to guard.*[1] Hence

[1] This was stated by Lord Mansfield as indispensably necessary to render the offence indictable. See R. *v.* Wheatly, 2 Burr. 1125; 1 Leading Crim. Cases, 1; cited with approbation by Lord Kenyon, as establishing the true bounds between frauds which are and are not indictable at common law, in R. *v.* Lara, 6 T. R. 565. And see 3 Chitty, Crim. Law, 2d ed. 994; Cross *v.* Peters, 1 Greenl. 387, per Mellen, C. J.; People *v.* Stone, 9 Wend. 182; State *v.* Justice, 2 Dev. 199; State *v.* Stroll, 1 Rich. 244. [In addition to the common-law offences which are described by the author in this section, there are in most States statutory provisions, by which one who induces another to part with his property by means of *false pretences*, is subjected to punishment. In these cases no injury to the public at large is necessary. The general scope of such provisions is well illustrated by the English statute, 24 & 25 Vict. c. 96, § 88, which in substance enacts that, whoever shall by any false pretence obtain from any other person, any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor; with a proviso that if at the trial he shall be found to have obtained the property in such a way as to be guilty of larceny, he shall not be acquitted of the misdemeanor on that account, but shall not be subsequently prosecuted for larceny on the same facts; and also a proviso, that in alleging the intent to defraud, no particular person intended to be defrauded need be named, and no ownership of the chattel, etc., need be alleged. A similar statute covers the fraudulently procuring the signing and indorsement of commercial paper. See on this subject, Russ. on Crimes, 5th (Eng.) ed. vol. ii. c. 32; and see the Pennsylvania statute, act of March 31, 1860 (Pamph. L. 410, § 111). The opinion of Paxson, J., in Com. *v.* Moore, 3 Crim. L. Mag. 838, decided in the Supreme Court of Pennsylvania, in February, 1882, gives a very clear statement of what a false pretence is, under the statutes: "The only question presented by this record is, whether the indictment sets forth an indictable offence. It contains two counts, in each of which the defendant is charged with cheating by false pretences. The particular act alleged was the procuring of the prosecutor's indorsement of the defendant's promissory note, and the false pretence charged consisted in representing to the prosecutor that he would use the note so indorsed to take up and cancel another note of the same amount then about maturing, and upon which the prosecutor was liable as indorser. In other words, the note was given in renewal of another note of like amount, and the indictment charges that the defendant, instead of using it for this purpose, as he promised to do, procured it to be discounted, and used a portion of the proceeds for other purposes.

"A false pretence, to be within the statute, must be the assertion of an existing fact, not a promise to do some act in the future: [Hurst *v.* State, 45 S. W. 573, Tex. Cr. App. But false representations are sufficient though coupled with a promise: State *v.* Jules, 85 Md. 305; State *v.* Gordon, 56 Kan. 64; Donohoe *v.* State, 59 Ark. 375; Thomas *v.* State, 90 Ga. 437]. The man who asserts that he is the owner of a house states a fact, and one that is calculated to give him a credit. But a mere failure to keep a promise is another and a very different affair. That occurs when a man fails to pay his note. It is true Chief Justice Gibson doubted, in Com. *v.* Burdick, 2 Pa. St. 164, whether every naked lie by which a credit is gained is not a false pretence within the statute. This doubt has run its course, and has long since ceased to disturb the

it was held indictable for common players to cheat with false dice;[2] and for a person to pretend to have power to discharge soldiers,[3] thereupon taking money from them for false discharges.[4] So, obtaining an order from the court to hold to bail,

criminal law of the State. There was nothing in Com. *v.* Burdick to suggest such a doubt, as the defendant had wilfully misrepresented that he had a capital of $8,000 in right of his wife; while in all the cases cited therein there was a misrepresentation as to existing facts, by means whereof a credit was obtained. The decisions on this subject are uniform, and it would be an affectation of learning to cite the cases. In the case in hand, there was no assertion of an existing fact, nor was there anything done by which even a credit was given. The credit had been obtained when the original note was indorsed; the present note was indorsed in lieu thereof, and for the purpose of taking up the original. The failure to use it for such purpose was a dishonest act on the part of the defendant, but we do not think it punishable under the statute defining false pretences."

In R. *v.* Coulson (1 Den. C. C. 592), the pretence that the following instrument was a Bank of England note was held to be false: —

£5] *Bank of England.* [No. 230.

I promise to pay on demand the sum of Five Rounds, if I do not sell articles cheaper than anybody in the whole universe.

Five. For Myself & Co.,
Jan. 1, 1850. M. Carroll.

So it was held that a pretence that a one-pound note was a five-pound note was a false pretence, though the party to whom the pretence was made could read, and the note was plainly on its face a one-pound note: R. *v.* Jessop, D. & B. C. C. 442. It cannot be material to the question of forgery whether a forged signature to a check upon which money has been obtained bears a greater or less resemblance to the genuine signature.

The instrument relied on in R. *v.* Coulson, *supra*, as printed in Russ. on Crimes, 5th Eng. ed. c. 32, vol. ii., is headed "Bank of Elegance," and promises to pay "five pounds." Under the statutes creating the offence of obtaining goods by false pretences, it is held that if the goods were obtained by a false statement, on the part of the defendant, that he was the owner of certain property upon which he gave a mortgage to the seller, thereby inducing him to part with his goods, it is a clear and sufficient case of obtaining goods by false pretences: Com. *v.* Lee, 149 Mass. 183; Com. *v.* Coe, 115 id. 481; Com. *v.* Lincoln, 11 Allen 233. The fact that the goods are to be obtained from time to time, and not all at once, makes no distinction if the false pretence is a continuing one, and applicable to each delivery: Com. *v.* Lee, *supra*. It makes no difference that the seller had the means of knowing that the pretence is false; he is entitled to rely on the statements of the defendant, and is not further put upon his inquiry as to a motive which was within the knowledge of the defendant, and as to which he himself knew nothing. If he knew that the defendant was not the owner, or if both parties alike know whether an affirmation is true or false, being equally cognizant of, or personally connected with, the facts to which it relates, the case cannot be supported: Com. *v.* Lee, *supra*. In a recent case in Massachusetts, Com. *v.* Wood, 142 Mass. 460, the representations were as to the value of shares in the capital stock in a company, also the market price and the amount of capital paid in. It was held that the first being a mere expression of opinion would not support the indictment, but that the others would. [As to the effect of statements of value, see People *v.* Peckens, 153 N. Y. 576.] On the question of what delivery and possession are necessary to support this accusation, the case of Com. *v.* Devlin, 141 Mass. 423, is instructive, the rule being that the representation must have been made before the goods were delivered to the defendant.] [Where the seller of goods worth 25 cents receives a $20 gold piece, knowing it to be such, which the purchaser believes to be a dollar, and gives back change for a dollar, inducing the purchaser to continue in his belief, he is a cheat: Jones *v.* State, 97 Ga. 430.]

[2] Leeser's Case, Cro. Jac. 497.

[3] [Or to compromise a prosecution: Ryan *v.* State, 30 S. E. 678, Ga.]

[4] Serlested's Case, Latch 202.

by means of a false voucher of a fact, fraudulently produced for that purpose;[5] furnishing adulterated bread to the government, for the use of a military asylum;[6] and selling army-bread to the government, by false marks of the weight, fraudulently put on the barrels,[7] — have been held indictable offences at common law. On the other hand, it has been held not indictable for a man to violate his contract, however fraudulently it be broken;[8] or, to obtain goods by false verbal representations of his credit in society and his ability to pay for them;[9] or, tortiously to retain possession of a chattel;[10] or, tortiously to obtain possession of a receipt;[11] or of lottery-tickets, by pretending to pay for them by drawing his check on a banker with whom he had no funds;[12] or, to receive good barley from an individual to grind, and instead thereof to return a musty mixture of barley and oatmeal;[13] or, fraudulently to deliver a less quantity of beer than was contracted for and represented;[14] or, fraudulently to obtain goods on promise to send the money for them by the servant who should bring them;[15] or, to borrow money or obtain goods in another's name, falsely pretending to have been sent by him for that purpose;[16] or, falsely and fraudulently to warrant the soundness of a horse, or the title to land.[17]

[5] Per Lord Ellenborough, in Omealy *v.* Newell, 8 East 364, 372. {Cf. R. *v.* Evans, 1 D. & B. 236.}

[6] R. *v.* Dixon, 3 M. & S. 14.

[7] Respublica *v.* Powell, 1 Dall. 47.

[8] Com. *v.* Hearsey, 1 Mass. 137 ; [Garlington *v.* State, 97 Ga. 629.]

[9] Com. *v.* Warren, 6 Mass. 72.

[10] People *v.* Miller, 14 Johns. 371.

[11] People *v.* Babcock, 7 Johns. 201.

[12] R. *v.* Lara, 6 T. R. 565. But see *contra*, R. *v.* Jackson, 3 Campb. 370. {This case was decided under Stat. 30 Geo. II. c. 24, against false pretences, and confirms rather than opposes R. *v.* Lara. See R. *v.* Wheatly, 1 Leading Crim. Cases, 12.}

[13] R. *v.* Haynes, 4 M. & S. 214.

[14] R. *v.* Wheatly, 2 Burr. 1125 ; 1 Leading Crim. Cases, 1.

[15] R. *v.* Goodhall, Russ. & Ry. 461. And in Hartmann *v.* Com., 5 Barr 60, it was held, that obtaining a false credit otherwise than by false tokens, or the removal and secreting of goods with intent to defraud creditors, are not indictable at common law.

[16] R. *v.* Jones, 1 Salk. 379 ; R. *v.* Bryan, 2 Stra. 866.

[17] R. *v.* Pywell, 1 Stark. 402 ; [Miller *v.* State, 99 Ga. 207.] See also Weierbach *v.* Trone, 2 Watts & Serg. 408. See R. *v.* Rowlands, 2 Denison C. C. 364 ; 5 Cox C. C. 481 ; 9 Eng. Law & Eq. 291 ; R. *v.* Kenrick, 5 Q. B. 62, *infra*, tit. Conspiracy, § 90 *a*. Where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it, with the usual covenants for title, Littledale, J., held, that he could not be convicted for obtaining money by false pretences ; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as such, and the party be transported : R. *v.* Codrington, 1 C. & P. 661. But in R. *v.* Kenrick, 5 Q. B. 49 ; Dav. & M. 208, that decision was much questioned ; and it was strongly intimated, that the execution of a *contract* between the same parties does not secure from punishment the obtaining of money under false pretences, in conformity with that

§ 85. **Selling Unwholesome Food.** Under this head may be ranked the offence of selling unwholesome food, which was indictable by the common law, and by the statute of 51 Hen. III. st. 6.[1] In such case, it is not material whether the offence be committed from malice or the desire of gain; nor whether the offender be a public contractor or not, or the injury be done to the public service or not; nor that he acted in violation of any duty imposed by his peculiar situation; nor that he intended to injure the health of the particular individual for whose use the noxious articles were sold; the essence of the offence consisting in doing an act, the probable consequences of which are injurious to the health of man.[2]

§ 86. **Cheating by False Weights or Tokens.** To cheat a man of his money or goods, by using false weights or false measures, has been indictable at common law from time immemorial. In addition to this, cheating by false "privy tokens and counterfeit letters in other men's names," was made indictable by the statute of 33 Hen. VIII. c. 1, which has been adopted and acted upon as common law in some of the United States, and its provisions are believed to have been either recognized as common law, or expressly enacted, in them all.[1] Under this statute it has been held, that the fraud must have been perpetrated by means of some token or thing visible and real, such as a ring or key, or the like, a verbal representation not being sufficient; or else by means of a writing, either in the name of another, or so framed as to afford more credit than the mere assertion of the party defrauding.[2]

contract. {A false statement that a party has a certain amount "due and owing to him," is not a false representation on which an indictment can be maintained: R. *v.* Oates, 25 Law & Eq. 552.} And in R. *v.* Abbott, 1 Denison C. C. 173, 2 C. & K. 630, it was decided unanimously by the judges, upon a case reserved, that the law was so.

[1] 4 Bl. Comm. 162; 2 East P. C. 822.

[2] Ibid.; 2 Chitty, Crim. Law, 557, n.; 3 M. & S. 16, per Ld. Ellenborough; R. *v.* Treeve, 2 East P. C. 821; 1 Russ. on Crimes, 5th (Eng.) ed. 268.

[1] Com. *v.* Warren, 6 Mass. 72; People *v.* Johnson, 12 Johns. 292. {To maintain an indictment for cheating by false pretence, it must be alleged and proved that some existing fact was falsely pretended, with intent to defraud, and that the fact falsely pretended was the inducement which led the defrauded party to part with his money or property: Com. *v.* Coe, 115 Mass. 481. If the false pretence materially influences, — turns the balance, so to speak, in the defrauded party's mind, — it is sufficient to sustain the charge: R. *v.* English, 12 Cox C. & C. 171; R. *v.* Lince, ib. 451;} [State *v.* Davis, 56 Kan. 54; State *v.* Knowlton, 11 Wash. 512; Wax *v.* State, 43 Neb. 18.]

[2] 2 East P. C. 689; 3 Chitty, Crim. Law, 997; R. *v.* Wilders, cited in 2 Burr. 1128, per Ld. Mansfield. The statute of 30 Geo. II. c. 24, was enacted to supply the deficiency of the existing law against cheating, by rendering it an indictable offence to cheat another of his money or goods, by *any false pretences whatsoever*. Similar statutes have been enacted in many of the United States; but they are generally construed to

§ 87. **Indictment must show the Mode of Cheating.** In the *second* place, the indictment must show, and the prosecutor must prove, *the manner in which the cheating was effected;* as, for example, if it were by a false token, the particular kind of token must be specified;[1] but if several tokens or means are described, it will be sufficient if any one of them be proved.[2]

§ 88. **Indictment must show that some Person was in Danger of Loss.** In the *third* place, it is material to specify and prove the *person* intended to be defrauded; and that the *design* was *successfully accomplished,* at least so far as to expose the person to the danger of loss.[1]

extend only to such pretences as are calculated to mislead persons of ordinary prudence and caution. See R. *v.* Young, 3 T. R. 98; R. *v.* Goodhall, 1 Russ. & Ry. 461; People *v.* Williams, 4 Hill (N. Y.) 9; State *v.* Mills, 17 Me. 211; Com. *v* Wilgus, 4 Pick. 177; Com. *v.* Drew, 19 id. 179; Com. *v.* Call, 21 id. 515; People *v.* Galloway, 17 Wend. 540. [The general construction is now the other way: Oxx *v.* State, 59 N. J. L. 99; Miller *v.* People, 22 Col. 530; Com. *v.* Mulrey, 49 N. E. 91, Mass.] {But see *ante,* § 84, n. A person who sells barrels of turpentine, representing that they were all right, "just as good at bottom as at the top," but which are mostly filled with chips and dirt, with a few inches of turpentine only on the top, is guilty of cheating by false tokens: State *v.* Jones, 70 N. C. 75. See also State *v.* Phifer, 65 id. 321.}

[1] R. *v.* Mason, 2 T. R. 581; 2 East P. C. 837.

[2] R. *v.* Dale, 7 C. & P. 352; R. *v.* Story, 1 Russ. & Ry. 80; State *v.* Dunlap, 24 Me. 77; State *v.* Mills, 17 id. 211; 14 Wend. 547, per Walworth, Ch.; R. *v.* Perrott, 2 M. & S. 379.

[1] State *v.* Woodson, 5 Humph. 55; People *v.* Genung, 11 Wend. 18; Com. *v.* Wilgus, 4 Pick. 177.

CONSPIRACY.

§ 89. **Definition.** A conspiracy may be *described*, in general terms, as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.[1] It is not essential that

[1] [Drake *v.* Stewart, 40 U. S. App. 173; U. S. *v.* Benson, 44 id. 219; State *v.* Clark, 9 Houst. 536; Pettibone *v.* U. S., 148 U. S. 197. In Colorado, if the purpose is lawful, the use of unlawful means is insufficient to establish a conspiracy: Liepschitz *v.* People, 53 P. 1111, Col.] The books contain much discussion on the nature and definition of this offence; but this description being one of the most recent, and given upon great consideration, is deemed sufficient. See Com. *v.* Hunt, 4 Met. 111. The learned Chief Justice, in delivering the judgment in that case, expounded what may be regarded as the general doctrine of American law on this subject as follows: "We have no doubt, that, by the operation of the constitution of this Commonwealth, the general rules of the common law, making conspiracy an indictable offence, are in force here, and that this is included in the description of laws which had, before the adoption of the constitution, been used and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised in the courts of law: Const. of Mass. c. 6, § 6. It was so held in Com. *v.* Boynton, and Com. *v.* Pierpont, cases decided before reports of cases were regularly published,* and in many cases since: Com. *v.* Ward, 1 Mass. 473; Com. *v.* Judd, and Com. *v.* Tibbetts, 2 id. 329, 536; Com. *v.* Warren, 6 id. 74. Still it is proper in this connection to remark, that although the common law in regard to conspiracy in this Commonwealth is in force, yet it will not necessarily follow that every indictment at common law for this offence is a precedent for a similar indictment in this State. The general rule of the common law is, that it is a criminal and indictable offence for two or more to confederate and combine together by concerted means to do that which is unlawful, or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law in England and in this Commonwealth; and yet it must depend upon the local laws of each country to determine, whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. All those laws of the parent country, whether rules of the common law or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship, — not being adapted to the circumstances of our colonial condition, — were not adopted, used, or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the constitution already cited. This consideration will do something towards reconciling the English and American cases, and may indicate how far the principles of the English cases will apply in this Commonwealth, and show why a conviction in England, in many cases, would not be a precedent for a like conviction here. The King *v.* Journeyman Tailors of Cambridge, 8 Mod. 10, for instance, is commonly cited as an authority for an indictment at common law, and a conviction of journeyman mechanics of a conspiracy to raise their wages. It was there held, that the indictment need not conclude *contra*

* See a statement of these cases in 3 Law Reporter, 295, 298.

the act intended to be done should be punishable by indictment; for if it be designed to destroy a man's reputation by verbal slander,[2] or to seduce a female to elope from her parents' house

formam statuti, because the gist of the offence was the conspiracy, which was an offence at common law. At the same time, it was conceded, that the unlawful object to be accomplished was the raising of wages above the rate fixed by a general act of Parliament. It was therefore a conspiracy to violate a general statute law, made for the regulation of a large branch of trade, affecting the comfort and interest of the public; and thus the object to be accomplished by the conspiracy was unlawful, if not criminal." "But the great difficulty is in framing any definition or description, to be drawn from the decided cases, which shall specifically identify this offence, — a description broad enough to include all cases punishable under this description, without including acts which are not punishable. Without attempting to review and reconcile all the cases, we are of opinion, that as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. We use the terms 'criminal or unlawful,' because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment." See 4 Met. 121–123. And see People *v.* Mather, 4 Wend. 229, 259; State *v.* Rowley, 12 Conn. 101; Com. *v.* Carlisle, 1 Journ. Jurisp. 225, per Gibson, J.; R. *v.* Vincent, 9 C. & P. 91, per Alderson, B.; R. *v.* Seward, 1 Ad. & El. 713, per Ld. Denman. As to conspiracies to obtain goods under pretence of buying them, in fraud of the vendor, and the mode of charging this offence, see Com. *v.* Eastman, 1 Cush. 189; 1 Leading Cases, 264, and n.; Com. *v.* Shedd, 7 Cush. 514; State *v.* Roberts, 34 Me. 320; State *v.* Hewitt, 31 id. 396; State *v.* Ripley, ib. 386; Hartmann *v.* Com., 5 Barr 60. {In regard to the meaning of the word "unlawful," in the definition of conspiracy, the English law is said in Roscoe's Criminal Evidence, 9th Eng. ed., p. 417, to support the following propositions: —

1°. A combination to commit any crime is an indictable conspiracy.

2°. A combination to commit a civil injury is in many, though it is impossible to say in what, cases.

3°. Combinations to do acts which the courts regarded as outrageous on morality and decency, or as dangerous to the public peace, or injurious to the public interest, have in many cases been held to be conspiracies; and it is there said that the vagueness of the second and third of these propositions leaves so broad a discretion in the hands of the judges that it is hardly too much to say that plausible reasons may be found for declaring it to be a crime to combine to do almost anything which the judges regard as morally wrong or politically or socially dangerous.

While there is no doubt that the cases in the United States are in great conflict on this subject, yet it may be said that the strict construction which is contended for by Judge Redfield, *infra*, § 90 *a*, by which the term "unlawful" is limited to "criminal," is not the general rule. "Illegal" has been used as a synonym for it: Com. *v.* Bliss, 12 Phila. (Pa.) 580. Thus it has been held that a conspiracy to slander a person by accusing him of a criminal act is an indictable conspiracy: State *v.* Hickling, 9 Cent. L. J. (1880), 406. And for a member of a firm to combine with a third party to issue and put into circulation the notes of the firm drawn by such partner for the purpose of paying his individual debts: State *v.* Cole, 39 N. J. L. 324. In the recent case of Com. *v.* Waterman, 122 Mass. 43, it was held that a conspiracy to cause it falsely to appear of record that a certain person is lawfully married to one of the parties, and to obtain for that purpose from a justice of the peace a false certificate of marriage, duly recorded by means of false personation and false representations, followed by false assertions of other parties to the conspiracy that they were present as witnesses at the ceremony, with intent to injure and prevent such person from contracting any other marriage, is an indictable offence. The question of the meaning of the word "unlawful" was then discussed by Colt., J., and he says that many acts not punishable by indictment have been held to come within this definition, citing mostly criminal cases. But cf. Com. *v.* Hunt, Thach. Crim. Cas. 609, and Com. *v.* Boynton, ib. 640; State *v.* Burnham, 15 N. H. 396.}

[2] 4 Met. 123, per Shaw, C. J.; R. *v.* Armstrong, 1 Vent. 304.

for the purpose of prostitution, the conspiracy is a criminal offence, though the act itself be not indictable.[3]

§ 90. **Objects of Conspiracy.** The *objects* of this crime, though numerous and multiform, may be classified as follows: 1st. *To perpetrate an offence which is already punishable by law;* as, for example, to commit a murder or other felony, or a misdemeanor, such as to vilify the government and embarrass its operations; or to sell lottery-tickets when forbidden by law; and the like.[1] And here it may be observed, that where the conspiracy to commit a felony is carried into effect, the crime of conspiracy, which is a misdemeanor, is merged in the higher offence of felony; but that if the object of the conspiracy be to commit a misdemeanor only, and it be committed, the offence of conspiracy is not merged, but is still separately punishable.[2] 2dly. *To injure a third person* by charging him with a *crime*, or with any other act *tending to disgrace and injure him*, or with intent to *extort money* from him by putting him in fear of disgrace or harm; or by *defrauding him* of his property, or ruining his *reputation*, *trade*, or *profession*. Of this class are conspiracies to indict a man of a crime, in order to extort money from him;[3] or falsely to charge a man with the paternity of a bastard child;[4] or with fraudulently abstracting goods from a bale;[5] or, to make him drunk in order to cheat him;[6] or, to impose inferior goods upon another, as and for goods of another and better kind, in exchange for goods of his own;[7] or, to impoverish a man by

[3] {State *v.* Norton, 3 Zabr. (N. J.) 33 ;} [State *v.* Powell, 28 S. E. 525, N. C ;] R. *v.* Delaval, 3 Burr. 1434 ; 1 Leading Crim. Cases, 457 ; R. *v.* Mears, 15 Jur. 56 ; 1 Leading Crim. Cases, 462 ; 4 Cox C. C. 423 ; 2 Denison C. C. 79 ; Temple & Mew C. C. 414 ; 1 Eng. Law & Eq. 581 ; R. *v.* Lord Grey, 1 East P. C. 460 ; Mifflin *v.* Com., 5 W. & Serg. 561 ; Anderson *v.* Com., 5 Rand. 627 ; Respublica *v.* Hevice, 2 Yeates 114 ; State *v.* Murphy, 6 Ala. 765.

[1] Com. *v.* Crowninshield, 10 Pick. 497 ; R. *v.* Vincent, 9 C. & P. 91 ; Com. *v.* Kingsbury, 5 Mass. 106 ; State *v.* Buchanan, 5 H. & J. 317.

[2] Ibid. : People *v.* Mather, 4 Wend. 265 ; State *v.* Murray, 15 Me. 100. [A conspiracy to commit a felony outside the jurisdiction is a misdemeanor: Thompson *v.* State, 106 Ala. 67.]

[3] R. *v.* Hollingberry, 4 B. & C. 329 ; 6 D. & R. 345. If the object be to extort money from him, it is immaterial whether the charge be true or false : ib. And see Wright *v.* Black, Winch. 28, 54.

[4] 1 Hawk. P. C. c. 72, § 2 ; R. *v.* Best, 2 Ld. Raym. 1167. And see Com. *v.* Tibbetts, 2 Mass. 536.

[5] R. *v.* Rispal, 3 Burr. 1320 ; 1 W. Bl. 368.

[6] State *v.* Younger, 1 Dever. 357.

[7] R. *v.* Macarty, 2 Ld. Raym. 1179 ; State *v.* Rowley, 12 Conn. 101. So, to defraud a trader of his goods by false pretences. If the parties conspire to obtain money by false pretences of existing facts, it is no objection to the indictment for conspiracy, that the money was to be obtained through the medium of a *contract;* R. *v.* Kendrick, 5 Q.

preventing him from working at his trade;[8] or, to defraud a corporation.[9] But it is said, that if the act to be done is merely a civil trespass, such as to poach for game,[10] or to sell an unsound horse with a false warranty of soundness,[11] an indictment will not lie. 3dly. To do an act tending to *obstruct*, *pervert*, or *defeat the course of public justice*. Hence it is an indictable offence to conspire to obtain from magistrates a false certificate that a highway is in good repair, in order to influence the judgment to be pronounced against the parish for not repairing;[12] or, to dissuade a witness from attending court and giving evidence;[13] or, to procure false testimony; or, to affect and bias witnesses by giving them money;[14] or, to publish a libel or handbills, with intent to influence the jurors who might try a cause;[15] or, to procure certain persons to be placed upon the jury.[16] 4thly. To do an act, *not unlawful in an individual*, but with intent either to accomplish it by *unlawful means*, or to carry into effect a design of *injurious tendency to the public*. Of this nature are conspiracies to maintain each other, right or wrong;[17] or, to raise the price of stocks or goods by artificial excitement beyond what they would otherwise bring.[18] So, where certain brokers agreed together, before a sale at auction, that only one of them should bid on each article sold, and that the articles purchased should afterwards be sold again by themselves, and the proceeds divided, it was held a conspiracy.[19] So,

B. 49 ; Dav. & M. 208. And see R. *v.* Button, 12 Jur. 1017 ; R. *v.* Gompertz, 9 Q. B. 824; 2 Cox C. C. 145 ; Com. *v.* Ward, 1 Mass. 473.

[8] R. *v.* Eccles, 1 Leach C. C. (4th ed.) 274 ; [State *v.* Dyer, 67 Vt. 690.]

[9] State *v.* Buchanan, 5 Har. & J. 317 ; Com. *v.* Warren, 6 Mass. 74 ; Lambert *v.* People, 7 Cowen 166.

[10] R. *v.* Turner, 13 East 228. This case has been overruled. See *infra*, § 90 *a*, n.

[11] R. *v.* Pywell, 1 Stark. 402. See *infra*, § 90 *a*.

[12] R. *v.* Mawbey, 6 T. R. 619.

[13] R. *v.* Steventon, 2 East 362. So, to destroy evidence : State *v.* De Witt, 2 Hill (S. C.) 282. [And see *Re* Quarles, 158 U. S. 532.]

[14] R. *v.* Johnson. 2 Show. 1 ; [U. S. *v.* Van Leuven, 65 F. 78.]

[15] R. *v.* Gray, 1 Burr. 510 ; R. *v.* Jolliffe, 4 T. R. 285 ; R. *v.* Burdett, 1 Ld. Raym. 148.

[16] R. *v.* Opie, 1 Saund. 301. {A conspiracy to procure certain persons to violate a statute, for the purpose of extorting money from them by compounding their offences, is indictable, whether the illegal acts were procured or not : Hazen *v.* Com., 23 Pa. 355. *Aliter*, if the object be to secure the detection of suspected offenders : ibid.}

[17] The Poulterers' Case, 9 Co. 56.

[18] R. *v.* De Berenger, 3 M. & S. 68 ; R. *v.* Norris. 2 Ld. Ken. 300 ; R. *v.* Hilbers, 2 Chitty 163 ; [People *v.* Milk Exchange, 145 N. Y. 267 ; People *v.* Sheldon, 139 id. 251 ; U. S. *v.* Hopkins, 82 F. 529 ; U. S. *v.* Trans-Missouri Freight Ass'n, 166 U.S. 290. Combinations in restraint of trade are often made conspiracies by statute, and if unreasonable are illegal at common law.]

[19] Levi *v.* Levi, 6 C. & P. 239.

if the workmen of any trade conspire to raise the price of wages by the adoption of rules with penalties, or other unlawful means of coercion;[20] or, if the masters in like manner conspire to reduce them.[21] 5thly. *To defraud and cheat the public* or *whoever may be cheated.* Of this class are conspiracies to manufacture base and spurious goods, and sell them as genuine;[22] and conspiracies to raise the market prices by false news and artificial excitements, as already mentioned; and conspiracies to smuggle goods in fraud of the revenue;[23] or to defraud traders of their goods by false pretences;[24] and the like.

[§ 90 *a.* **Same Subject.** Without attempting to reconcile all the cases, a task nearly hopeless in the present undefined state of the law of conspiracy, a general rule may be deduced from the current of well-considered cases, that an indictable conspiracy must be a corrupt confederation to promote an evil in some degree *criminal*, or to effect some wrongful end by means having some degree of *criminality.* Although in some cases, it has been said, that, if the end is *unlawful*, concerted action to promote it is indictable,[1] yet the word "unlawful" is to be taken in the sense of *criminal*,[2] as it is unlawful to commit a trespass; still no indictment will lie for a conspiracy to commit such a civil injury.[3] Indeed, unless some element of a criminal nature enters into either the means to be used or the purpose to be effected, no indictment will lie for a conspiracy to do a private injury when a civil action will afford redress. As examples of

[20] People *v.* Fisher, 14 Wend. 9; Com. *v.* Hunt, 4 Met. 111; R. *v.* Bykerdyke, 1 M. & Rob. 179.

[21] Per Ld. Kenyon, in R. *v.* Hammond, 2 Esp. 719, 720.

[22] Com. *v.* Judd, 2 Mass. 329.

[23] R. *v.* Blake, 8 Jur. 145; ib. 666; 6 Q. B. 126.

[24] King *v.* R., 9 Jur. 833; 7 Q. B. 782; R. *v.* Roberts, 1 Campb. 399. {As to whether a conspiracy to cheat and defraud an individual of his goods or lands is indictable at common law, without specifying the means or proving that they were criminal, see R. *v.* Gompertz, 9 Q. B. 824; Sydserff *v.* R., 11 id. 245; R. *v.* Gill, 2 B. & Ald. 204; People *v.* Richards, 1 Mich. 216; Alderman *v.* People, 4 id. 414; People *v.* Lambert, 9 Cowen 578; Com. *v.* Shedd, 7 Cush. (Mass.) 514; Com. *v.* Eastman, 1 id. 189; State *v.* Roberts, 34 Me. 320.}

[1] Com. *v.* Hunt, 4 Met. 111; O'Connell *v.* R., 11 Cl. & Fin. 155; 9 Jur. 25.

[2] Com. *v.* Shedd, 7 Cush. 514. ["Criminal" and "unlawful" are used disjunctively in Drake *v.* Stewart, 40 U. S. App. 173.]

[3] R. *v.* Pywell, 1 Stark. 402; R. *v.* Turner, 13 East 228. The authority of R. *v.* Pywell has been shaken (R. *v.* Kenrick, 5 Q. B. 62); but not upon this point. R. *v.* Turner, cited with approbation in Com. *v.* Hunt, 4 Met. 111, has been distinctly overruled; R. *v.* Rowlands, 5 Cox C. C. 490; 2 Denison C. C. 388; 9 Eng. Law & Eq. 292; upon the ground that the indictment charged an agreement to commit an indictable offence as well as the use of unlawful means, to wit, armed numbers prepared for resistance by force. And see State *v.* Rickey, 4 Halst. 293; *In re* Turner, 9 Q. B. 80; R. *v.* Daniell, 6 Mod. 99. {See R. *v.* Carlisle, 25 Eng. L. & Eq. 577.}

the means, a concert by *numbers* to destroy a man's reputation, or by false accusation to cause one wrongfully to pay money; or, as to the end, to take away a female for the purposes of prostitution, this being an offence punishable in the ecclesiastical courts;[4] or, to do something which may affect the public mediately or immediately.[5] There is, however, a disposition in the courts not to extend the law of conspiracy beyond its present limits, and to confine it, as is believed, within the definition above given.[6]]

§ 91. **Unlawful Combination, Gist of the Offence.** The *essence* of this offence consists in the *unlawful agreement and combination* of the parties; and, therefore, it is completed whenever such combination is formed, although no act be done towards carrying the main design into effect.[1] If the ultimate design was

[4] R. *v.* Delaval, 3 Burr. 1434; 1 Leading Crim. Cases, 457; R. *v.* Lord Grey, 9 Howell St. Tr. 127.

[5] R. *v.* De Berenger, 3 M. & S. 67.

[6] Com. *v.* Hunt, 4 Met. 124; Com. *v.* Eastman, 1 Cush. 189; 1 Leading Crim. Cases, 264. {A combination to induce a witness to go from one State to another to testify, by means of pecuniary inducements, is not a conspiracy, unless the design is to induce him to testify falsely; and therefore the acts and declarations of one of the persons so combining are not admissible in evidence against the others: Com. *v.* Smith, 11 Allen 243.}

[1] {Heine *v.* Com., 91 Pa. St. 145; State *v.* Burnham, 15 N. H. 396; Com. *v.* Gillespie, 7 S. & R. (Pa.) 469; People *v.* Clark, 10 Mich. 310; State *v.* Adams, 1 Del. Cr. 361. [*Contra*, U. S. *v.* Barrett, 65 F. 62; U. S. *v.* Newton, 52 id. 275.] But in several States statutes have been enacted by which the agreement and combination is not indictable till some overt act has been done in furtherance of it. Thus, in New Jersey, to constitute a crime of this class something more than the unexecuted agreement between the persons combining must have occurred. This modification of the old law has been introduced by the statutory provision which now stands as section 191 of the Crimes Act of that State, and which declares that combination to do certain acts, among which is specified the cheat of obtaining money by false pretences, shall be deemed conspiracy, and to this declaration is added a qualification, in these words, viz.: "But no agreement to commit any offence, other than murder, manslaughter, sodomy, rape, arson, burglary, or robbery, shall be deemed a conspiracy unless some act in execution of such agreement be done to effect the object thereof by one or more of the persons to such agreement." N. J. Rev. p. 261. The effect of this qualification is to make the doing of an overt act a necessary part of the crime of conspiracy except as stated above: Wood *v.* State, 47 N. J. L. 180; [State *v.* Barr, 40 A. 772, N. J. L.] So the statute of New York has modified the common law in this respect, by requiring that to constitute the crime of conspiracy, there must be both an agreement and an overt act to effect the object of the agreement, except where the conspiracy is to commit certain felonies specified: N. Y. Penal Code, § 171.

The formation of a design by two or more persons is never simpliciter a criminal conspiracy. This may be and often is perfectly innocent. The criminal quality resides in the intention of the parties to the agreement, construed in connection with the purpose contemplated. The mere fact that the conspiracy has for its object the doing of an act which may be unlawful, followed by the doing of such act, does not constitute the crime of conspiracy unless the jury find that the parties were actuated by a criminal intent. In many cases this inference would be irresistible, in others the jury might find that, although the object of the agreement and the overt act were unlawful, nevertheless the parties charged acted under a misconception or in ignorance, without any actual criminal motive. If that conclusion should be reached by the jury, then whatever criminal penalties the parties might have incurred, the crime of conspiracy would

unlawful, it is of no importance to the completeness of the offence, whether the means were lawful or not; as, for example, in a conspiracy to extort money from a man by means of a criminal charge, the conspiracy for this object is criminal, whether he be guilty or not of the offence imputed to him. On the other hand, if the ultimate object is not unlawful, the combination to effect it is not an offence, unless the means intended to be employed are unlawful.[2]

§ 92. **Mode of Proof.** We have shown, in a preceding volume, that, in *proving this offence*, no evidence ought, in strictness, to be given of the acts of strangers to the record, in order to affect the defendants, until the fact of a conspiracy with them is first shown, or until at least a *prima facie* case is made out either against them all, or against those who are affected by the evidence proposed to be offered; and that of the sufficiency of such *prima facie* case, to entitle the prosecutor to go into other proof, the judge, in his discretion, is to determine. But this, like other rules in regard to the *order* in which testimony is to be adduced, is subject to exceptions, for the sake of convenience; the judge sometimes permitting evidence to be given, the relevancy of which is not apparent at the time when it is offered, but which the prosecutor or counsel shows will be rendered so, by other evidence which he undertakes to produce.[1] Accordingly, it is now well settled in England, and such is conceived to be the rule of American law, that on a prosecution for a crime to be proved by conspiracy, general evidence of a con-

not have been established and the defendant would be entitled to an acquittal. The actual criminal or wrongful purpose must accompany the agreement, and if that is absent the crime of conspiracy has not been committed: People *v.* Flack, 125 N. Y. 332. A peculiar case occurred in Massachusetts, Com. *v.* McParland, 145 Mass. 378, in which the defendants were alleged to have conspired and agreed that one Weeks, apparently a stranger to the agreement, and ignorant of it, should make a complaint, against the defendant, Byers, before a trial justice, for keeping a nuisance, and further to have conspired and agreed to cause Byers to be acquitted upon the complaint, and to aid one another in the putting into execution their alleged conspiracy. These were the only acts which the defendants were alleged to have conspired to do. The court held that no indictable offence was alleged.}

[2] R. *v.* Best, 2 Ld. Raym. 1167; 1 Salk. 174; R. *v.* Spragg, 2 Burr. 993; R. *v.* Rispal, 3 id. 1320; O'Connell *v.* R., 11 Cl. & Fin. 155; 9 Jur. 25. {The unlawful conspiracy is the gist of the offence, and therefore it is not necessary to allege or prove the execution of the agreement: State *v.* Noyes, 25 Vt. 415. A common design is the essence of the charge of conspiracy; and this is made to appear where the parties steadily pursue the same object, whether acting separately or together by common or different means all leading to the same unlawful result: U. S. *v.* Cole, 5 McLean C. C. 513. See also Com. *v.* Edwards, 135 Pa. St. 478.}

[1] See *ante*, Vol. I. § 51 *a*; ib. § 111; 2 Stark. Evid. 234; 4th Am. ed. *406; R. *v.* Hammond, 2 Esp. 719; {U. S. *v.* Cole, 5 McLean C. C. 513; People *v.* Brotherton, 47 Cal. 388.}

spiracy may in the first instance be received as a preliminary to the proof that the defendants were guilty participators in that conspiracy; but, in such cases, the general nature of the whole evidence intended to be adduced should be previously opened to the court, so that the judge may form an opinion as to the probability of affecting the individual defendants by particular proof, applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if, upon such opening, it should manifestly appear that no particular proof, sufficient to affect the defendants, is intended to be adduced, it would be the duty of the judge to stop the cause *in limine*, and not to allow the general evidence to be received.[2]

§ 93. **Evidence generally circumstantial.** The *evidence* in proof of a conspiracy will generally, from the nature of the case, be *circumstantial*. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion, that they were engaged in a conspiracy to effect that object.[1] Nor is it necessary to prove that the conspiracy originated with the defendants; or that they met during the process of its concoction; for every person, entering into a conspiracy or common design already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design.[2]

§ 94. **Declarations and Acts of Co-conspirators.** The *principle*

[2] The Queen's Case, 2 Brod. & Bing. 310, by all the judges. And see R. *v.* Frost, 9 C. & P. 129; R. *v.* Hunt, 3 B. & Ald. 566; 2 Russ. on Crimes, 699, 700; 5th (Eng.) ed. vol. iii. 144, 145.

[1] R. *v.* Murphy, 8 C. & P. 297, per Coleridge, J. And see Com. *v.* Ridgway, 2 Ashm. 247; {U. S. *v.* Doyle, 6 Sawy. C. C. 612; Mussell Slough Case, 5 Fed. Rep. 680; [State *v.* Mushrush, 97 Iowa 444; Farley *v.* Peebles, 50 Neb. 723.] See U. S. *v.* Cole, 5 McLean C. C. 513; [*ante*, Vol. I. § 233.]

And if there is any competent evidence of the conspiracy it is the duty of the court to submit it to the jury to say whether a conspiracy was in fact formed or not: Bloomer *v.* State, 48 Md. 521.}

[2] Ibid. And see *ante*, Vol. I. § 111, and cases there cited; R. *v.* Cope, 1 Stra. 144; R. *v.* Parsons, 1 W. Bl. 393; R. *v.* Lee, 2 McNally on Evid. 634; R. *v.* Hunt, 3 B. & Ald. 566; R. *v.* Salter, 5 Esp. 225; Com. *v.* Warren, 6 Mass, 74; People *v.* Mather, 4 Wend. 259; [People *v.* Peckens, 153 N. Y. 576; State *v.* Clark, 9 Houst. 536; U. S. *v.* Cassidy, 67 F. 698.]

on which the *acts and declarations of other conspirators*, and acts done at different times, are admitted in evidence against the persons prosecuted, is, that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by any one in furtherance of that design, a part of the *res gestæ*, and therefore the act of all.[1] It is the same principle of identity with each other that governs in regard to the acts and admissions of agents when offered in evidence against their principals, and of partners, as against the partnership, which has already been considered.[2] And here, also, as in those cases, the evidence of what was said and done by the other conspirators must be limited to their acts and declarations made and done while the conspiracy was pending, and in furtherance of the design; what was said or done by them before or afterwards not being within the principle of admissibility.[3]

§ 95. **When the Method must be stated and proved.** Where the conspiracy was to do an act in itself unlawful, the *means* intended to be employed to effect the object are not usually stated in the indictment; nor is it necessary, in such case, to state them;[1] but if the conspiracy was carried out, to the full accomplishment of its object, it is necessary to state what was done, and the persons who were thereby injured or defrauded; and if property was wrongfully obtained, to state what and

[1] {For this reason the conspiracy must be proved *prima facie*, or the counsel for the prosecution must undertake to produce evidence of the conspiracy subsequently, in order to let in the acts and declarations of conspirators against the defendant: Davis *v.* State, 9 Tex. App. 363; Avery *v.* State, 10 id. 199. See also the cases *infra*, note 3.} [It is no defence that the acts were performed by a conspirator who was of unsound mind: Tucker *v.* Hyatt, 51 N. E. 469, Ind.]

[2] See *ante*, Vol. I. §§ 108–114, [184 *a*]; R. *v.* Salter, 5 Esp. 125; Collins *v.* Com., 3 S. & R. 220; State *v.* Soper, 16 Me. 293; Aldrich *v.* Warren, ib. 465; R. *v.* Shellard, 9 C. & P. 277; R. *v.* Blake, 6 Q. B. 126; R. *v.* Stone, 6 T. R. 528. And see Hardy's Case, 24 Howell's St. Tr. 199.

[3] Ibid.; R. *v.* Murphy, 8 C. & P. 297; R. *v.* Shellard, 9 id. 277; {People *v.* Kief, 126 N. Y. 662; People *v.* McQuade, 110 id. 307; Com. *v.* Ratcliffe, 130 Mass. 36; Marwilsky *v.* State, 9 Tex. App. 377; Davis *v.* State, ib. 633; Miller *v.* Com., 78 Ky. 15; Heine *v.* Com., 91 Pa. St. 145; People *v.* Aleck, 9 Pac. C. L. J. p. 807; Wilson *v.* People, 94 Ill. 299.

But on a joint trial of two for conspiracy, declarations of one made after the design was completed and abandoned are *admissible*, because they tend to connect him with the conspiracy; but the judge should instruct the jury that these declarations have *no weight* as evidence to prove the other guilty of conspiracy: Jones's Case, 31 Gratt. (Va.) 836.}

[1] {Twitchell *v.* Com., 9 Pa. St. 211; Hazen *v.* Com., 23 id. 355; People *v.* Richards, 1 Mich. 216; People *v.* Clark, 10 id. 310; State *v.* Bartlett, 30 Me. 132; Com. *v.* Warren, 6 Mass. 72; State *v.* Parker, 43 N. H. 83.}

whose property it was. If, however, in the former case, the means to be employed are set forth, it is conceived that the prosecutor is bound to prove the allegation, as he certainly ought to do, in the latter case. So, if the object to be effected was not unlawful, but the means intended to be employed were unlawful, it is obvious that, as the criminality of the design consists in the illegality of the means to be resorted to for its accomplishment, these means must be described in the indictment, and proved at the trial.

§ 96. **Evidence confined to the Allegations.** In the proof of this offence, as well as of others, the evidence will be *confined to the particular allegations* in the indictment. Thus, if the indictment charges an intent to defraud J. S. *and others*, of their goods, and it appears at the trial that J. S. was one of a commercial house, the evidence must be confined to J. S. and *his partners;* and evidence of an intent to defraud any other persons is inadmissible.[1] So, if the alleged intent be to defraud A, evidence of an intent to defraud the public generally, or whoever might be defrauded, will not support the allegation.[2] But if the alleged intent be to accomplish several illegal objects, it will not be necessary to prove all the particulars of the charge; but it will be sufficient if a conspiracy to effect any one of the illegal objects, mentioned in the indictment, be proved.[3] So, if an intent be alleged to prevent *the workmen* of A from continuing to work, it is proved by evidence of an intent to prevent any from so continuing.[4] So, if the indictment be against journeymen for a conspiracy to prevent their employers from taking *any apprentices*, it will be proved by evidence of their having quitted their employment, with intent to compel their employers to dismiss *any person* as an apprentice.[5] And if the indictment contain allegations of several illegal acts done, pursuant to the conspiracy, on a *certain day*, evidence is admissible of *such* acts, done on *different days*.[6]

[2] 2 Russ. on Crimes, 694, 695, n.; 5th (Eng.) ed. Vol. III. pp. 131, 132; R. *v.* Parker, 6 Jur. 822; 3 Q. B. 292; 2 G. & D. 709. {Alderman *v.* People, 4 Mich. 414; People *v.* Clark, 10 id. 310; State *v.* Noyes, 25 Vt. 415; Com. *v.* Eastman, 1 Cush. (Mass.) 414.}

[1] R. *v.* Steele, Car. & Marsh. 337; 2 Moody C. C. 246.

[2] Com. *v.* Harley, 7 Met. 506; Com. *v.* Kellogg, 7 Cush. 473; *ante*, § 17, n.

[3] O'Connell *v.* R., 11 Cl. & Fin. 155; 9 Jur. 25.

[4] R. *v.* Bykerdyke, 1 M. & Rob. 179.

[5] R. *v.* Ferguson, 2 Stark. 489.

[6] R. *v.* Levy, 2 Stark. 458. And see R. *v.* Charnock, 4 St. Tr. 570. {In People *v.* Arnold (Mich. Sup. Ct., June, 1881), 3 Crim. L. Mag. p. 62, the question was raised

§ 97. **Effect of Death or Acquittal of one of the Parties.** If two only be charged with a conspiracy, and one be acquitted, the other must also be acquitted, though he be guilty of doing the act charged; for it will be no conspiracy, however otherwise it may be criminal. And if one of several defendants charged with this offence be acquitted, the record of his acquittal is admissible in evidence, in favor of another of the defendants, subsequently tried.[1] But if two be indicted, and one die before the trial; or if three be indicted, and one be acquitted and the other die; this is no defence for the other.[2] Nor is it exceptionable that one is indicted alone, if the charge be of a conspiracy with other persons to the jurors unknown.[3]

§ 98. **Husband and Wife.** The wife of one of several conspirators is not admissible as a witness for the others; the acquittal of the others being a ground for discharging her husband. Nor is she a competent witness against him.[1] And it is said that if a man and woman are jointly indicted for a conspiracy, proof that they were husband and wife will generally be a complete defence against the charge; on the ground, that being regarded as one person in law, the husband alone is responsible for the act done.[2] But indictments against the husband and wife, for this offence, have been supported, where *others* were indicted jointly with them.[3] And if the conspiracy

whether the allegation of an overt act would aid a defective charge of conspiracy when the allegation itself is unnecessary and, if defective, might be treated as surplusage. Cooley, C. J., expresses his personal opinion to be that such an allegation would cure the defective charge, on the authority of R. *v.* Spragg, 2 Burr. 993, but the court held that it would not. Cf. R. *v.* King, 7 Q. B. 795, 809.]

[1] R. *v.* Tooke, 1 Burn's Just. 823 (Chitty's ed.); State *v.* Tom, 2 Dev. 569. [If all be convicted, and a new trial be granted on grounds applicable only to one, it must be granted to all; but if some be convicted and others acquitted, a new trial may be granted to the former without disturbing the verdict as to the latter: R. *v.* Gompertz, 9 Q. B. 824.]

[2] People *v.* Olcott, 2 Johns. Cas. 301; R. *v.* Kinnersley, 1 Stra. 193; R. *v.* Niccolls, 2 id. 1227.

[3] People *v.* Mather, 4 Wend. 229, 265. In a very recent case, in the Court of Queen's Bench, the indictment charged A, B, and C with conspiring together and "with divers other persons to the jurors unknown." The jury found that A had conspired with either B, or C, but that they could not say with which. The evidence at the trial applied only to A, B, and C. On this finding it was held that A was entitled to an acquittal: R. *v.* Thompson, 20 L. J. M. C. 183; 5 Cox C. C. 166; 4 Eng. Law & Eq. 287.

[1] Com. *v.* Robinson, 1 Gray 555; Com. *v.* Marsh, 1 Leading Crim. Cases, 124, n.; R. *v.* Locker, 5 Esp. 107; R. *v.* Serjeant, Ry. & M. 352; R. *v.* Smith, 1 Moody C. C. 289; 1 Hawk. P. C. c. 41, § 13; Com. *v.* Easland, 1 Mass. 15; Pullen *v.* People, 1 Doug. (Mich.) 48. But see State *v.* Anthony, 1 McCord 285. See further, as to the competency of the wife, *ante*, Vol. I. §§ [333 *c*–346] 407 and cases there cited.

[2] [State *v.* Clark, 9 Houst. 536.]

[3] Com. *v.* Wood, 7 Law Rep. 58; R. *v.* Locker, 5 Esp. 107.

were concocted before the marriage, their subsequent marriage is no defence.[4]

§ 99. **Good Faith a Defence.** In some cases, the correspondence between the defendants may be read in exculpation of one of them. Thus, where two persons were indicted of a conspiracy to defraud a third person of his money, by inducing him to lend it to one of them upon a false representation of his titles to certain estates; and the latter had left the country, and the other defended himself on the ground that his co-defendant had made the same representations to him, and led him to believe them to be true, and his titles valid; the correspondence between them on this subject was held admissible, to show that the party on trial was in fact the dupe of the other, and had acted in good faith.[1]

[4] In R. *v.* Robinson and Taylor, 1 Leach C. C. (4th ed.) 37, 2 East P. C. 1010, a servant-woman conspired with a man, that he should personate her master, and marry her, with intent fraudulently to raise a specious title to his property, and the marriage was accordingly celebrated; for which they were afterwards indicted and convicted, and the conviction was held good.

[1] R. *v.* Whitehead, 1 C. & P. 67.

EMBRACERY.[1]

§ 100. **Definition.** The crime of *embracery*, which is an offence against public justice, consists in attempting to corrupt, instruct, or influence a jury beforehand, or to incline them to favor one side of a cause in preference to the other, by promises, persuasions, entreaties, letters, money, entertainments, and the like; or by any other mode except by the evidence adduced at the trial, the arguments of counsel, and the instructions of the judge.[2] The giving of money to another, to be distributed among the jurors, and procuring one's self or others to be returned as talesmen, in order to influence the jurors, are also offences of this description.[3] It may also be committed by one

[1] [See also Bribery, *ante*, §§ 71–73.] An indictment for embracery may be in this form: —

The jurors (etc.), on their oath present, that A. B., of ——, on ——, at ——, in said county of ——, knowing that a certain jury of said county of —— was then duly returned, impanelled, and sworn to try a certain issue in the —— (*describing the court*), then held and in session according to law at —— aforesaid, in and for said county of ——, between C. D., plaintiff, and E. F., defendant, in a plea of ——; and then also knowing that a trial was about to be had of the said issue in the court last aforesaid, then in session as aforesaid; and unlawfully intending to hinder a just and lawful trial of said issue by the jury aforesaid, returned, impanelled, and sworn as aforesaid to try the same, on ——, at ——, in the county aforesaid, unlawfully, wickedly, and unjustly, on behalf of the said E. F., the defendant in said cause, did solicit and persuade one G. H., one of the jurors of said jury returned, impanelled, and sworn as aforesaid, for the trial of said issue, to appear, attend, and give his verdict in favor of the said E. F., the defendant in said cause; and then and there did utter to the said G. H., one of said jurors, divers words and discourses by way of commendation of the said E. F., and in disparagement of the said C. D., the plaintiff in said cause; and then and there unlawfully and corruptly did move and desire the said G. H. to solicit and persuade the other jurors, returned, impanelled, and sworn to try the said issue, to give their verdict in favor of the said E. F., the defendant in said cause, the said A. B. then and there well knowing the said G. H. to be one of the jurors returned, impanelled, and sworn as aforesaid; against the peace, etc.

Some precedents of indictments for this offence contain an allegation, that the jury gave their verdict for the defendant by reason of the words, discourses, etc., spoken. But this is unnecessary. The crime is complete by the attempt, whether it succeed or not: Hawk. P. C. b. 1, c. 85, §§ 1, 2; 1 Deacon, Crim. Law, 378.

[2] 4 Bl. Comm. 140; 1 Deacon, Crim. Law, 378; 1 Russ. on Crimes, 182, 5th (Eng.) ed. 360; 1 Inst. 369 *a*; 1 Hawk. P. C. c. 85, § 1; Gibbs *v.* Dewey, 5 Cowen 503. See Knight *v.* Freeport, 13 Mass. 218. [As to the nature of the offence, see *Re* Haymond, 53 P. 899, Cal. The offence is complete when the attempt is made: State *v.* Williams, 163 Mo. 293.]

[3] 1 Hawk. P. C. c. 85, § 3; R. *v.* Opie, 1 Saund. 301; 1 Russ. on Crimes, 182, 5th (Eng.) ed. 360.

of the jurors, by the above corrupt practices upon his fellows. It is not material to this offence that any verdict be rendered in the cause; nor whether it be true or false, if rendered.

§ 101. **Specific Facts must be alleged.** As this offence cannot be prosecuted under a general charge, but the acts constituting the crime must be specifically set forth in the indictment, the proof on either side will consist of evidence proving or disproving the commission of the acts set forth as done by the defendant.

FORGERY.

§ 102. **Common-law Offence.** In all the United States, this offence is punishable by statute; but it is conceived that these statutes do not take away the character of the offence, as a crime or misdemeanor at common law, but only provide additional punishments, in the cases particularly enumerated in the statutes.[1] By the common law, every forgery is at least a misdemeanor, though some, such as forgeries of royal charters, writs, etc., were felonies, and in some cases were punished as treasons.[2]

§ 103. **What constitutes Forgery.** It seems to have been the opinion of some of the old writers on criminal law that forgery could not be committed of a private writing, unless it was under seal; but this opinion has long since been discarded; and it is now well settled that forgery, in the sense of the common law, may be *defined* as "the fraudulent making or alteration of a writing, to the prejudice of another man's right."[1] It may

[1] Com. *v.* Ayer, 3 Cush. 150; State *v.* Ames, 2 Greenl. 365.

[2] This distinction is mentioned by Glanville, the earliest of the common-law authors, who wrote in the time of Henry II., about the year 1180. He observes that "the crime of falsifying, in a general sense, comprises under it many particular species, as, for example, false charters, false measures, false money, and others of a similar description." And he adds, "that if a person should be convicted of falsifying a charter, it becomes necessary to distinguish whether it be a royal or a private charter," because of the diversity of punishments which he mentions; the former being punishable as treason, and the latter by the loss of members only: Glanville, b. 14, c. 7. The same distinction is alluded to by Bracton, lib. 3, c. 3, § 2, and c. 6, and in the Mirror, c. 4, § 12. Falsifying the seal of one's lord was also punishable capitally, as treason; but forgeries less heinous were punished by the pillory, tumbril, or loss of members; as appears from Britton, c. 4, § 1; ib. c. 8, §§ 4, 5; Fleta, lib. 1, c. 22; ib. lib. 2, c. 1; 3 Inst. 169; 2 Ld. Raym. 1464. And see 2 Russ. on Crimes, 357, 358; Com. *v.* Boynton, 2 Mass. 77.

[1] 4 Bl. Comm. 247. Forgery at common law is defined by Russell (2 Crim. Law, 318, 5th (Eng.) ed. 618), and his definition has been adopted by the Supreme Judicial Court of Massachusetts, to be "a false making, or making *malo animo*, of any written instrument, for the purpose of fraud and deceit:" Com. *v.* Ayer, 3 Cush. 150. And see R. *v.* Ward, 2 Ld. Raym. 1461; 2 Russ. on Crimes, 318, 357, 358, 5th (Eng.) ed. 613, 672, 673; Alison's Crim. Law of Scotland, p. 371. {Forgery may be of a printed or engraved, as well as of a written, instrument: Com. *v.* Ray, 3 Gray (Mass.) 441. But it must be of some document or writing; therefore the painting an artist's name in the corner of a copy of a picture, in order to pass it off as an original picture by that artist, is not a forgery: R. *v.* Closs, 3 Jur. N. S. 1309. The writing of a letter of

be committed of any writing, which, if genuine, would operate as the foundation of another man's liability or the evidence of his right, such as a letter of recommendation of a person as a man of property and pecuniary responsibility;[2] an order for the delivery of goods;[3] a receipt;[4] or a railway pass;[5] as well as a bill of exchange or other express contract.[6] So, it may be com-

introduction bespeaking attentions to the bearer from railroad officials, and promising reciprocation, purporting to be signed by a railroad superintendent, is no forgery: Waterman *v.* People, 67 Ill. 91. But one may be indicted for the forgery of a railroad ticket (R. *v.* Fitch, 9 Cox C. C. 160), or a free pass: Com. *v.* Ray, 3 Gray (Mass.) 441; R. *v.* Boult, 2 C. & K. 604. The instrument forged must in some way affect the legal rights of the supposed signer. It must be in form, and upon its face a valid instrument: Abbott *v.* Rose, 62 Me. 194; Waterman *v.* People, *supra*. It was held in Com. *v.* Carroll, 122 Mass. 16, that if it is proved that a mortgagor pays the mortgagee the amount of his mortgage, and receives back the papers, still if the mortgagor falsely makes out a discharge of the mortgage in the name of the mortgagee, without his knowledge or consent, and for the fraudulent purpose of inducing a third party to grant a loan on the property and take a mortgage on it as security, the jury may, on this proof, convict of forgery. But it has been held that a letter seeking to induce the sale of certain coupons is not the subject of forgery, as it prejudices no one's rights: State *v.* Ward, 7 Baxt. (Tenn.) 76. Nor a memorandum book kept by a judge of probate for his own convenience, and not required by law, entries in which would not affect legal rights: Downing *v.* Brown, 86 Ill. 239.

It was said in Com. *v.* Costello, 120 Mass. 358, that the false making of an instrument merely frivolous, or one which is upon its face clearly void, is not forgery, because from its character it could not have operated to defraud, or been intended for that purpose. But if the instrument is one made with intent to defraud, although before it can have effect other steps must be taken, or other proceedings had upon the basis of it, then the false making is a forgery, notwithstanding such steps may never have been taken, or proceedings had.

See also Van Seckle *v.* People, 29 Mich. 61. In R. *v.* Sharman, Dears. C. C. 285, the false making of a letter of recommendation, by an applicant for a school, purporting to set forth his qualifications for the place, was held to be a forgery. See also R. *v.* Moak, D. & B. C. C. 550. If the instrument forged is not valid upon its face, it must be shown to be so by the proper averments: State *v.* Wheeler, 19 Minn. 98. Cf. Com. *v.* Spilman, 124 Mass. 327;} [Com. *v.* Dunleay, 157 id. 386. Altering a record by an official so as to affect his right to fees is forgery: State *v.* Van Auken, 98 Iowa 674. But a false certificate and jurat to an affidavit by a notary is not: U. S. *v.* Glasener, 81 F. 566. The certificate of a clerk of the recording of a deed may be forged: People *v.* Turner, 113 Cal. 278. It is forgery for a post-office clerk to send a telegram to a book-maker offering a bet on a horse which has won a race, purporting to have been handed in before the news was received, but actually sent afterward: R. *v.* Riley, 1896, 1 Q. B. 309. Fabricating a copy of a decree of divorce is forgery: Murphy *v.* State, 23 S. 719, Miss. Signing another's name to a letter attacking the character of a third person is not forgery: People *v.* Wong Sam, 117 Cal. 29.]

[2] State *v.* Ames, 2 Greenl. 365; State *v.* Smith, 8 Yerg. 151; Com. *v.* Chandler, Thach. Cr. Cas. 187.

[3] People *v.* Fitch, 1 Wend. 198; State *v.* Holly, 2 Bay 262. The false making of an acceptance of a conditional order for the delivery of goods, is forgery at common law: Com. *v.* Ayer, 3 Cush. 150. {A railway company paid its dividends by an order or warrant addressed to the company's banker. The document required the shareholder's indorsement, and it would not be paid by the banker, even to the shareholder himself, without such indorsement. A clerk of the company, having forged an indorsement of the shareholder's name, was held properly convicted of forgery: R. *v.* Autey, 7 Cox Cr. Cas. 329.}

[4] State *v.* Foster, 3 McCord (S. C.) 442; [State *v.* Smith, 46 La. Ann. 1433.] {A person who utters a forged pawnbroker's duplicate may be indicted for uttering a forged receipt: R. *v.* Fitchie, 40 Eng. Law & Eq. 598.}

[5] R. *v.* Boult, 2 C. & K. 604; Com. *v.* Ray, 3 Gray 441.

[6] In Massachusetts, the Society of Odd Fellows has regulations by which a member

mitted by the person's fraudulently writing his own name, where he was not the party really meant, though of the same name;[7] as, where one who was not the real payee of a bill of exchange, but of the same name, indorsed his own name upon it, with intent to give it currency as though it were duly negotiated;[8] or where one claimed goods as the real consignee, whose name was identical with his own, and, in that character, signed over the permit for their landing and delivery to one who advanced him money thereon.[9] So, if one sign a name wholly fictitious, it is forgery.[10] But if there be two persons of the same name, but of different descriptions and addresses, and a bill be directed to one, with his proper address, and be accepted by the other with the addition of his own address, it is not forgery.[11] Nor is this crime committed, where the paper forged appears on its face to be void; as where it was a promise to pay a certain sum in work and labor, with no mention of value received in the note, and no averment of any in the indictment;[12] or where a will is forged, without the requisite number

in sickness is entitled to a weekly allowance of money, upon producing a certificate of a physician. A case recently occurred of a forgery of such a certificate: Com. *v.* Ayer, 3 Cush. 153. {Making a false entry in what purports to be a banker's pass-book, with intent to defraud, is a forgery: R. *v.* Smith, 1 L. & C. C. C. 168.}

[7] [Peel *v.* State, 35 Tex. Cr. R. 308; White *v.* Van Horn, 159 U. S. 3.]

[8] Mead *v.* Young, 4 T. R. 28; and see R. *v.* Parkes, 2 Leach C. C. (4th ed.) 775; 2 East P. C. 963. {The drawer of a check on a bank, which was duly honored and returned to him by the bank, afterwards altered his signature in order to give it the appearance of forgery, and to defraud the bank and cause the payee of the check to be charged with forgery. Held, this alteration was not a forgery: Brittain *v.* Bank of London, 3 F. & F. 465.}

[9] People *v.* Peacock, 6 Cowen 72; [Beattie *v.* National Bank, 174 Ill. 571.]

[10] R. *v.* Bolland, 1 Leach C. C. (4th ed.) 83; 2 East P. C. 958; R. *v.* Taylor, 1 Leach C. C. (4th ed.) 214; 2 East, P. C. 960; R. *v.* Marshall, Russ. & Ry. 75; 2 Russ. on Crimes, 331–340, 5th (Eng.) ed. 640–648. {If one assumes a fictitious name in good faith, and without intending to deceive, such use does not constitute a forgery: R. *v.* Bontien, Russ. & Ry. 260; R. *v.* Peacock, ib. 278, 282. But if one is indicted for forgery in signing a fictitious name, the fact that he has previously used that name for other acts of a fraudulent or criminal nature will not give him such a right to use it as will be a defence to the indictment: Com. *v.* Costello, 120 Mass. 358. But it is not forgery to sign a note with the name of a fictitious firm, the signer falsely representing himself and another to be members thereof: Com. *v.* Baldwin, 21 Law Rep. 562.}

[11] R. *v.* Webb, 3 Brod. & Bing. 228; Bayley on Bills, 605; Russ. & Ry. 405.

[12] People *v.* Shall, 9 Cowen 778; R. *v.* Jones, 1 Leach C. C. (4th ed.) 204; {People *v.* Harrison, 8 Barb. (N. Y.) 560; Com. *v.* Ray, 3 Gray (Mass.) 441; State *v.* Humphreys, 10 Humph. (Tenn.) 442. But where the invalidity is to be made out by proof of some extrinsic fact, the instrument, if good on its face, may be legally capable of effecting a fraud, and the party making the same may be punished: State *v.* Pierce, 8 Iowa 231.} [As where a city warrant, regular on its face, is void for exceeding the constitutional limit of indebtedness: State *v.* Brett, 40 P. 873, Mont.; or an order for payment accompanying an assignment of the unearned salary of a school-teacher is void: People *v.* Munroe, 100 Cal. 664; or a note is barred by the statute of limitations: State *v.* Dunn, 32 P. 621, Or.]

of witnesses.[13] To constitute this offence, it is also essential that there be an *intent to defraud;*[14] but it is not essential that any person be actually defrauded, or that any one act be done towards the attainment of the fruits of the crime, other than making or altering the writing.[15] Nor is it necessary that the party should have had present in his mind an intention to defraud a *particular* person, if the consequences of his act would necessarily or possibly be to defraud *some* person;[16] but there must, at all events, be a possibility of some person being defrauded by the forgery.[17] An intent to defraud the person, who would be liable to discharge the obligation if genuine, is to be

[13] R. *v.* Wall, 2 East P. C. 953. And see 2 Russ. on Crimes, 344, 353–355, 5th (Eng.) ed. 665–668; {Roode *v.* State, 5 Neb. 174.}

[14] [Kotter *v.* People, 150 Ill. 441. An intent that the forged instrument shall be used as evidence is sufficient: Bennett *v.* State, 62 Ark. 516.] {Evidence that the person charged with forgery borrowed money on the forged instrument is admissible to show the *intent* with which the forgery was made: U. S. *v.* Brooks, 3 McArthur (D. C.) 315. Possession of the forged paper is *prima facie* proof of a guilty intent, but is open to rebuttal: Fox *v.* People, 95 Ill. 71; State *v.* Outs, 30 La. Ann. Pt. II. 1155. Proof that the person making the forgery had reason to believe, and did believe, that he had authority to sign the name which is forged, rebuts the presumption of fraudulent intent: Parmelee *v.* People, 15 N. Y. Supreme Ct. 623. [Writing the name of another and signing one's own initials is not forgery: People *v.* Bendit, 111 Cal. 274; State *v.* Taylor, 46 La. Ann. 1332.] And so proof that the forgery was an interlineation of words in a lease, in order to make it conform to the understanding of the parties at the time of the execution of the lease, rebuts the presumption of fraudulent intent: Pauli *v.* Com., 89 Pa. St. 432. [And see Gaertner *v.* Heyl, 179 id. 391.] As to the bearing of the fact of knowledge that the instrument is forged, or the question of fraudulent intent, and the mode of proof of such knowledge, see *post*, § 111 and notes.

If the holder of notes with forged indorsements puts them in the bank when they are payable, with directions to the bank officers to collect, and the notes are protested, this will not support an indictment for uttering with intent to defraud, if the holder, maker, and indorser all knew that the indorsements were forged: State *v.* Redstrake, 39 N. J. L. 365.}

[15] Com. *v.* Ladd, 15 Mass. 526; State *v.* Washington, 1 Bay 120; R. *v.* Ward, 2 Ld. Raym. 1461, 1469. In Scotland, the law is otherwise; the crime of forgery not being complete unless the forged instrument be uttered or put to use: Alison's Crim. Law of Scotland, p. 401, c. 15, § 19. {Under the act of the United States against counterfeiting, it is no offence to counterfeit the coin of the country for any other purpose than to pass it as genuine, even if the purpose for which it is intended be morally indefensible: U. S. *v.* King, 5 McLean C. C. 208. Counterfeiting the current coin of the United States is an offence punishable in a State court, in the absence of any statutes of the United States forbidding such punishment: State *v.* McPherson, 9 Iowa 53.}

[16] [Morearty *v.* State, 46 Neb. 652; State *v.* Gullette, 121 Mo. 447;] {But see R. *v.* Hodgson, 36 Eng. L. & Eq. 626.}

[17] R. *v.* Marcus, 2 Car. & Kir. 358, 361; R. *v.* Hoatson, ib. 777. See R. *v.* Nash, 2 Denison C. C. 499, 503; 12 Eng. Law & Eq. 578; 16 Jur. 553; 21 Law J. N. S. M. C. 147. {In People *v.* Krummer, 4 Parker C. R. (N. Y.) 217, it is held that it is not necessary, in order to constitute forgery of an instrument, that the party in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it if genuine, or have a remedy over. It is the felonious making and uttering of a false instrument as true in fact which constitutes the crime.}

inferred by the jury, although, from the manner of executing the forgery, or other circumstance, that person would not be likely to be imposed upon, and although the prisoner's actual intent was to defraud whoever he might defraud.[18] Uttering a forged paper, knowing it to be such, with intent to defraud, is also an act of forgery, punishable by the common law;[19] provided some fraud be actually perpetrated by it.[20]

§ 104. **Same Subject.** The *usual form of charging* this offence in the indictment is, that the defendant "feloniously and falsely did make, forge, and counterfeit" the writing described, "with intent one A. B. to defraud."[1] But in the *proof of the charge* it is not necessary to show that the *entire* instrument is fictitious. The allegation may be proved by evidence of a fraudulent insertion, alteration, or erasure in any material part of a true writing, whereby another may be defrauded.[2] And

[18] R. *v.* Mazagora, Bayley on Bills, 613; Russ. & Ry. 271; {Com. *v.* Stevenson, 11 Cush. (Mass.) 481.}

[19] Com. *v.* Searle, 2 Binn. 332. As to what constitutes forgery, see 2 Russ. on Crimes, 318–361, 5th (Eng.) ed. 618–670, where the subject is amply treated. {The alteration or the false entry of a sum in a merchant's journal by a confidential clerk or book-keeper, with intent to defraud, is forgery at common law: Biles *v.* Com., 32 Pa. St. 529. Where the defendant wrote a promissory note for $141.26, and read it to another, who was unable to read, as a note for $41.26, and induced him to sign it as maker, it was held that this did not constitute forgery: Com. *v.* Sankey, 22 id. 390. But it seems that it is forgery for one to whom a blank acceptance is intrusted, to fill up the blank by inserting a sum greater than he is authorized to insert: Van Duzer *v.* Howe, 21 N. Y. 531. So where a blank check is signed, and left with authority to fill up in a certain way, and for a specific purpose, and it is filled up in a different way and used for a different purpose, it is forgery: State *v.* Kroeger, 47 Mo. 552. The fraudulent detachment of a written condition, made as part of the contract, from a promissory note, is forgery: State *v.* Stratton, 27 Iowa 420. See also Wait *v.* Pomeroy, 20 Mich. 425; Benedict *v.* Cowden, 49 N. Y. 396; s. c. 10 Am. Rep. 382 and n. So is the writing a note over a signature on a piece of blank paper, without the consent of the author of the signature: Caulkins *v.* Whistler, 29 Iowa 495.}

[20] R. *v.* Boult, 2 Car. & Kir. 604. It is *not* necessary that some fraud be actually perpetrated. In R. *v.* Sharman, 18 Jur. 157, 6 Cox C. C. 312, 24 Eng. Law & Eq. 553, the prisoner was indicted for forging a testimonial to his character as a schoolmaster, and other counts of the indictment charged him with having uttered the forged document. The jury acquitted him of the forgery, but found him guilty of the uttering with intent to obtain the emoluments of the place of schoolmaster, and to deceive the prosecutor. On a case reserved, it was held, that this finding of the jury amounted to an offence at common law of which the prisoner was properly convicted. But Williams, J., remarked that R. *v.* Boult had created some doubt in his mind.

[1] {There is no duplicity in an indictment in alleging that the respondent forged and caused to be forged, and aided and assisted in forging — they being, in legal contemplation, the same act: State *v.* Morton, 27 Vt. 310.}

[2] 1 Hale P. C. 683–685; 1 Hawk. P. C. c. 70, § 2; 2 Russ. on Crimes, 319–360, 5th (Eng.) ed. 619–670; 3 Chitty, Crim. Law, 1038; Com. *v.* Ladd, 15 Mass. 526; R. *v.* Atkinson, 7 C. & P. 669; R. *v.* Teague, Russ. & Ry. 33; 2 East P. C. 979; R. *v.* Elsworth, 2 East P. C. 986, 988; R. *v.* Post, Russ. & Ry. C. C. 101; R. *v.* Treble, ib. 164; 2 Taunt. 328; {Com. *v.* Butterick, 108 Mass. 12, p. 18; Com. *v.* Boutwell, 129 id. 124; State *v.* Flye, 26 Me. 312; State *v.* Floyd, 5 Strob. (S. C.) 58; State *v.*

where the evidence was, that the defendant, having a number of bank-notes of the same bank and the same denomination, took a strip perpendicularly out from a different part of each note, with intent out of these parts to form an additional note, the court seemed inclined to think that the act, if completed, would amount to forgery.[3] So, in an indictment for uttering a forged stamp, where the evidence was that the defendant, having engraved a counterfeit stamp, in some parts similar, and in others dissimilar, to the genuine stamp, cut out the dissimilar part of the stamp, and united the dissevered parts together, covering the deficiency by a waxen seal upon it, the proof was held sufficient to support an indictment for forging the stamp.[4] If the evidence be that the act was done by several persons, either by employing another to commit the deed,[5] or by each one separately performing a distinct essential part of it, as, for example, if it be the forgery of a bank-note, one engraving the plate, and others writing the signatures of the several officers, proof of the part performed by the prisoner is sufficient to support an indictment against him alone, as the sole forger of the instrument; though he does not know who performed the other parts.[6]

§ 105. **Forgery must be such as is calculated to deceive.** It must appear that the instrument, on its face, had such *resemblance to the true instrument* described, as to be calculated to deceive persons of ordinary observation; though it might not deceive experts, or persons more than ordinarily acquainted with the subject.[1] The want of such appearance on the face of the

Maxwell, 47 Iowa 454; State *v.* Marvels, 2 Harr. (Del.) 527; Bittings *v.* State, 56 Ind. 101.} [Tearing from a due-bill a credit entered on the instrument below the due-bill proper is not forgery: State *v.* Millner, 131 Mo. 432.]

[3] Com. *v.* Haywood, 10 Mass. 34. And see the Rev. Sts. of Mass. c. 127, § 12.

[4] R. *v.* Collicott, 4 Taunt. 300.

[5] R. *v.* Mazean, 9 C. & P. 676.

[6] R. *v.* Kirkwood, 1 Moody C. C. 304; R. *v.* Dade, ib. 307; R. *v.* Bingley, Russ. & Ry. 446. If one part of a machine for counterfeiting bank-notes is found in the prisoner's possession, evidence is admissible to show that other parts were found in the possession of other persons, with whom he was connected in the general transaction: U. S. *v.* Craig, 4 Wash. 729. See Com. *v.* Ray, 3 Gray 441. {Possession of a forged instrument by a person claiming under it is strong evidence that he forged it, or caused it to be forged: Com. *v.* Talbot, 2 Allen (Mass.) 161.}

[1] 2 Russ. on Crimes, 344, 5th (Eng.) ed. 657; Archbold, Crim. Pl. (London ed. 1853) 453; 8th (Am.) ed. vol. ii. p. 1622; R. *v.* McIntosh, 2 East P. C. 942; ib. 950; R. *v.* Elliott, 4 Leach C. C. (4th ed.) 175; U. S. *v.* Morrow, 4 Wash. 733; [Rohr *v.* State, 60 N. J. L. 576.] {The same rule applies to counterfeiting coins: U. S. *v.* Burns, 5 McLean C. C. 23. But see *ante*, § 84, n.} [It is not necessary that a forged order should resemble such an order as would have been drawn by the person whose name is forged: State *v.* Gullette, 121 Mo. 447. It is sufficient if there is an intent to deceive, and a possibility of deceiving another who may not know the genuine signature: State *v.* Gryder, 44 La. Ann. 962.]

paper cannot be supplied by evidence of any declarations or representations, made by the party charged, at the time when he uttered and passed it as true; as, for example, if it be a fabricated bank-note, but not purporting to be signed;[2] or a will, not having the number of witnesses expressly required by statute, in order to its validity.[3] But a mere literal mistake, such as a blunder in the spelling of a name, will not make any difference; it being sufficient to constitute the crime, if a signed writing, which is forged, be intended to be taken as true, and might so be taken by ordinary persons.[4]

§ 106. **Proof of Falsity.** The proof that the *writing is false and counterfeit* may be made by the evidence of any person acquainted with the handwriting of the party whose autograph it is pretended to be, or by comparing it with genuine writings or signatures of the party, in the mode and under the limitation stated in a preceding volume.[1] And it is now well settled, that the person whose signature or writing is said to be forged is a competent witness, in a criminal trial, to prove the forgery;[2] but he is not an indispensable witness, his testimony not being the *best* evidence which the nature of the case admits, though it is *as good* as any, and might, in most cases, be more satisfactory than any other.[3] If the crime consists of the prisoner's

[2] R. *v.* Jones, 1 Doug. 300; 1 Leach C. C. (4th ed.) 204; {R. *v.* Keith, 39 Eng. L. & Eq. 558.}

[3] R. *v.* Wall, 2 East P. C. 953. And see R. *v.* Moffat, 1 Leach C. C. (4th ed.) 431.

[4] 2 Russ. on Crimes, 348–350, 5th (Eng.) ed. 658, 659; R. *v.* Fitzgerald, 1 Leach C. C. (4th ed.) 20; 2 East P. C. 953; Alison's Crim. Law of Scotland, c. 15, § 1, p. 371; [People *v.* Alden, 113 Cal. 264; State *v.* Gryder, 44 La. Ann. 962.]

[1] For the proofs of handwriting, see *ante*, Vol. I. §§ 576, 581; Com. *v.* Smith, 6 S. & R. 568; State *v.* Lawrence, Brayt. 78; State *v.* Carr, 5 N. H. 367; Martin's Case, 2 Leigh 745; Com. *v.* Carey, 2 Pick. 47; State *v.* Ravelin, 1 D. Chipm. (Vt.) 295; State *v.* Candler, 3 Hawks 393; Watson *v.* Cresap, 1 B. Monr. 195; Foulker's Case, 2 Rob. (Va.) 836; {Keith *v.* Lothrop, 10 Cush. (Mass.) 453. Where the prisoner, being suspected on discovery of the forgery, was asked to write his name for the purpose of comparison, and did so, it was held that this signature was inadmissible on the part of the prosecution for that purpose: R. *v.* Aldridge, 3 F. & F. 781.}

[2] *Ante*, Vol. I. § 414; Com. *v.* Peck, 1 Met. 428. But in the examination of such witness, it is deemed improper to conceal from him all the writing except the signature; and it is held, that he is not bound to answer whether the signature is *in fact* his, without first seeing the entire paper: Com. *v.* Whitney, Thach. C. C. 588. In the examination of experts, however, and of other persons testifying their *opinions*, it is not unusual to conceal all but the signature. The reason for this difference is obvious. The party, called to testify to a fact, upon his own knowledge, is entitled to all the means of arriving at certainty; but the *opinions* of other persons as to the genuineness of a signature ought to be founded on the signature alone, unbiassed by any collateral circumstances.

[3] 2 Russ. on Crimes, 392, 5th (Eng.) ed. 712; R. *v.* Hughes, 2 East P. C. 1002. In the Scotch law, the oath of the party, whose signature is said to be forged, is considered the *best* evidence of the forgery. Other evidence is estimated in the following

fraudulently writing his own acceptance on a forged bill of exchange, evidence that, when the bill was shown to him in order to ascertain whether it was a good bill, he answered that it was very good, is admissible to the jury, and is sufficient ground for a verdict of conviction.[4]

§ 107. **When Forged Instrument provable by Secondary Evidence.** If the *writing said to be forged* is in existence, and accessible, it *must be produced at the trial.* But its absence, if it be proved to be in the prisoner's possession, or to have been destroyed by him, or otherwise destroyed without the fault of the prosecutor, is no legal bar to proceeding in the trial, though it may increase the difficulty of proving the crime.[1] Thus, where the forged deed was in possession of the prisoner, who refused to produce it, it was held that the grand jury might receive *secondary evidence* of its contents, and, if thereupon satisfied of the fact, might return a true bill; and that, on the trial of the indictment, the like evidence was admissible.[2] But before secondary evidence can be received of the contents of the forged paper, in the prisoner's possession, due *notice must be given to the prisoner to produce it*, unless it clearly appears that he has destroyed it.[3]

§ 108. **Variance.** The writing, when produced or proved, must agree in all essential respects with the description of it in the indictment; a material *variance*, as we have heretofore seen, being fatal.[1]

order: 1. That of persons acquainted with his handwriting, and who have seen him write; 2. That of persons who have corresponded with him, without having seen him write; 3. *A comparatio literarum* with his genuine writings; 4. That of experts, or persons accustomed to compare the similitude of handwriting. See Alison's Crim. Law of Scotland, c. 15, § 24, p. 412. But in England and the United States in these different kinds of evidence, there is no *legal* preference of one before another, however differently they may be valued by the jury. See *ante*, Vol. I. §§ 84, 576–581.

[4] R. *v.* Hevey, 1 Leach C. C. (4th ed.) 232.

[1] Such is also the law of Scotland: Alison's Crim. Law, p. 409, c. 15, § 22.

[2] R. *v.* Hunter, 3 C. & P. 591; s. c. 4 id. 128. In the latter case, it was held, that if the paper was in the hands of the prisoner's counsel or attorney, it was the duty of the latter not to produce it, but to deliver it up to his client. See also R. *v.* Dixon, 3 Burr. 1687; Anon., 8 Mass. 370; Dwyer *v.* Collins, 12 Eng. Law & Eq. 532.

[3] 2 Russ. on Crimes, 743–745 (3d ed.); R. *v.* Haworth, 4 C. & P. 254; State *v.* Potts, 4 Halst. 26; U. S. *v.* Britton, 2 Mason 464, 468; R. *v.* Spragge, cited 14 East 276; {Johnson *v.* State, 9 Tex. App. 249; Com. *v.* Snell, 3 Mass. 82.} See U. S. *v.* Doebler, Baldwin 519, 522, *contra*. As to the time and manner of giving notice, and when notice is necessary, see *ante*, Vol. I. §§ 560–563. If the fact of the destruction of the instrument is not clearly proved, and is denied by the prisoner, notice to produce it will not be dispensed with: Doe *v.* Morris, 3 Ad. & El. 46.

[1] See *ante*, Vol. I. §§ 63–70; State *v.* Handy, 20 Me. 81; Com. *v.* Adams, 7 Met. 50. Thus, if the indictment charge the forgery of "a certain *warrant and order* for the payment of money," it is not supported by proof of the forgery of a *warrant* for

§ 109. **Identity of Person defrauded; Fictitious Name.** If the prisoner, on uttering a forged note made payable to himself, *represent* the maker as being at a particular place, and engaged in a particular business, evidence that it is not *that* person's note is sufficient *prima facie* proof of the forgery; for the prisoner, being the payee of the note, must have known who was the maker. And if it should appear that there is another person of the same name, but engaged in a different business, it will not be necessary for the prosecutor to show that it was not this per-

the payment of money, which is not also an *order:* R. *v.* Williams, 2 Car. & Kir. 51. But in a very recent English case, it has been held, that, if the instrument be set out *in hæc verba*, a misdescription of it in the indictment will be immaterial, at least if any of the terms used to describe it be applicable. In this case, Parke, B., said: "The question may be very different, if the indictment sets out the instrument, from what it would be if it merely described it in the terms of the statute. In the former case, the matter, which it is contended is descriptive, may be mere surplusage, for when the instrument is set out on the record, the court are enabled to determine its character, and so a description is needless:" R. *v.* Williams, 2 Denison C. C. 61; 1 Temple & Mew C. C. 382; 4 Cox C. C. 256; 2 Eng. Law & Eq. 533 (1850). In this case the indictment charged the defendant with having forged "a certain warrant, order, and request, in the words and figures following," etc. It was objected that the paper, being only a request, did not support the indictment, which described it as a warrant, order, and request. But it was held, that there was no variance, as the document, being set out in full in the indictment, the description of its legal character became immaterial. Parke, B., suggested that the correct course would have been, to have alleged the uttering of one warrant, one order, and one request. "The principle of this decision seems to be," says Denison, "that where an instrument is described in an indictment by several designations, and then set out according to its tenor, either with or without a *videlicet*, the court will treat as surplusage such of the designations as seem to be misdescriptions, and treat as material only such designations as the tenor of the indictment shows to be really applicable. And where the indictment is so drawn as to enable the court to treat as material only the tenor of the indictment itself, all the descriptive averments may be treated as surplusage. The principal case seems reconcilable with R. *v.* Newton, 2 Moody C. C. 59, but to overrule R. *v.* Williams, 2 Car. & Kir. 51." In R. *v.* Charretie, 3 Cox C. C. 503 (1849), Davison, *amicus curiæ*, mentioned that Creswell, J., in a subsequent case, had declined to act upon the authority of R. *v.* Williams, 2 Car. & Kir. 51. And see Com. *v.* Wright, 1 Leading Crim. Cases, 319. {So when an indictment was for uttering a forged note, and the note set forth in the indictment differed from that offered in evidence, by the use of the word "semi-annually," instead of "annually," it was held that there was a fatal variance: Haslip *v.* State, 10 Neb. 590.

When the allegation in the indictment is of a signature *purporting to be* that of a certain man, *e. g.* Charles W. Jefferies, proof of a signature C. W. Jefferies upholds the allegation: State *v.* Bibb, 68 Mo. 286. But if the allegation is that the forged instrument was *signed* by a certain man, *e. g.* Pat Whelan, proof that it was signed by P. Whelan, or D. Whelan, is a variance: State *v.* Murphy, 6 Tex. App. 554. So, if the name alleged is James C. Orr, and the name signed, J. C. Orr: State *v.* Fay, 65 Mo. 490.

In an indictment for uttering a forged bank-bill, it is not necessary to set forth those parts of the bill which are merely repetitions of the essential parts of the contract, such as figures and words in the margin, or only serve as check marks for the benefit of the bank officers: Com. *v.* Bailey, 1 Mass. 62; Com. *v.* Stevens, ib. 203; Com. *v.* Taylor, 5 Cush. (Mass.) 605. But the name of the State to which the bank belongs, inserted in the margin of the note and not repeated in its body, is part of its date, and therefore of the contract, and the omission of it in the indictment is a fatal variance: Com. *v.* Wilson, 2 Gray (Mass.) 70.} [The lack of certain figures charged in the indictment constitutes a variance: McDonnell *v.* State, 58 Ark. 242. Proof of a mortgage with a certificate of acknowledgment does not constitute a variance where the indictment fails to mention the certificate: People *v.* Baker, 100 Cal. 188.]

son's note; it being incumbent on the prisoner to prove that it is the genuine note of such other person.[1] So where the prisoner obtained money from a person, for a check drawn by G. A. upon a certain banking-house, and it appeared that no person of that name kept an account, or had funds or credit in that house, this was held sufficient *prima facie* evidence that G. A. was a fictitious person until the prisoner should produce him, or give other sufficient explanatory proof to the contrary.[2] Where inquiries are to be made in regard to the residence or existence of any supposed party to a forged instrument, it is proper and usual to call the police officers, penny-postmen, or other persons well acquainted with the place and its inhabitants; but if inquiries have been made in the place by a stranger, his testimony, as to the fact and its results, is admissible to the jury, though it may not be satisfactory proof of the non-existence of the person in question.[3] If the forgery be by executing an instrument in a fictitious name, for the purpose of defrauding, the prosecutor must show that the fictitious name was assumed for the purpose of defrauding in that particular instance; it will not be sufficient to prove that it was assumed for general purposes of concealment and fraud, unless it appears that the particular forgery in question was part of the general purpose.[4] And if there be proof of the prisoner's real name, the burden is on him to prove that he used the assumed name before the time when he contemplated the particular fraud.[5]

§ 110. **Uttering and Publishing.** The allegation of *uttering and publishing* is proved by evidence that the prisoner *offered* to pass the instrument to another person, declaring or asserting, directly or indirectly, by words or actions, that it was *good*.[1] The act of *passing* is not complete until the instrument is received by the person to whom it is offered.[2] If the instru-

[1] R. *v.* Hampton, 1 Moody C. C. 255.

[2] R. *v.* Backler, 5 C. & P. 118: {Thompson *v.* State, 49 Ala. 16;} [People *v.* Eppinger, 105 Cal. 36.] And see R. *v.* Brannan, 6 C. & P. 326.

[3] R. *v.* King, 5 C. & P. 123.

[4] R. *v.* Bontien, Russ. & Ry. C. C. 260.

[5] R. *v.* Peacock, Russ. & Ry. C. C. 278.

[1] Com. *v.* Searle, 2 Binn. 399, per Tilghman, C. J. And U. S. *v.* Mitchell, Baldwin 367; R. *v.* Shukard, Russ. & Ry. C. C. 200.

[2] Ibid. The word "pass," as applied to bank-notes, is technical, and means to deliver them as money, or as a known and conventional substitute for money: Hopkins *v.* Com., 3 Met. 464, per Shaw, C. J. {When the indictment is for forging a deed, proof that it has been placed on record is *prima facie* proof of uttering, as it is of delivery of the deed: U. S. *v.* Brooks, 3 MacArthur (D. C.) 315.} [Presentation for

ment is uttered through the medium of an innocent agent, this is proof of an uttering, by the employer;[3] and this principle seems equally applicable to the case of uttering by means of a guilty agent.[4] If the instrument be delivered *conditionally*, as, for example, to stand as collateral security, if, upon inquiry, it be found satisfactory, this is sufficient proof of uttering it.[5] But if it be given as a specimen of the forger's skill;[6] or be exhibited with intent to raise a false belief of the exhibitor's property or credit, though it be afterwards left with the other party sealed in an envelope, to be kept safely, as too valuable to be carried about the person; this is not sufficient evidence to support the allegation of uttering.[7] The offence of uttering forged bank-notes is committed, although the person to whom the notes were delivered is the agent of the bank, employed for the purpose of detecting persons guilty of forging its notes, but representing himself to the prisoner as a purchaser of such spurious paper.[8]

§ 111. **Guilty Knowledge.** In proof of the criminal uttering of a forged instrument, it is essential to prove *guilty knowledge* on the part of the utterer.[1] And to show this fact, evidence is admissible that he had about the same time uttered, or attempted to utter, other forged instruments, of the same description;[2] or, that he had such others, or instruments for

record constitutes an uttering: Espalla *v.* State, 108 Ala. 38. Placing a forged mortgage on record at the desire of one who is to lend money thereon is sufficient uttering, though the mortgage is not delivered: People *v.* Baker, 100 Cal. 188.]

[3] Com. *v.* Hill, 11 Mass. 136; Foster, C. L. Disc. 3, c. 1, § 3, p. 349; {R. *v.* Fitchie, 1 Dears. & B. 175; 40 Eng. L. & Eq. 598.}

[4] R. *v.* Giles, 1 Moody C. C. 166; R. *v.* Palmer, 1 New Rep. 96; U. S. *v.* Morrow, 4 Wash. 733.

[5] R. *v.* Cooke, 8 C. & P. 582.

[6] R. *v.* Harris, 7 C. & P. 428.

[7] R. *v.* Shukard, Russ. & Ry. C. C. 200; Bayley on Bills, 609.

[8] R. *v.* Holden, 2 Taunt. 334; Russ. & Ry. C. C. 154; 2 Leach C. C. (4th ed.) 1019. But the showing a forged *receipt* to a person with whom the defendant is claiming credit for it, was held to be an offering or uttering within the statute 1 W. IV. c. 66, § 10, although the defendant refused to part with the possession of it: R. *v.* Radford, 1 Denison C. C. 59; 1 Leading Crim. Cases, 397; 1 Car. & Kir. 707; 1 Cox C. C. 168. And where the defendant placed a forged receipt for poor-rates in the hands of the prosecutor, for the purpose of inspection only, in order, by representing himself as a person who had paid his poor-rates, fraudulently to induce the prosecutor to advance money to a third person, for whom the defendant proposed to become a surety for its repayment; this was held an uttering within the statute 1 W. IV. c. 66, § 10; R. *v.* Ion, 16 Jur. 746; 1 Leading Crim. Cases, 400; 2 Denison C. C. 475; 6 Cox C. C. 1; 14 Eng. Law & Eq. 556. The rule there laid down is, that a using of the forged instrument in some way in order to get money or credit upon it, *or by means of it*, is sufficient to constitute the offence described in the statute.

[1] [Gates *v.* State, 71 Miss. 884; People *v.* Smith, 103 Cal. 563.]

[2] {Com. *v.* Coe, 115 Mass. 481; Heard *v.* State, 9 Tex. App. 1; Francis *v.* State,

manufacturing them, in his possession;[3] or, that he pointed out the place where such others were by him concealed;[4] or, that at other utterings of the same sort of papers, he assumed different names;[5] or that he uttered the paper in question under false representations made at the time, or the like.[6] But where such other instruments, said to be forged, are offered in proof of guilty knowledge, there must be strict proof that they are forgeries.[7] And when evidence is given of other utterings, in order to show guilty knowledge in the principal case, the evidence must be confined to the fact of the prisoner's having uttered such forged instruments, and to his conduct at the time of uttering them; it being improper to give evidence of what he said or did at any other time, collateral to such other utterings, as the prisoner could not be prepared to meet it.[8]

7 id. 501; Robinson *v.* State, 66 Ind. 331; McCartney *v.* State, 3 id. 353. But see *contra*, People *v.* Corbin, 56 N. Y. 363; People *v.* Coleman, 55 id. 81. And see *ante*, § 15; Vol. I. §§ [14 *q*,] 53;} R. *v.* Wylie, 1 New Rep. 92; 1 Leading Crim. Cases, 185; R. *v.* Ball, 1 Camp. 324; *supra*, § 15; U. S. *v.* Roudenbush, Baldwin 514; U. S. *v.* Doebler, ib. 519; State *v.* Antonio, Const. Rep. (S. C.) 776; [State *v.* Hodges, 45 S. W. 1093, Mo.] See Alison's Crim. Law of Scotland, c. 15, § 28, pp. 419–422, where the circumstances evincing guilty knowledge are more amply detailed. See also R. *v.* Oddy, 5 Cox C. C. 210. {Evidence that soon after the prisoner's arrest, similar forgeries were found in the pockets of his wife, without other proof of concert between them, is held inadmissible: People *v.* Thoms, 3 Parker C. R. 256. In R. *v.* Salt, 3 F. & F. 834, it is said to be impossible to lay down any general rule as to the time within which such previous uttering must have taken place to be admissible.}

[3] R. *v.* Hough, Russ. & Ry. C. C. 120; Com. *v.* Stone, 4 Met. 43; Bayley on Bills, 617; {U. S. *v.* Burns, 5 McLean C. C. 23; U. S. *v.* King, ib. 208.} Proof of the possession, at the same time, of other forged instruments of a different description, has been admitted: Sunderland's Case, 1 Lewin C. C. 102; Kirkwood's Case, ib. 103; Martin's Case, ib. 104; R. *v.* Crocker, 2 New Rep. 87, 95; Hess *v.* State, 5 Ham. 5; Hendrick's Case, 5 Leigh 707; State *v.* McAllister, 24 Me. 139. See *supra*, § 15.

[4] R. *v.* Rowley, Russ. & Ry. C. C. 110; Bayley on Bills, 618.

[5] R. *v.* Millard, Russ. & Ry. C. C. 245; Bayley on Bills, 619; R. *v.* Ward, ib.

[6] R. *v.* Sheppard, Russ. & Ry. C. C. 169; 1 Leach C. C. (4th ed.) 226; 2 East P. C. 697. And see State *v.* Smith, 5 Day 175. On the trial of two persons for the joint possession of counterfeit bank-notes with intent to utter them, it is competent to show that one of them, at another time and place, had other counterfeit notes in his possession, in order to prove his guilty knowledge: Com. *v.* Woodbury, Thach. Crim. Cas. 47. {Upon a trial for forgery, testimony that the respondent had offered and used in support of the instrument alleged to be forged, a false and fictitious deposition, which was obtained by his personating the apparent deponent, is admissible as tending to show his guilt: State *v.* Williams, 27 Vt. 726.}

[7] R. *v.* Forbes, 7 C. & P. 224. And see R. *v.* Millard, Russ. & Ry. C. C. 245. See also State *v.* Williams, 27 Vt. 724. [Evidence that other checks were not paid is inadmissible without proof that they too were forged: People *v.* Whiteman, 114 Cal. 338.]

[8] Phillips's Case, 1 Lewin C. C. 105; State *v.* Van Hereten, 2 Pa. 672; Com. *v.* Bigelow, 8 Met. 235. And see *ante*, Vol. I. §§ 52, 53; R. *v.* Forbes, 7 C. & P. 224; R. *v.* Cooke, 8 id. 586. In R. *v.* Butler, 2 C. & K. 221, evidence of what the prisoner said about money of the prosecutor found in his possession at the time of his arrest *other* than that for which he was indicted, was held not to be competent, and the case may thus be reconciled. If such other utterings are the subject of distinct indictments, the evidence will not on *that* account be rejected: Com. *v.* Stearns, 10 Met. 256; R. *v.* Aston, 2 Russ. on Crimes, 406, 407, per Alderson, B.; R. *v.* Lewis, Archb. Crim. Pl. (London ed. 1853), per Ld. Denman. In R. *v.* T. Smith, 2 C. & P. 633,

§ 111 *a*. **Same Subject.** It is now the settled law of England, that this species of evidence may be admitted to prove the *scienter* in trials for forgery, uttering, or having in possession, false notes, bills of exchange, or bank-bills, of all descriptions, if previous to the principal charge.[1] The same doctrine is applied to the crime of uttering counterfeit coin.[2] In America, this exception in the law of evidence has been adopted, both in practice and by authority.[3] This kind of evidence has been extended to proof of the *scienter* on the trial of an indictment for falsely representing the bill of an insolvent bank as good, and thereby obtaining property with intent to defraud.[4]

§ 112. **Place.** To show *the place where the forgery was committed*, it is competent to prove that the instrument was found in the prisoner's possession in such place, and that he resided there; of the sufficiency of which the jury will judge.[1] And if the instrument bears date at a certain place, and it is proved that the prisoner was there at that time, this is sufficient evidence that it was made at that place.[2] But where a forged in-

such evidence was rejected by Vaughan B. But in R. *v.* F. Smith, 4 id. 411, Gaselee J., after consulting the Ld. Ch. Baron, and referring to Russell, as above cited, was disposed to admit it. See acc. State *v.* Twitty, 2 Hawks 248; Com. *v.* Percival, Thach. Crim. Cas. 293. {So what one on trial for forging a note said of another note which was claimed to be a forgery is not admissible: Fox *v.* People, 95 Ill. 71. If, however, there is evidence that the defendant was engaged in a scheme for the perpetration of numerous forgeries, evidence may be given of all the other specific acts done in execution of the scheme, as bearing on the question of intent: Carver *v.* People, 39 Mich. 786.

So, where several persons were indicted for forging a check on a bank, it was held admissible to prove that previous to presenting the check the respondents had agreed to procure money by means of forged papers, without reference to any particular bank: State *v.* Morton, 27 Vt. 310.}

[1] R. *v.* Wiley, 1 Leading Crim. Cases, 189; R. *v.* Nisbett, 6 Cox C. C. 320; R. *v.* Taverner, 4 C. & P. 413, n., is an authority that the subsequent utterings cannot be given in evidence unless competent on other grounds. But see R. *v.* Smith, 2 id. 633.

[2] Harrison's Case, 2 Lewin C. C. 118; R. *v.* Foster, 6 Cox C. C. 521; 29 Eng. Law & Eq. 548; Monthly Law Reporter, N. S. vol. viii. 404. {So, also, guilty knowledge may be inferred from the fact that the prisoner had a large quantity of counterfeit coin in his possession, many pieces being of the same sort, of the same date, and made in the same mould, each piece being wrapped in a separate piece of paper, and the whole being distributed in different pockets of the dress: R. *v.* Jarvis, 33 Eng. L. & Eq. 567, and R. *v.* Francis, 12 Cox C. C. 612.}

[3] Com. *v.* Bigelow, 8 Met. 235; Com. *v.* Stearns, 10 id. 256; State *v.* McAllister, 24 Me. 139; Com. *v.* Turner, 3 Met. 19; U. S. *v.* Roudenbush, Baldwin 514; State *v.* Antonio, 2 Const. Rep. 776.

[4] Com. *v.* Stone, 4 Met. 43, 47. The court said that the case is strictly analogous to the rule in relation to proof of the *scienter* on a charge of passing counterfeit bills or coins, which is well established here and in England. See R. *v.* Oddy, 5 Cox C. C. 210; 2 Denison C. C. 264; 4 Eng. Law & Eq. 572; R. *v.* Green, 3 Car. & Kir. 209.

[1] R. *v.* Crocker, 2 New Rep. 87; Russ. & Ry. C. C. 97; Spencer's Case, 2 Leigh 751; [State *v.* Gullette, 121 Mo. 447.]

[2] State *v.* Jones, 1 McMullan 236.

strument was found in the prisoner's possession, at W., where he then resided, but it bore date at S., at a previous time, when he dwelt in the latter place, this was held not to be sufficient evidence of the commission of the offence in W.[3] If the instrument is not dated at any place, and the fact of forgery by the prisoner is proved, and that he uttered, or attempted to utter, it at the place named in the indictment, this is evidence that it was forged at that place.[4] If a letter, containing a forged instrument, be put into the post-office, this is not evidence of an uttering at that place; but the venue must be laid in the place where the letter was received.[5]

§ 113. **Bank-notes.** If the indictment be for uttering a forged bank-note, *parol evidence* is admissible to show that the person, whose name appears on the note as president, is in fact the president of that bank;[1] but it is not necessary to prove the existence of the bank, unless it be described in the indictment as a bank duly incorporated, or an intent to defraud that bank be alleged.[2]

[3] R. *v.* Crocker, 2 New Rep. 87; Russ. & Ry. C. C. 97.

[4] Bland *v.* People, 3 Scam. 364.

[5] People *v.* Rathbun, 21 Wend. 509, 527–541, where all the cases, English and American, on this point, are collected and fully reviewed. The principle on which this point was decided is, that the offence charged was a felony, to which the act of consummation was indispensably necessary; the *attempt* to commit a felony being of itself, and without consummation, only a misdemeanor. But where an act of forgery amounts only to a misdemeanor, as the attempt to commit it is of itself a misdemeanor, it is conceived that proof of putting a letter, containing the false instrument, into the post-office, would be sufficient to support a charge of commiting the crime at that place. See Perkins's Case, Lewin C. C. 150; *supra*, § 2.

[1] State *v.* Smith, 5 Day 175.

[2] Com. *v.* Smith, 6 S. & R. 568; People *v.* Peabody, 25 Wend. 473.

HOMICIDE.

§ 114. **Definition.** HOMICIDE is "*the killing of any human being.*" It is of *three kinds:* 1. *Justifiable;* 2. *Excusable;* 3. *Felonious.*

§ 115. **Justifiable.** 1. *Justifiable homicide* is that which is committed either, 1st, by *unavoidable necessity*, without any will, intention, or desire, or any inadvertence or negligence in the party killing, and therefore without blame; such as, by an officer, executing a criminal, pursuant to the death-warrant, and in strict conformity to the law, in every particular; — or, 2dly, for the *advancement of public justice;* as, where an officer, in the due execution of his office, kills a person who assaults and resists him; or, where a private person or officer attempts to arrest a man *charged* with felony and is resisted, and in the endeavor to take him, kills him; or, if a felon flee from justice, and in the pursuit he be killed, where he cannot otherwise be taken; or, if there be a riot, or a rebellious assembly, and the officers or their assistants, in dispersing the mob, kill some of them, where the riot cannot otherwise be suppressed; or, if prisoners, in jail, or going to jail, assault or resist the officers, while in the necessary discharge of their duty, and the officers or their aids, in repelling force by force, kill the party resisting; — or, 3dly, for the *prevention of any atrocious crime*, attempted to be committed by force; such as murder, robbery, housebreaking in the night-time, rape, mayhem, or any other act of felony against the person.[1] But in such cases the attempt must be not merely

[1] 4 Bl. Comm. 178–180; 1 Russ. on Crimes, 665–670, 5th (Eng.) ed. 842, 843; 1 Wharton, Crim. Law, 8th ed. § 307. The Roman civil law recognized the same principles. "Qui latronem (insidiatorem) occiderit, non tenetur, utique si aliter periculum effugere non potest:" Inst. lib. 4, tit. 3, § 2. "Furem nocturnum si quis occiderit, ita demum impuné foret, si parcere ei sine periculo suo non potuit:" Dig. lib. 48, tit. 8, l. 9. "Qui stuprum sibi vel suis per vim inferentem occidit, dimittendus:" Dig. lib. 48, tit. 8, l. 1, § 4. "Si quis percussorem ad se venientem gladio repulerit, non ut homicida tenetur; quia defensor propriæ salutis in nullo peccasse videtur:" Cod. lib. 9, tit. 16, l. 3. In the cases mentioned in the text, if the homicide is committed with undue precipitancy, or the unjustifiable use of a deadly weapon, the slayer will

suspected, but apparent; the danger must be imminent, and the opposing force or resistance necessary to avert the danger or defeat the attempt.[2]

§ 116. **Excusable.** 2. *Excusable homicide* is that which is committed either, 1st, *by misadventure* (*per infortunium*); which is where one, doing a *lawful* act, unfortunately kills another; as, if he be at work with a hatchet, and the head thereof flies off and kills a by-stander; or if a parent is correcting his child, or a master his apprentice or scholar, the bounds of moderation not being exceeded, either in the manner, the instrument, or the quantity of punishment; or if an officer is punishing a criminal, within the like bounds of moderation, or within the limits of the law, and in either of these cases, death ensues;[1] or, 2dly, in *self-defence* (*se defendendo*),[2] which is where one is assaulted, upon a sudden affray, and in the defence of his person, where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there was no other probable means of escape, he kills the assailant. To reduce homicide in self-defence to this degree, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault.[3] The jury must be satisfied that, unless he had killed the assailant, he was in imminent and manifest danger either of losing his own life, or of suffering enormous bodily harm.[4] This latter

be culpable. See Alison's Crim. Law of Scotland, p. 100; ib. pp. 132–139. [The threatened injury must amount to felony: Battle *v.* State, 29 S. E. 491, Ga.]

[2] U. S. *v.* Wiltberger, 3 Wash. 515. And see State *v.* Rutherford, 1 Hawks 457; State *v.* Roane, 2 Dev. 58.

[1] 4 Bl. Comm. 182; 1 Russ. on Crimes, 657–660, 5th (Eng.) ed. 843.

[2] [On the issue of self-defence the burden is on the defendant: State *v.* Ballou, 40 A. 861, R. I. See also *ante*, Vol. I. § 81 *b*.]

[3] [The general duty to retreat is affirmed in Allen *v.* U. S., 164 U. S. 492; State *v.* Warner, 100 Iowa 260; People *v.* Constantino, 153 N. Y. 24; Frank *v.* State, 94 Wis. 211; Compton *v.* State, 110 Ala. 24; State *v.* Walker, 9 Houst. 464; State *v.* Zeigler, 40 W. Va. 593; Clark *v.* Com., 90 Va. 360; and denied in La Rue *v.* State, 64 Ark. 144. But the duty does not exist when the defendant is in a place where he has a right to be and to remain, such as his own premises (Beard *v.* U. S., 158 U. S. 550; Alberty *v.* U. S., 162 id. 499; People *v.* Lewis, 117 Cal. 186; State *v.* O'Brien, 18 Mont. 1; State *v.* Cushing, 14 Wash. 527; Waugher *v.* State, 105 Ala. 26; Willis *v.* State, 43 Neb. 102; Eversole *v.* Com., 95 Ky. 623; Page *v.* State, 141 Ind. 236), or a hotel (Rowe *v.* U. S., 164 U. S. 546); or if he is an officer doing his duty (Boykin *v.* People, 22 Col. 496; Lynn *v.* People, 170 Ill. 527).]

[4] 4 Bl. Comm. 182; 1 Russ. on Crimes, 660, 661, 5th (Eng.) ed. 843; 1 Wharton, Crim. Law, 8th ed. § 306; [Acers *v.* U. S., 164 U. S. 388; Allen *v.* U. S., ib. 492; State *v.* Scossoni, 48 La. Ann. 1464; State *v.* Frazier, 137 Mo. 317.] "Qui, cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt. Vim enim vi defendere, omnes leges omniaque jura permittunt:" Dig. lib. 9, tit. 2, l. 45, § 4. "Is

kind of homicide is sometimes called *chance-medley*, or *chaud-medley*, words of nearly the same import; and closely borders

qui aggressorem vel quemcunque alium in dubio vitæ discrimine constitutus occiderit, nullam ob id factum calumniam metuere debet:" Cod. lib. 9, tit. 16, l. 2; Cheek *v.* State, 4 Tex. App. 444; Draper *v.* State, 4 Baxt. (Tenn.) 246; Kennedy *v.* Com., 14 Bush (Ky.) 340. There is an extension of this principle which allows the jury to acquit the defendant if the circumstances were such that an ordinarily reasonable and prudent man would have believed himself in such danger, although in fact such danger did not exist, as the law holds no one to a higher standard of conduct than that of the reasonable and prudent man: Steenmeyer *v.* People, 95 Ill. 383; State *v.* Bohan, 19 Kan. 28, p. 55; [Redd *v.* State, 99 Ga. 210; Godwin *v.* State, 73 Miss. 873. The act must be committed because of such belief: Walker *v.* State, 23 S. E. 992, Ga.]

The belief of the accused, however, that he was in such danger, is immaterial unless it coincides with what the belief of the ordinarily reasonable and prudent man would be under the circumstances: Parker *v.* State, 55 Miss. 414; Kendrick *v.* State, ib. 436; [Frank *v.* State, 94 Wis. 211; State *v.* Ussery, 24 S. E. 414, N. C.; Housh *v.* State, 43 Neb. 163; State *v.* Morey, 25 Or. 241; Roden *v.* State, 97 Ala. 54; Wilson *v.* State, 30 Fla. 234; People *v.* Hecker, 109 Cal. 451.] For an interesting discussion of the relation of the conduct of an ordinarily reasonable and prudent man to the criminal law as affording a standard by which all principles of legal liability are set, see Holmes, Common Law, Lecture II.

There are numerous decisions in which it has been held that evidence of threats of the deceased, of violence to the accused or others, and his character for brutality, and acts of violence, is admissible in trials for homicide. The principle on which this evidence is admissible is that these facts are part of the *res gestæ* where the accused alleges that the homicide was committed in self-defence, and they are so because to make out the defence that the homicide was committed in self-defence, the jury must be satisfied that unless the accused killed the assailant, he was in imminent and manifest danger either of losing his own life or of suffering enormous bodily harm (*supra*, § 116), and the question whether such danger existed may well be affected by the character of the deceased and his known propensities for homicide, or his particular enmity to the accused. There is great conflict in the decisions, but it is believed that this principle will be found to be supported by the majority of the courts. Thus it has been held that the character of the deceased can be brought in issue only where the circumstances raise a doubt whether the homicide was in malice or in self-defence (State *v.* Pearce, 15 Nev. 188; People *v.* Lombard, 17 Cal. 316; Little *v.* State, 6 Baxt. (Tenn.) 491), so that previous threats by the deceased against the accused are admissible if the accused is relying upon self-defence for his excuse (State *v.* Cooper, 32 Ala. Ann. 1084), but not otherwise (Harris *v.* State, 34 Ark. 469). [See *ante*, Vol. I. §§ 14 *k*, 14 *p*.]

As the proof of such threats is admitted to show the reasonableness of the act of the accused, as a measure of self-defence, it would seem that in some cases it might be immaterial whether the accused knew of these threats or not, since the question is not whether the accused believed he was in danger, but whether the jury believes that he was in such danger that his act was justifiable, and this evidence of threats against the accused would tend to prove such danger. If there is an attempt to make out a case of self-defence, the general tendency of the decisions in the majority of the States is to admit evidence of the brutal character of the deceased or his threats against the accused: Fields *v.* State, 47 Ala. 603; Bowles *v.* State, 58 id. 335; Payne *v.* State, 60 id. 80; People *v.* Taing, 53 Cal. 602; Davidson *v.* People, 4 Col. 145; Campbell *v.* People, 16 Ill. 17; Wilson *v.* People, 94 id. 299; State *v.* Browne, 22 Kan. 222; Cornelius *v.* Com., 15 B. Mon. (Ky.) 546; State *v.* Ricks, 32 La. Ann. 1098; State *v.* Burns, 30 id. Pt. II. 1176; State *v.* Chavis, 80 N. C. 353; Crabtree *v.* State, 1 Lea (Tenn.) 267; Little *v.* State, 6 Baxt. (Tenn.) 491; Sims *v.* State, 9 Tex. App. 586; Peck *v.* State, 5 id. 611; U. S. *v.* Mingo, 2 Curtis C. C. 1. Cf. Com. *v.* Wilson, 1 Gray (Mass.) 337; *contra*, Com. *v.* Meade, 12 id. 167; Com. *v.* Hilliard, 2 id. 294; [Hart *v.* State, 38 Fla. 39; Hunter *v.* State, 74 Miss. 515; Wallace *v.* U. S., 162 U. S. 466. To render such evidence admissible there must be some evidence that the killing was in self-defence: State *v.* Reed, 137 Mo. 125.] See also Pfomer *v.* People, 4 Park. Cr. R. 558. In a case in Massachusetts the principle under discussion was considered, and a distinction drawn between the evidence of the character of the deceased for brutality or for picking quarrels and evidence of the fact of the comparative size

upon manslaughter. In both cases it is supposed that passion was kindled on each side, and that blows have passed between the parties; but the difference lies in this, — that in manslaughter, it must appear, either that the parties were actually in mutual combat when the mortal stroke was given, or, that the slayer was not at that time in imminent danger of death; but that in homicide excusable by self-defence it must appear, either that the slayer had not begun to fight, or that, having begun, he endeavored to decline any further struggle, and afterwards, being closely pressed by his antagonist, he killed him to avoid his own destruction.[5] Under this excuse of self-defence, the principal civil and natural relations are comprehended; and, therefore, a master and servant, parent and child, and husband and wife, killing an assailant, in the necessary defence of each other respectively, are excused.[6]

§ 117. **Same Subject.** Homicide is also excusable, when unavoidably comitted in *defence of the possession of one's dwelling-house*,[1] against a trespasser, who, having entered, cannot be put out otherwise than by force; and no more force is used, and no other instrument or mode is employed, than is necessary and proper for that purpose.[2] So, if, in a common calamity, two

and strength of the deceased and the accused, holding the latter to be admissible as bearing upon the question whether the accused had reason to believe himself in danger of serious bodily harm : Com. *v.* Barnacle, 134 Mass. 215. The court in this case expressly overrules Com. *v.* Mead, 12 Gray 167, in which the fact that the deceased was a man of great muscular strength was excluded as irrelevant. The court also distinguished the case of Com. *v.* Hilliard, 2 id. 294, and Com. *v.* York, 7 Law Rep. 497, 507, as cases where evidence of the *character* of the deceased for brutality was offered.}

[5] 4 Bl. Comm. 184 ; 1 Russ. on Crimes, 661, 5th (Eng.) ed. 844; State *v.* Hill, 4 Dev. & Batt. 491 ; [Rowe *v.* U. S., 164 U. S. 546 : Crauford *v.* State, 112 Ala. 1 ; Dalney *v.* State, 113 id. 38 ; People *v.* Hecker, 109 Cal. 451 ; Barton *v.* State, 96 Ga. 435 ; State *v.* Ballou, 40 A. 681, R. I. ; State *v.* Vaughan, 141 Mo. 514.]

[6] 4 Bl. Comm. 186 ; 1 Hale P. C. 448 ; [Hathaway *v.* State, 32 Fla. 56.] {A man cannot justify killing another by pretence of necessity, unless he were wholly without fault in bringing that necessity upon himself ; if he kill one in defence of an injury done by himself, he is guilty of manslaughter at least : People *v.* Lamb, 17 Cal. 323. The benefit of a doubt whether the homicide is justifiable or not is to be given to the prisoner : People *v.* Arnold, 15 id. 476 ; [Henson *v.* State, 112 Ala. 41 ; Miller *v.* State, 19 S. 37, Ala. ; People *v.* Marshall, 112 Cal. 422.] See also People *v.* Gibson, 17 id. 283. It is the duty of the court, upon common principles of humanity and justice, first, to pronounce the criminal innocent until he is proved guilty ; and, secondly, after he is shown to have committed a homicide, to look for every excuse which may reduce the guilt to the lowest point consistent with the facts proved : State *v.* McDonnell, 32 Vt. 538. But an expert's doubts as to the defendant's sanity are not legal proof of his insanity, and therefore are inadmissible : Sanchez *v.* People, 22 N. Y. 147.}

[1] [This right does not extend beyond the limits of the dwelling and customary outbuildings : State *v.* Bartmess, 54 P. 167, Or.]

[2] 1 Hale P. C. 485, 486; 1 Russ. on Crimes, 662, 664, 5th (Eng.) ed. 847, cites Mead's Case, 1 Lewin C. C. 184; Wild's Case, 2 id. 214 ; Hinchcliff's Case, 1 id. 161. See *ante*, § 65, n. [But see State *v.* Taylor, 44 S. W. 785, Mo.]

persons are reduced to the dire alternative, that one or the other or both must certainly perish, as, where two shipwrecked persons are on one plank, which will not hold them both, and one thrusts the other from it, so that he is drowned, the survivor is excused.[3]

§ 118. **Distinction.** The *distinction* between justifiable and excusable homicide was formerly important, inasmuch as in the latter case, the law presumed that the slayer was not wholly free from blame; and therefore he was punished by forfeiture of goods, at least. But in the United States, this rule is not known ever to have been recognized; it having been the uniform practice here, as it now is in England, where the homicide does not rise to the degree of manslaughter, to direct an acquittal.[1]

§ 119. **Felonious Homicide; Manslaughter.** 3. FELONIOUS HOMICIDE is of two kinds, namely, *manslaughter* and *murder;* the difference between which consists principally in this, that in the latter there is the ingredient of malice, while in the former there is none; or, as Blackstone expresses it, manslaughter, when voluntary, arises from the sudden heat of the passions; murder, from the wickedness of the heart. MANSLAUGHTER is therefore defined to be "*the unlawful killing of another, without malice, either express or implied.*"[1] And hence every indictment for wilful homicide, in which the allegation of malice is omitted, is an indictment for manslaughter only. So, on the trial of an indictment for murder, if there is no sufficient proof of malice aforethought, and the act of killing, being proved, is not justified or excused, the jury must return a verdict for manslaughter. As this offence is supposed to have been committed without malice, so also it must have been without premeditation; and therefore there can be no accessories before the fact. Thus, it is said that, if A is charged with murder, and B is charged as accessory before the fact (and not as present, aiding and abetting, for such are principals), and A is found guilty of manslaughter only, B must be altogether ac-

[3] 4 Bl. Comm. 186. And see Holmes's Case, where several passengers were thrown over from the overloaded long-boat of a foundered ship, to save the lives of the others; in which this doctrine was very fully and ably discussed: 1 Wharton's Crim. Law, 8th ed. § 511, note 6.

[1] 4 Bl. Comm. 188; 2 Inst. 148, 315.

[1] 4 Bl. Comm. 191; 1 Hale P. C. 466; Com. *v.* Webster, 5 Cush. 304.

quitted.[2] But if A is charged with murder, and B is charged with receiving, harboring, and assisting him, well knowing that he had committed the murder; and A be found guilty of manslaughter only; B may be found guilty of being accessory after the fact to the latter offence.[3]

§ 120. **Same Subject.** The *indictment for manslaughter* is in the same form with an indictment for murder, hereafter to be stated, except that the allegation, "of his malice aforethought," and the word "murder," are omitted. The substance of the charge, therefore, so far as the proof is concerned, is, that the prisoner (describing him), at such a time[1] and place, feloniously and wilfully assaulted the deceased (describing him), and killed him in the particular manner therein set forth. The allegations of diabolical motive in the slayer, and that the deceased was in the peace of God and the State, and that the offence was committed with force and arms, though usually inserted, are superfluous, and not necessary to be proved.[2] And the time of any homicide is not material to be precisely proved, if it appear, both on the face of the indictment, and also by the evidence, that the death happened within a year and a day after the stroke was given, or the poison administered, or other wrongful act done, which is supposed to have occasioned the death. The day is added to the year, in order to put the completion of a full year beyond all doubt, which might arise from the mode of computation by including or excluding the day of the stroke or infliction; and because, as Lord Coke has remarked, in case of life the rule of law ought to be certain; and if the death did not take place within the year and day, *the law* draws the conclusion that

[2] 1 Hale P. C. 450; Bibithe's Case, 4 Rep. 43 *b*, pl. 9. {Evidence that a party is present, aiding and abetting in a murder, will support an indictment charging him with having committed the act with his own hand: Com. *v.* Chapman, 11 Cush. (Mass.) 422. See also R. *v.* Gaylor, 7 Cox Cr. Cas. 253.}

[3] R. *v.* Greenacre, 8 C. & P. 35. {One indicted for *manslaughter*, may, on trial, be convicted for an *assault and battery*, though the indictment contains no count specially charging the minor offence (State *v.* Scott, 24 Vt. 127), if the assault and battery are well charged, and are part and parcel of the same transaction: Com. *v.* Murphy, 2 Allen (Mass.) 163; Com. *v.* Dean, 109 Mass. 349; *post*, § 121, n. In Maine, upon an indictment charging an assault with intent to murder, the jury may find an assault with intent to kill, but not to murder: State *v.* Waters, 39 Me. 54. See also People *v.* Johnson, 1 Parker, C. R. 291, and People *v.* Shaw, ib. 327. See also *ante*, § 120, n.}

[1] [The crime is committed at the time of the fatal blow, though the death occurs later: Debney *v.* State, 45 Neb. 856.]

[2] Heydon's Case, 4 Rep. 41, pl. 5; 3 Chitty, Crim. Law, 751, n.; 2 Hale P. C. 186, 187; Com. *v.* Murphy, 11 Cush. (Mass.) 472. {Nor to be alleged: Dumas *v.* State, 63 Ga. 600.}

the injury received was not the cause of the death; and neither the court nor jury can draw a contrary one.[3]

§ 121. **Proof.** Where the crime of manslaughter only is charged, the *proof of the offence*, on the part of the prosecution, is by proving the fact of killing, with such circumstances as show criminal culpability on the part of the prisoner. And the defence consists either in a denial of the principal fact, or in a denial of all culpability, supported by the proof of circumstances, reducing the fact of killing to the degree of excusable or justifiable homicide.[1] But the distinction between murder and manslaughter most frequently arises where the indictment is for murder, and the evidence on the part of the prisoner is directed to reducing the act to the degree of manslaughter only. The cases on this subject are of two classes, the offence being either *voluntary* or *involuntary*. *Voluntary* manslaughter is where one kills another in the heat of blood; and this usually arises from *fighting*, or from *provocation*. In the *former case*, in order to reduce the crime from murder to manslaughter, it must be shown that the fighting was not preconcerted, and that there was not sufficient time for the passion to subside; for in the case of a deliberate fight, such as a duel, the slayer and his second are murderers.[2] And though there were not time for passion to subside, yet if the case be attended with such circumstances as indicate malice in the slayer, he will be guilty of murder. Thus, if the slayer provide himself with a deadly weapon beforehand, in anticipation of the fight, and not for mere defence of his person against a felonious assault;[3] or if he take an undue advantage of the other in the fight;[4] or if, though he were in the heat of passion, he should designedly select out of several weapons equally at hand, that which alone is deadly, — it is murder.[5] Where, in a fight, the victor had followed up his advantage with great fury, giving the mortal blows after the

[3] 3 Inst. 53; State *v.* Orrell, 1 Dev. 139, 141; 2 Hale P. C. 179; {Com. *v.* Burke, 14 Gray (Mass.) 101.}

[1] It is no defence to an indictment for manslaughter, that the homicide appears by the evidence to have been committed with malice aforethought, and is therefore murder; but the defendant may be properly convicted of the crime of manslaughter: Com. *v.* M'Pike, 3 Cush. 181.

[2] 1 Russ. on Crimes, 531, 5th (Eng.) ed. 695; 1 Hale P. C. 452, 453.

[3] R. *v.* Smith, 8 C. & P. 160; R. *v.* Anderson, 1 Russ. on Crimes, 531, 5th (Eng.) ed. 701; R. *v.* Whiteley, 1 Lewin C. C. 173.

[4] R. *v.* Kessel, 1 C. & P. 437; Fost. 295.

[5] 1 Leach 151; 1 East P. C. 245; Foster 294, 295; R. *v.* Anderson, *supra*; R. *v.* Whiteley, *supra*; 1 Russ. on Crimes, 531, 5th (Eng.) ed. 701.

other party was down, and had become unable to resist, it was still held to be only manslaughter.[6]

§ 122. **Provocation.** Where homicide is committed *upon provocation*, it must appear that the provocation was considerable, and not slight only, in order to reduce the offence to manslaughter; and for this purpose the proof of *reproachful words*,[1] how grievous soever, or of *actions or gestures* expressive of contempt or reproach, without an assault, actual or menaced, on the person, will not be sufficient if a deadly weapon be used.[2] But if the fatal stroke were given by the hand only, or with a small stick, or other instrument not likely to kill, a less provocation will suffice to reduce the offence to manslaughter.[3] Thus, the killing has been held to be only manslaughter, though a deadly weapon was used, where the provocation was by pulling the nose;[4] purposely jostling the slayer aside in the highway;[5] or other actual battery.[6] So, where a husband caught a man *in the act* of adultery with his wife,[7] and instantly killed either or both of them.[8] And where a boy, being beaten by another boy, ran home to his father, who, seeing him very bloody, and hearing his cries, instantly took a rod or small stick, and, running to the field three-quarters of a mile distant, struck the aggressor on the head, of which he died, this was ruled manslaughter only, because it was done upon provocation by the injury to his son, and in sudden heat and passion.[9]

[6] R. *v.* Ayes, Russ. & Ry. 166. But it has been thought that where the manner of the fight was deadly, as, "an up-and-down fight," if death ensued, it would be murder: R. *v.* Thorpe, 1 Lewin C. C. 171.

[1] [See § 124, *post*.]

[2] [A deadly weapon is "anything with which death may be easily and readily produced:" Acers *v.* U. S., 164 U. S. 388.]

[3] Foster, 290, 291; *infra*, § 124; U. S. *v.* Wiltberger, 3 Wash. 515.

[4] J. Kely. 135.

[5] Lanure's Case, 1 Hale P. C. 455. If the provocation by a blow be too slight to reduce the killing to manslaughter, yet it has been thought sufficient, if accompanied by words and gestures calculated to produce a degree of exasperation equal to what would be caused by a violent blow: R. *v.* Sherwood, 1 Car. & Kir. 556, per Pollock C. B.

[6] R. *v.* Stedman, Foster 292.

[7] [But not with his mistress: Cyrus *v.* State, 29 S. E. 917, Ga.]

[8] Maddy's Case, 1 Vent. 156; T. Raym. 212; s. c. nom. Manning's Case, where the court is reported to have said that "there could not be a greater provocation than this:" J. Kely. 137. See also People *v.* Ryan, 2 Wheeler C. Cas. 54; R. *v.* Fisher, 8 C. & P. 182; Pearson's Case, 2 Lewin C. C. 216; Alison's Crim. Law of Scotland, p. 113; R. *v.* Kelly, 2 C. & K. 814; [Jones *v.* People, 23 Col. 276. Nothing less is sufficient provocation as matter of law: Hooks *v.* State, 99 Ala. 166; Todd *v.* State, 44 S. W. 1096, Tex. Cr. App.]

[9] Royley's Case, Godb. 182; Cro. Jac. 296; 12 Rep. 87; 1 Hale P. C. 453; s. c. Foster 294, 295. Coke calls the instrument used in this case a *cudgel*. Godbolt says it was a *rod*. Lord Hale terms it a *staff*. Croke terms it a *little cudgel;* and Lord

§ 123. Same Subject. Another kind of provocation sometimes arises in the *execution of process*. For, though the killing of an officer of justice, while in the regular execution of his duty, knowing him to be an officer, and with intent to resist him in such exercise of duty, is murder, the law in that case implying malice; yet where the process is defective or illegal, or is executed in an illegal manner, the killing is only manslaughter, unless circumstances appear to show express malice: and then it is murder.[1] Thus, the killing will be reduced to manslaughter, if it be shown in evidence that it was done in the act of protecting the slayer against an arrest by an officer acting beyond the limits of his precinct;[2] or, by an assistant not in the presence of the officer;[3] or, by virtue of a warrant essentially defective in describing either the person accused or the offence;[4] or, where the party had no notice, either expressly, or from the circumstances of the case, that a lawful arrest was intended; but, on the contrary, honestly believed that his liberty was assailed without any pretence of legal authority;[5] or, where the arrest

Raymond observes that it was a weapon "from which no such fatal event could reasonably be expected:" 2 Ld. Raym. 1498. Whatever it may have been, all agree that it was not a lethal or deadly weapon, from the use of which malice might have been presumed; and therefore the killing was but manslaughter, in the heat of passion, and upon great provocation.

[1] Foster, 311; 1 Russ. on Crimes, 617, 5th (Eng.) ed. 707; Com. *v.* Drew, 4 Mass. 395, 396. If a felony has actually been committed, any man upon fresh pursuit, or hue and cry, may arrest the felon, without warrant. But *suspicion of the felony* will not be enough to justify the arrest. The felony must have been committed in fact. But if *a felony be committed,* and one is upon reasonable ground *suspected of being the felon,* and thereupon is freshly pursued by a private individual without warrant, and is killed in the attempt to arrest him, it is only manslaughter. An *officer,* however, having reasonable ground to *suspect that a felony has been committed,* may arrest and detain the supposed felon; which a private citizen cannot lawfully do: Beckwith *v.* Philby, 6 B. & C. 635, per Ld. Tenterden; 2 Hale P. C. 76–80; 1 Russ. on Crimes, 593–595, 5th (Eng.) ed. 711; Com. *v.* Carey, 4 Law Rep. N. S. 169, 173. And see Price *v.* Seeley, 10 Cl. & Fin. 28; 1 Leading Crim. Cases, 143, and n.; Derecourt *v.* Corbishley, 32 Eng. Law & Eq. 106; Rohan *v.* Sawin, 5 Cush. 281; Broughton *v.* Jackson, 11 Eng. Law & Eq. 388; Thomas *v.* Russell, 25 Eng. Law & Eq. 550; Samuel *v.* Payne, 1 Doug. 359; 1 Leading Crim. Cases, 157; Ledwith *v.* Catchpole, Cald. 291; 1 Leading Crim. Cases, 158 and n.; R. *v.* Walker, 25 Eng. Law & Eq. 589; State *v.* Weed, 1 Foster (N. H.) 262; 1 Leading Crim. Cases, 164 and n.

[2] 1 Hale P. C. 459; R. *v.* Mead, 2 Stark. 205.

[3] R. *v.* Patience, 7 C. & P. 795; R. *v.* Whalley, ib. 245.

[4] R. *v.* Hood, 1 Moody C. C. 281; Foster 312; 1 Hale P. C. 457; Hoye *v.* Bush, 1 Man. & Grang. 775; 2 Scott N. R. 86; State *v.* Weed, 1 Foster (N. H.) 262; 1 Leading Crim. Cases, 164 and n. {Or where the officer had no warrant, although he knew that one had been issued, but said that he had one, and refused to give any explanation whatever: Drennan *v.* People, 10 Mich. 169.}

[5] 1 Hale P. C. 470. And see Buckner's Case, Sty. 467; J. Kely. 136; 1 Russ. on Crimes, 623, 5th (Eng.) ed. 680; R. *v.* Withers, 1 East P. C. 233; R. *v.* Howarth, 1 Moody C. C. 207. {In a case in New York, People *v.* Carlton, 115 N. Y. 623, the defendant requested the court to rule that it is the duty of an officer to give notice of

attempted, though for a felony, was not only without warrant, but without hue and cry, or fresh pursuit; or, being for a misdemeanor only, was not made *flagrante delicto;*[6] or, where the party was, on any other ground, not legally liable to be arrested or imprisoned.[7] So, if the arrest, though the party were legally liable, was made in violation of law, as, by breaking open the outer door or window of the party's dwelling-house, on civil process; for such process does not justify the breaking of the dwelling-house, to make an original arrest; or, by breaking the outer door or window, on criminal process, without previous notice given of his business, with demand of admission, or something equivalent thereto, and a refusal.[8]

§ 124. **Provocation; Words.** But the *proofs of provocation*, in order to reduce the act of killing to the degree of manslaughter, must, as we have seen, be by evidence of *something more than words* or *gestures;* for these, however opprobrious and irritating, are not sufficient in law to free the slayer from the guilt of murder, if the person was killed with a deadly weapon, or there be a manifest intent to do him some great bodily harm.[1] But if, upon provocation by words or gestures only, the party, in the

an intention to make an arrest before using, or attempting to use, violence upon the accused, and if, without giving such notice, he struck or attempted to strike him, or even to take him into custody, the accused had a right to resist; and if, in so resisting, he killed the officer, he cannot be convicted of murder in the first degree. The court refused to give such a ruling, saying: "The request, in effect, asked the court to charge that a suspected criminal may deliberately and premeditatedly shoot and kill an officer attempting to make an arrest, irrespective of all the other circumstances, without incurring the penalty for murder in the first degree, unless the officer shall, in all cases, first give notice of his intention to arrest. A homicide committed under such circumstances would neither be justifiable nor excusable within the definition contained in the Penal Code, sections 203, 204, 205, Penal Code, and, therefore, comes within the definition of murder in the first degree. (Section 183, Penal Code.) Even supposing it to be the duty of an officer to give notice of an intention to arrest, before doing so, it by no means follows that the person sought to be arrested has the right to shoot or kill the officer for attempting to arrest without notice. He may not lawfully offer forcible resistance to such attempted arrest until all other means of peaceably avoiding it have been exhausted, and it is only in the last extremity that the right to use a deadly weapon, under any circumstance, arises: People *v.* Sullivan, 7 N. Y. 396."}

[6] 1 Russ. on Crimes, 593–595, 598, 5th (Eng.) ed. 715, 716, 724; 1 Hale P. C. 463; R. *v.* Curvan, 1 Moody C. C. 132; R. *v.* Curran, 3 C. & P. 397; Com. *v.* Carey, 4 Law Rep. N. S. 170; [Hughes *v.* Com., 41 S. W. 294, Ky.]

[7] Com. *v.* Drew, 4 Mass. 395, 396; U. S. *v.* Travers, 2 Wheeler Cr. Cas. 495, 509; R. *v.* Corbett, 4 Law Rep. 369; R. *v.* Thompson, 1 Moody C. C. 80; R. *v.* Gillow, ib. 85; 1 Lewin C. C. 57; R. *v.* Phelps, Car. & Marsh. 180, 186.

[8] Foster, 320. Whether a previous demand be necessary in cases of felony, *quære;* and see Launock *v.* Brown, 2 B. & Ald. 592.

[1] [Compton *v.* State, 110 Ala. 24; State *v.* Walker, 9 Houst. 464; State *v.* Martin, 124 Mo. 514; Friederick *v.* People, 147 Ill. 310; People *v.* Murback, 64 Cal. 369; Clifford *v.* State, 37 A. 1101, N. J. L.; Daughdrill *v.* State, 113 Ala. 7; Sawyers *v.* Com., 38 S. W. 136, Ky.; Allen *v.* U. S., 164 U. S. 492

heat of passion, intended merely to chastise the insolence of the other, by a box on the ear, or a stroke with a small stick or other weapon not likely to kill, and death accidentally ensued, this would be but manslaughter.[2] And it seems that if, upon provocation by words only, the party provoked should strike the other a blow not mortal, which is returned by the other, and a fight thereupon should ensue, in which the party first provoked should kill the other, this also would be but manslaughter.[3] So, if the words were words of menace of bodily harm, accompanied by some outward act showing an intent immediately to do the menaced harm, this would be a sufficient provocation to reduce the killing to manslaughter.[4]

§ 125. **Provocation; Subsidence of Passion.** In all these cases of voluntary homicide, upon provocation, and in the heat of blood, it must appear that the fatal stroke was given *before the passion*, originally raised by the provocation, *had time to subside, or the blood to cool;* for it is only to human frailty that the law allows this indulgence, and not to settled malignity of heart. If, therefore, after the provocation, however great it may have been, there were time for passion to subside, and for reason to resume her empire before the mortal blow was struck, the homicide will be murder.[1] And whether the time which elapsed between the provocation and the stroke were sufficient for that purpose, is a question of law to be decided by the court; the province of the jury being only to find what length of time did in fact elapse.[2]

§ 126. **Provocation; Express Malice.** It is further to be observed, that in cases of homicide upon provocation or in sudden

[2] Foster 290, 291; Watts *v.* Brains, Cro. El. 778; J. Kely. 130, 131; 1 Hale P. C. 455; 1 Russ. on Crimes, 580, 5th (Eng.) ed. 682; *supra*, § 122.

[3] Morley's Case, 1 Hale P. C. 456; J. Kely. 55, 130; 1 Russ. on Crimes, 580, 5th (Eng.) ed. 678.

[4] 1 Hale P. C. 456; 1 East P. C. 233; 1 Russ. on Crimes, 580, 5th (Eng.) ed. 678. And see Monroe's Case, 5 Ga. 85. [See *ante*, Vol. I. §§ 14 *k*, 14 *p*.]

[1] R. *v.* Oneby, 2 Ld. Raym. 1493–1496; Foster 296; 1 Hale P. C. 453; R. *v.* Thomas, 7 C. & P. 817; [Com. *v.* Aiello, 180 Pa. 597; People *v.* Kerrigan, 147 N. Y. 210; State *v.* Holmes, 12 Wash. 169. It is immaterial that the rage actually continued: McNeill *v.* State, 102 Ala. 121.]

[2] 2 Ld. Raym. 1493. And so held in R. *v.* Fisher, 8 C. & P. 182, by Park, J., Parke, B., and Mr. Recorder Law. Both questions had previously been left to the jury, by Ld. Tenterden, in R. *v.* Lynch, 5 C. & P. 324, and by Tindal, C. J., in R. *v.* Hayward, 6 id. 157. {The act must be done when reason is disturbed, or obscured by passion to an extent which *might render* ordinary men of fair average disposition *liable* to act rashly, without reflection, and from passion rather than from judgment; and only in very clear cases might the court, perhaps, undertake to decide these questions without committing error: Maher *v.* People, 10 Mich. 212.}

fight, if there be evidence of actual malice, the offence, as we shall hereafter see, will amount to murder. It must therefore appear that the *chastisement or act of force* intended on the part of the slayer, *bore some reasonable proportion to the provocation received*, and did not proceed from brutal rage or diabolical malignity. Proof of great provocation[1] is requisite to extenuate the offence, where the killing was by a deadly weapon, or by other means likely to produce death; but if no such weapon or means were used, a less degree of provocation will suffice.[2] Thus, while the prisoner, who was a soldier, was struck in the face with an iron patten, and thereupon killed the assailant with his sword, it was held only manslaughter.[3] So, where a pickpocket, caught in the act, was thereupon thrown into a pond by way of punishment, and was unintentionally drowned, this was ruled to be manslaughter.[4] And if one should find another trespassing on his land by cutting his wood or otherwise, and in the first transport of passion should beat him by way of chastisement for the offence, and unintentionally kill him, no deadly weapon being used, it would be but manslaughter.[5] But if the provocation be resented in a brutal and ferocious manner, evincive of a malignant disposition to do great mischief, out of all proportion to the offence, or of a savage disregard of human life, the killing will be murder. Such was the case of the park-keeper, who, finding a boy stealing wood in the park, tied him to a horse's tail and beat him, whereupon the horse running away, the boy was killed.[6] So, in the case of the trespasser cutting wood as above mentioned, if the owner had knocked out his brains with an axe or hedge-stake, or had beaten him to death with an ordinary cudgel, in an outrageous manner, and beyond the bounds of sudden treatment, it would have been murder; these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent on mischief, which enter into the true notion of malice, in the legal sense of that word.[7]

[1] [As to what is great provocation, see State *v.* Countryman, 57 Kan. 815.]
[2] Foster 291 ; 1 Hale P. C. 454 ; 1 Russ. on Crimes, 581, 5th (Eng.) ed. 679.
[3] Stedman's Case, Foster 292.
[4] R. *v.* Fray, 1 East P. C. 236 ; 1 Russ. on Crimes, 582, 5th (Eng.) ed. 685.
[5] 1 Hale P. C. 473 ; Foster 291. And see R. *v.* Wiggs, 1 Leach C. C. (4th ed.) 379 ; Wild's Case, 2 Lewin C. C. 214 ; R. *v.* Connor, 7 C. & P. 438 ; [Wallace *v.* U. S., 162 U. S. 466.]
[6] Halloway's Case, Cro. Car. 131 ; J. Kely. 127.
[7] Foster 291 ; J. Kely. 132 ; [Wallace *v.* U. S., 162 U. S. 466 ; Sellers *v.* State, 99 Ga. 689 ; State *v.* Edgerton, 100 Ia. 63.]

§ 127. **Provocation; Rebuttal.** The *defence of provocation may be rebutted*, by proof that the provocation was sought for and induced by the prisoner himself, in order to afford an opportunity to wreak his malice; or, by proof of express malice, notwithstanding the provocation; or, that after it was given there was sufficient time for the passion thereby excited to subside; or, that the prisoner did not in fact act upon the provocation, but upon an old subsisting grudge.[1]

§ 128. **Involuntary Manslaughter.** *Involuntary manslaughter* is where one, doing an *unlawful*[1] *act*, not felonious nor tending to great bodily harm, or doing a *lawful act*, without proper caution or requisite skill, undesignedly kills another.[2] To reduce a charge of murder to manslaughter of this kind, the evidence will be directed to show either that the act intended or attempted to be done was not felonious, nor tending to great bodily harm; or that it was not only lawful, but was done with due care and caution, or in cases of science, with requisite skill. Thus, if one, shooting at another's poultry wantonly, and without intent to steal them, accidentally kills a man, it is but manslaughter; but if he had intended to have stolen the poultry, it would have been murder.[3] So, if he throw a stone at another's horse, and inadvertently it kills a man;[4] or if one, in playing a merry, though mischievous, prank, cause the death of another, where no serious personal hurt was intended, as by tilting up a cart, or the like, it is not murder, but manslaughter.[5] But if the sport intended was dangerous, and likely in itself to produce great bodily harm, or to cause a breach of the peace, these circumstances might show malice, and fix upon the party the guilt of murder.[6]

§ 129. **Negligence.** If the act be in itself *lawful*, but done in

[1] R. *v.* Mason, Foster 132; id. 296; 1 Hale P. C. 452; R. *v.* Hayward, 6 C. & P. 157; 1 East P. C. 239; R. *v.* Kirkham, 8 C. & P. 115; R. *v.* Thomas, 7 id. 817; *supra*, § 125; {State *v.* Johnson, 2 Jones (N. C.) Law, 247. Where the defendant was accused of murder of one who was injuring a mining claim, it was held that evidence was admissible on the part of the defendant of his ownership of the claim at the time, to show the condition of his mind and the character of the offence, and as part of the *res gestæ*: People *v.* Costello, 15 Cal. 356.}

[1] [Siberry *v.* State, 47 N. E. 458, Ind.]

[2] 4 Bl. Comm. 182, 192; Foster 261, 262.

[3] Foster 258, 259.

[4] 1 Hale P. C. 39.

[5] R. *v.* Sullivan, 7 C. & P. 641. And see 1 East P. C. 257; 1 Russ. on Crimes, 637, 638, 5th (Eng.) ed. 761, 762; R. *v.* Martin, 3 C. & P. 211; R. *v.* Errington, 2 Lewin C. C. 217; 3 Inst. 57.

[6] 1 Russ. on Crimes, 637, 638, 5th (Eng.) ed. 761, 762.

an improper manner, whether it be by excess, or by culpable ignorance, or by want of due caution, and death ensues, it will be manslaughter.[1] Such is the case where death is occasioned by excessive correction given to a child by the parent or master;[2] or by ignorance, gross negligence, or culpable inattention or maltreatment of a patient on the part of one assuming to be his physician or surgeon;[3] or by the negligent driving of a cart or carriage,[4] or the like ill management of a boat; or by gross carelessness in casting down rubbish from a staging, or the like.[5] And, generally, it may be laid down, that where one, by his negligence, has contributed to the death of another, he is responsible.[6] The caution which the law requires in all these cases, is not the utmost degree which can possibly be used, but such reasonable care as is used in the like cases, and has been found, by long experience, to answer the end.

§ 130. **Murder.** MURDER, which is the other kind of felonious homicide, is when a person of sound memory and discretion unlawfully kills any reasonable creature in being, under the peace of the State, with malice aforethought, either express or implied.[1] In the *indictment* for this crime, it is alleged that the *prisoner*, describing him by his true name and addition, on such a *day*, at such a *place* within the *county* where the trial is had, of his *malice* aforethought, feloniously killed and *murdered* the

[1] {In the case of R. *v.* Hughes, 1 Dears. & Bell 248, it is laid down that "that which constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence." See also Com. *v.* Pierce, 138 Mass. 154.}

[2] 1 Hale P. C. 473, 474; J. Kely. 64, 133; R. *v.* Connor, 7 C. & P. 438; Foster 262.

[3] 1 Hale P. C. 429; R. *v.* Webb, 1 M. & Rob. 405; 2 Lewin C. C. 196; R. *v.* Spilling, 2 M. & Rob. 107; R. *v.* Spiller, 5 C. & P. 333; R. *v.* Simpson, 1 Lewin C. C. 172; R. *v.* Ferguson, ib. 181; R. *v.* Long, 4 C. & P. 398. [Or nurse: State *v.* Brown, 36 A. 458, Del.; R. *v.* Instan, 1893, 1 Q. B. 450.] Upon such a charge, evidence cannot be gone into on either side, of former cases treated by the prisoner: R. *v.* Whitehead, 3 C. & K. 202. And see R. *v.* Van Butchell, 3 C. & P. 629; R. *v.* Williamson, ib. 635; Com. *v.* Thompson, 6 Mass. 134.

[4] 1 East P. C. 263; R. *v.* Walker, 1 C. & P. 320; R. *v.* Knight, 1 Lewin C. C. 168; R. *v.* Grout, 6 C. & P. 629; Alison's Crim. Law of Scotland, pp. 113–122. See, as to bad navigation, R. *v.* Taylor, 9 C. & P. 672; Alison's Crim. Law of Scotland, p. 122; U. S. *v.* Warner, 4 McLean 463.

[5] 1 East P. C. 262; Foster 262; 1 Hale P. C. 472; 3 Inst. 57.

[6] R. *v.* Swindall, 2 C. & K. 232, per Pollock, C. B.

[7] Foster 274; Alison's Crim. Law of Scotland, p. 143. And see R. *v.* Hull, Kel. 40; 1 Leading Crim. Cases, 42; R. *v.* Murray, 5 Cox C. C. 509; R. *v.* Lowe, 4 id. 449; 3 C. & K. 123; 1 Leading Crim. Cases, 49; R. *v.* Middleship, 5 Cox C. C. 275; R. *v.* Longbottom, 3 id. 439; 1 Leading Crim. Cases, 54; R. *v.* Pocock, 17 Q. B. 34; 24 Eng. Law & Eq. 190.

[1] 3 Inst. 47; 4 Bl. Comm. 195; 1 Russ. on Crimes, 482, 5th (Eng.) ed. 641; 1 Wharton, Crim. Law, 8th ed. § 303; Com. *v.* Webster, 5 Cush. 304.

deceased, describing him as above, by the means and in the *manner* therein set forth.[2] All these allegations are material to be proved by the prosecutor, except the allegation that the deceased was in the peace of the State, which needs no proof, but will be presumed, until the contrary appears.

§ 131. **Corpus Delicti.** The point to which the evidence of the prosecutor is usually first directed, is the *death* of the person alleged to have been killed. And this involves two principal facts, namely, that the person is dead, and that he died in consequence of the injury alleged to have been received.[1] The *corpus delicti*, or the fact that a murder has been committed, is so essential to be satisfactorily proved, that Lord Hale advises that no person be convicted of culpable homicide, unless the fact were proved to have been done, or at least the body found dead.[2] Without this proof a conviction would not be warranted, though there were evidence of conduct of the prisoner exhibiting satisfactory indications of guilt.[3] But the fact, as we have already seen,[4] need not be directly proved: it being sufficient if it be established by circumstances so strong and intense as to produce the full assurance of moral certainty.[5] Neither is it

[2] An averment that the defendant committed the crime at a place specified, "in some way and manner, and by some means, instruments, and weapons to the jurors unknown," is sufficient when the circumstances of the case will not admit of greater certainty in stating the means of death: Com. *v.* Webster, 5 Cush. 295. {The omission of the word "with" in charging the instrument of the homicide is not fatal: Shay *v.* People, 22 N. Y. 317.}

[1] It must also appear that the death took place within a year and a day, that is, within a full year from the time when the wound was received; otherwise the law conclusively presumes that the wound was not the cause of the death. See *supra*, § 120; State *v.* Orrell, 1 Dev. 139, 141, per Henderson, J.; 3 Inst. 53; 3 Chitty Crim. Law, [736].

[2] 2 Hale P. C. 290. A similar rule prevailed in the Roman civil law, as appears from the Digest on the laws *de publica quæstione a familia necatorum habenda:* under which no person was put on his defence for the homicide, until the *corpus delicti* was proved; — "nisi constet aliquem esse occisum, non haberi de familia quæstionem. Quæstionem autem sic accipimus, non tormenta tantum, sed *omnem inquisitionem et defensionem mortis:*" Dig. lib. 29, tit. 5, l. 1, §§ 24, 25.

[3] R. *v.* Hopkins, 8 C. & P. 591. So held in a case of larceny, in Tyner *v.* State, 5 Humph. 383.

[4] *Supra*, § 30; [Wilson *v.* U. S., 162 U. S. 613; Campbell *v.* People, 159 Ill. 9.] In Georgia, in case of a capital conviction upon circumstantial evidence only, the judge who passes the sentence may commute the punishment to the penitentiary for life: Hotchk. Dig. p. 795; 2 Cobb's Dig. p. 838.

[5] {People *v.* Alviso, 55 Cal. 230; Dean *v.* Com., 32 Gratt. (Va.) 912; State *v.* Davidson, 30 Vt. 385; State *v.* Williams, 7 Jones (N. C.) L. 446. See the remarks of Maule, J., in R. *v.* Burton, Dears. 282. But in Ruloff *v.* People, 18 N. Y. 179, the question was discussed at great length, and the rule asserted that the fact of the death must be proved by certain and direct evidence. See also *ante*, § 30. And this has been enacted by statute, N. Y. Penal Code, § 181, which prohibits a conviction except "when the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are each established as independent facts, the former by direct proof, and

indispensably necessary to prove that the prisoner had any motive to commit the crime, though the absence of such motive ought to receive due weight in his favor.[6]

§ 132. **Proof of Death.** The most positive and satisfactory *evidence of the fact of death*, is the testimony of those who were present when it happened; or who, having been personally acquainted with the deceased in his lifetime, have seen and recognized his body after life was extinct. This evidence seems to be required in the English House of Lords, in claims of peerage, and *a fortiori* a less satisfactory measure of proof ought not to be required in a capital trial. In these cases the testimony of medical persons, where it can be had, is generally most desirable, whenever the nature of the case is such as to leave any doubt of the fact.[1]

§ 133. **Identity.** But though it is necessary that the *body of the deceased be satisfactorily identified*, it is not necessary that this be proved by direct and positive evidence, if the circum-

the latter beyond a reasonable doubt." The first clause of this provision does not apply the requirement of direct proof to the two facts of death and the identity, but only to the one fact of the death alone. That some one is dead is directly proved whenever a dead body is found. Its identity, as that of the person alleged to have been killed, is a further fact to be next established in the process of investigation. But it was never the doctrine of the common law that, when the *corpus delicti* had been duly established, the further proof of the identity of the deceased person should be of the same direct quality and character; nor is this rule established by the statute of New York: People *v.* Palmer, 109 N. Y. 112. In People *v.* Nilson, 3 Park. Cr. R. 199, it appeared that a dead body, with marks of violence upon it, had been washed ashore. It was alleged to have been the body of a Captain Palmer, for whose murder the prisoner was being tried. But the criminal fact of a death, by violence, having been fully established, the identity of the remains was proved by circumstances. Personal recognition had become impossible, and identity was established by an inference from resemblances. The height of the deceased was shown, an unusual length of face, and a widening of the end of the little finger, to which, in a general way, the body corresponded. But a more remarkable fact was that the captain had imprinted his name upon his arm and leg, and in the same portions of the body it was found the skin had been cut away, except that on the leg the letter P remained visible. A brother-in-law of the deceased, who had seen the body, was asked the question, whose body it was; but the court would not permit an answer; saying that the question was not the ordinary one of personal identity, since the body had been submerged for five months, but was one of an inference from resemblances, which the jury and not the witness must draw. The prisoner was convicted: People *v.* Palmer, 109 N. Y. 117.}

[6] Sumner *v.* State, 5 Blackf. 579.

[1] Hubback on Succession, pp. 159, 160. By the Roman civil law, as well as by ours, the death may be proved not only by those who saw the party dead and buried, but by those who saw him dying, or, who were present at a funeral called his, but who did not see the body: Mascard. De Probat. Concl. 1077. In some cases, by that law, death might be proved by common fame; but not in cases involving highly penal consequences; — "non in (causis) gravioribus; secus autem in his, quæ modicum damnum afferre possunt." Id. Concl. 1076, n. 1, 3. It might also be proved by circumstantial evidence; but was never to be presumed, as an inference of law. "Mors non præsumitur, sed est probanda; cum quilibet præsumatur vivere." Id. Concl. 1075, n. 1. And see Id. Concl. 1078, 1079; *ante*, Vol. II. tit. Death.

stances be such as to leave no reasonable doubt of the fact. Where only mutilated remains have been found, it ought to be clearly and satisfactorily shown that they are the remains of a human being, and of one answering to the sex, age, and description of the deceased; and the agency of the prisoner in their mutilation, or in producing the appearances found upon them, should be established. Identification may also be facilitated by circumstances apparent in and about the remains, such as the apparel, articles found on the person, and the contents of the stomach, connected with proof of the habits of the deceased in respect to his food, or with the circumstances immediately preceding his dissolution.[1]

§ 134. **Unlawful Killing.** The death and the identity of the body being established, it is necessary, in the next place, to prove that the deceased *came to his death by the unlawful act of another person.* The possibility of reasonably accounting for the fact by *suicide*, by *accident*, or by any *natural cause*, must be excluded by the circumstances proved; and it is only when no other hypothesis will explain all the conditions of the case, and account for all the facts, that it can safely and justly be concluded that it has been caused by intentional injury.[1] Though suicide and accident are often artfully but falsely suggested in the defence as causes of the death, especially where the circumstances are such as to give plausibility to the suggestion; yet the suggestion is not on this account to be disregarded, but all the facts relied on are to be carefully compared and considered; and upon such consideration, if the defence be false, some of the circumstances will commonly be found to be irreconcilable with the cause alleged. Scientific evidence sometimes leads to results perfectly satisfactory to the mind; but when uncorroborated by conclusive moral circumstances, it should be received with much caution and reserve; and justice no less than prudence requires that, where the guilt of the

[1] Wills on Cir. Evid. pp. 164–168, 5th (Am.) ed. 211, 214. See Boorn's Case, *ante*, Vol. I. § 214, n.; [Laughlin *v.* Com., 37 S. W. 590, Ky.; State *v.* Martin, 47 S. C. 67; State *v.* Smith, 9 Wash. 341.] That the *name* as well as the person of the deceased must be precisely identified, has already been shown, *supra*, § 22. The subject of the identification of mutilated remains was very fully discussed in the trial of Dr. Webster, reported by Mr. Benis.

[1] Wills on Cir. Evid. p. 168, 5th (Am.) ed. 214; [Cole *v.* State, 59 Ark. 50; Dreessen *v.* State, 36 Neb. 375. As to what is sufficient evidence, see Com. *v.* Bell, 164 Pa. 517.]

accused is not conclusively made out, however suspicious his conduct may have been, he should be acquitted.[2]

§ 135. **Poisoning.** In the case of *death by poisoning*, it is not necessary to prove the particular substance or kind of poison used; nor to give direct and positive proof what is the quantity which would destroy life;[1] nor is it necessary to prove that such

[2] Wills on Cir. Evid. pp. 168, 172; *supra*, § 29. On this subject the following important observations are made by Mr. Starkie: "It sometimes happens that a person determined on self-destruction resorts to expedients to conceal his guilt, in order to save his memory from dishonor, and to preserve his property from forfeiture. Instances have also occurred where, in doubtful cases, the surviving relations have used great exertions to rescue the character of the deceased from ignominy, by substantiating a charge of murder. On the other hand, in frequent instances, attempts have been made by those who have really been guilty of murder to perpetrate it in such a manner as to induce a belief that the party was *felo de se*. It is well for the security of society that such an attempt seldom succeeds, so difficult is it to substitute artifice and fiction for nature and truth. Where the circumstances are natural and real, and have not been *counterfeited* with a view to evidence, they must necessarily correspond and agree with each other, for they did really so coexist; and, therefore, if any one circumstance which is essential to the case attempted to be established be wholly inconsistent and irreconcilable with such other circumstances as are known or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential cannot be true. The question, whether a person has died a natural death, as from apoplexy, or a violent one from strangulation; whether the death of a body found immersed in water has been occasioned by drowning, or by force and violence previous to the immersion; whether the drowning was voluntary, or the result of force; whether the wounds inflicted upon the body were inflicted before or after death, — are questions usually to be decided by medical skill. It is scarcely necessary to remark, that where a reasonable doubt arises whether the death resulted on the one hand from natural or accidental causes, or, on the other, from the deliberate and wicked act of the prisoner, it would be unsafe to convict, notwithstanding strong, but merely circumstantial, evidence against him. Even medical skill is not, in many instances, and without reference to the particular circumstances of the case, decisive as to the cause of the death; and persons of science must, in order to form their own conclusion and opinion, rely partly on external circumstances. It is, therefore, in all cases, expedient that all the accompanying facts should be observed and noted with the greatest accuracy; such as the position of the body, the state of the dress, marks of blood, or other indications of violence; and in cases of strangulation, the situation of the rope, the position of the knot; and also the situation of any instrument of violence or of any object by which, considering the position and state of the body, and other circumstances, it is possible that the death may have been accidentally occasioned." 2 Stark. on Evid. 519–521 (6th Am. ed.). {As to opinions of experts, and non-experts, and their value as evidence, see Vol. I. §§ 440 *et seq.*}

[1] The observations of Mr Lofft, on the testimony of men of science, are worthy of profound attention. "In general," he says, "it may be taken, that when the testimonies of professional men of just estimation are *affirmative*, they may be safely credited; but when *negative*, they do not amount to a disproof of a charge otherwise established by various and independent circumstances. Thus, on the view of a body after death, on suspicion of *poison*, a physician may see cause for not positively pronouncing that the party died by *poison:* yet if the party charged be interested in the death, if he appears to have made preparations of poisons without any probable just motive, and this secretly; if it be in evidence that he has in other instances brought the life of the deceased into hazard; if he has discovered an expectation of the fatal event; if that event has taken place suddenly, and without previous circumstances of ill health; if he has endeavored to stifle inquiry by precipitately burying the body, and afterwards, on inspection, signs agreeing with poison are observed, though such as medical men will not positively affirm could not have been owing to any other cause, — the accumulative strength of circumstantial evidence may be such as to warrant a conviction; since more

a quantity was found in the body of the deceased. It is sufficient if the jury are satisfied, from all the circumstances, and beyond reasonable doubt, that the death was caused by poison, administered by the prisoner.[2] Upon the latter point, the material questions are, whether the prisoner had any motive to poison the deceased, — whether he had the opportunity of administering poison, — and whether he had poison in his possession or power to administer. To these inquiries every part of the prisoner's conduct and language, in relation to the subject, are material parts of the *res gestæ*, and are admissible in evidence.[3] But it is not necessary to prove that the poison was administered by the prisoner's own hand; for if, with intent to destroy the deceased, he prepares poison and lays it in his way, and he accordingly takes it and dies; or, if he gives it to an innocent third person, to be administered to the deceased as a medicine, which is done, and it kills him; this evidence will support a charge against the prisoner as the murderer.[4] So, where the third person, who was directed by the prisoner to administer the dose, omitted to do so, and afterwards the poison was accidentally administered by a child, and death ensued; this was held sufficient to support an indictment against the prisoner as the sole and immediate agent in the murder.[5]

§ 136. **Infanticide.** To support an indictment for *infanticide*, at common law, it must be clearly proved that the child was wholly born, and was born alive, having an independent circulation, and existence.[1] Its having breathed is not sufficient to make the killing amount to murder; as it might have breathed

cannot be required than that the charge should be rendered highly credible from a variety of detached points of proof, and that, supposing poison to have been employed, stronger demonstration could not reasonably have been expected to have been, under all the circumstances, producible." 1 Gilb. on Evid. by Lofft, p. 302.

[2] R. *v.* Tawell, cited in Wills on Cir. Evid. 180, 181, 5th (Am.) ed. 203, 204; [People *v.* Buchanan, 145 N. Y. 1.] Statements made by the deceased, a short time previous to the alleged poisoning, are admissible to prove the state of his health at that time: R. *v.* Johnson, 2 C. & K. 354. And see *ante*, Vol. I. § 102.

[3] See the observations of Buller, J., in Donellan's Case; and of Abbott, J., in R. *v.* Donnall; and of Rolfe, B., in R. *v.* Graham; and of Parke, B., in R. *v.* Tawell, cited in Wills on Cir. Evid. 187–191, 5th (Am.) ed. 203, 204; R. *v.* Geering, 18 Law J. 215; *supra*, § 9.

[4] J. Kely. 52, 53; Foster 349; 1 Hale P. C. 616; R. *v.* Nicholson, 1 East P. C. 346.

[5] R. *v.* Michael, 9 C. & P. 356; 2 Moody C. C. 120.

[1] [Johnson *v.* State, 24 S. W. 285, Tex. Cr. App. Changed by statute in Florida: Williams *v.* State, 34 Fla. 217. Where a child born alive dies of bruises inflicted on it before birth by the defendant's beating its mother, the defendant may be convicted of murder: Clarke *v.* State, 23 S. 671, Ala.]

before it was entirely born;[2] nor is it essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time afterwards.[3] Neither is it material that it is still connected with the mother by the umbilical cord, if it be wholly brought forth, and have an independent circulation.[4] But in all cases of this class it must be remembered, that stronger evidence of *intentional* violence will be required than in other cases; it being established by experience that in cases of illegitimate birth, the mother, in the agonies of pain or despair, or in the paroxysm of temporary insanity, is sometimes the cause of the death of her offspring, without any intention of committing such a crime; and that therefore mere appearances of violence on the child's body are not sufficient to establish her guilt, unless there be proof of circumstances, showing that the violence was intentionally committed, or the marks are of such a kind as of themselves to indicate intentional murder.[5]

§ 137. **Guilty Agency of Prisoner.** After proving that the deceased was feloniously killed, it is necessary to show that *the prisoner was the guilty agent.* And here, also, any circumstances in the conduct and conversation of the prisoner, tending to fix upon him the guilt of the act, such as the motives which may have urged him to its commission, the means and facilities for it which he possessed, his conduct in previously seeking for an opportunity, or in subsequently using means to avert suspicion from himself, to stifle inquiry, or to remove material evidence, are admissible in evidence. Other circumstances, such as possession of poison or a weapon, wherewith the deed may have been done, marks of blood, the state of the prisoner's dress, indications of violence, and the like, are equally competent evidence. But it is to be recollected, that a person of weak mind or nerves, under the terrors of a criminal accusation, or of his situation as calculated to awaken suspicion against him, and

[2] R. *v.* Enoch, 5 C. & P. 539; R. *v.* Poulton, ib. 329.

[3] R. *v.* Brain, 6 C. & P. 349.

[4] R. *v.* Reeves, 9 C. & P. 25; R. *v.* Crutchley, 7 id. 814; R. *v.* Sellis, ib. 850; R. *v.* Wright, 9 id. 754; Wills on Cir. Evid. p. 204, 5th (Am.) ed. 267; R. *v.* Trilloe, 2 Moody C. C. 260; 1 C. & M. 650. If the child be intentionally mortally injured before it is born, but is born alive, and afterwards dies of that injury, it is murder: 3 Inst. 50; 1 Russ. on Crimes, 485; R. *v.* Senior, 1 Moody C. C. 346; 4 Com. Dig. Justices, M. 2, p. 449. See R. *v.* West, 2 C. & K. 784.

[5] Alison's Prin. Crim. Law, pp. 158, 159; Wills on Cir. Evid. 206, 207, 5th (Am.) ed. 269, 270.

ignorant of the nature of evidence and the course of criminal proceedings, and unconscious of the security which truth and sincerity afford, will often resort to artifice and falsehood, and even to the fabrication of testimony, in order to defend and exonerate himself.[1] In order, therefore, to convict the prisoner upon the evidence of circumstances, it is held necessary not only that the circumstances all concur to show that he committed the crime, but that they all be inconsistent with any other rational conclusion.[2]

§ 138. **Same Subject.** But, in order to prove that the prisoner was the guilty agent, it is not necessary to show that the fatal deed was done immediately by *his own hand.* We have already seen that, if he were actually present, aiding and abetting the deed; or were constructively present, by performing his part in an unlawful and felonious enterprise, expected to result in homicide, such as by keeping watch at a distance to prevent surprise or the like, and a murder is committed by some other of the party, in pursuance of the original design; or if he combined with others to commit an unlawful act, with the resolution to overcome all opposition by force, and it results in a murder; or if he employ another person, unconscious of guilt, such as an idiot, lunatic, or child of tender age, as the instru-

[1] 2 Hale P. C. 290; 3 Inst. 202; 2 Stark. Ev. 521, 522.

[2] Hodge's Case, 2 Lewin C. C. 227. In this case the prisoner was charged with murder. The case was one of circumstantial evidence altogether, and contained no one fact which, taken alone, amounted to a presumption of guilt. The murdered party (a woman), who was also robbed, was returning from market with money in her pocket; but how much, or of what particular description of coin, could not be ascertained distinctly. The prisoner was well acquainted with her, and had been seen near the spot (a lane) in or near which the murder was committed, very shortly before. There were also four other persons together in the same lane about the same period of time. The prisoner, also, was seen some hours later, and on the same day, but at a distance of some miles from the spot in question, burying something, which, on the following day, was taken up and turned out to be money, and which corresponded generally as to amount with that which the murdered woman was supposed to have had in her possession when she set out on her return home from market, and of which she had been robbed.

Alderson, B., told the jury, that the case was made up of circumstances entirely; and that, before they could find the prisoner guilty, they must be satisfied, "not only that these circumstances were consistent with *his* having committed the act, but they must also be satisfied *that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.*" He then pointed out to them the proneness of the human mind to look for, and often slightly to distort, the facts, in order to establish such a proposition; forgetting that a single circumstance which is inconsistent with such a conclusion is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt. The learned Baron then summed up the facts of the case, and the jury returned a verdict of not guilty. See 1 Stark. Ev. (London ed. 1853) 862. {Jackson *v.* State, 9 Tex. App. 114. See *ante*, Vol. I. §§ 13 *a*, 74–81, and notes.}

ment of his crime, — he is guilty as the principal and immediate offender, and the charge against him as such will be supported by evidence of these facts.[1]

§ 139. **Cause of Death.** If death ensues from a *wound*, given in malice, but *not in its nature mortal*, but, which being neglected or mismanaged, the party died; this will not excuse the prisoner who gave it; but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for if the wound had not been given, the party had not died.[1] So, if the deceased were ill of a disease apparently mortal, and his death were hastened by injuries maliciously inflicted by the prisoner, this proof will support an indictment against him for murder; for an offender shall not apportion his own wrong.[2]

§ 140. **Mode of Killing.** The *mode of killing* is not material, *Moriendi mille figuræ*. It is only material that it be shown that the deceased died of the injury inflicted, as its natural, usual, and probable consequence. The nature of the injury is specifically set forth in the indictment; but, as we have already seen,[1] it is *sufficient if the proof agree with the allegation in its substance and generic character*, without precise conformity in every particular. Thus, if the allegation be that the death was caused by stabbing with a dagger, and the proof be of killing by any other sharp instrument;[2] or if it be alleged that the death was caused

[1] *Ante*, Vol. I. § 111; *supra*, tit. Accessory, *passim*; *supra*, § 9; Foster 259, 350, 353; R. *v.* Culkin, 5 C. & P. 121; 1 Hale P. C. 461; 1 Russ. on Crimes, 26–30, 5th (Eng.) ed. 160, 161; R. *v.* Tyler, 8 C. & P. 616; {Com. *v.* Chapman, 11 Cush. (Mass.) 422.}

[1] Com. *v.* M'Pike, 3 Cush. 181; McAllister *v.* State, 17 Ala. 434; Com. *v.* Green, 1 Ashm. 289; R. *v.* Rew, J. Kely. 26; 1 Hale P. C. 428; 1 Russ. on Crimes, 505, 5th (Eng.) ed. 674, 675; R. *v.* Holland, 2 M. & Rob. 351; Alison's Crim. Law of Scotland, 147; {State *v.* Bentley, 44 Conn. 537; Bowles *v.* State, 58 Ala. 335; State *v.* Briscoe, 30 La. Ann. Pt. I. 433; Williams *v.* State, 2 Tex. App. 271; State *v.* Morphy, 33 Iowa, 270;} [Daughdrill *v.* State, 113 Ala. 7; State *v.* Edgerton, 100 Pa. 63; Com. *v.* Eisenhower, 181 id. 470; Territory *v.* Yee Dan, 7 N. M. 439; Clark *v.* Com., 90 Va. 360; State *v.* Hambright, 111 N. C. 707.]

[2] 1 Hale P. C. 428; 1 Russ. on Crimes, 505, 506, and note by Greaves, 5th (Eng.) ed. 675, 676; R. *v.* Martin, 5 C. & P. 128; R. *v.* Webb, 1 M. & Rob. 405; {Com. *v.* Fox, 7 Gray (Mass.) 585. But if one person inflicts a mortal wound, and, before death from the wound, the party is killed by the act of another, this is not murder in the first: State *v.* Scates, 5 Jones (N. C.) 420.} [But if one inflicts a mortal wound in self-defence, and then inflicts a second wound not in self-defence which contributes to or accelerates death, he is guilty of felonious homicide. Rogers *v.* State, 60 Ark. 76.]

[1] *Ante*, Vol. I. § 65. And see 2 Hawk. P. C. c. 46, § 37.

[2] R. *v.* Mackalley, 9 Rep. 65, 67; 2 Inst. 319. So, if the charge be of murder by

by a blow with a club, or by a particular kind of poison, or by a particular manner of suffocation, and the proof be of killing by a blow given with a stone or any other substance, or by a different kind of poison, or another manner of suffocation, it is sufficient;[3] for, as Lord Coke observes, the evidence agrees with the effect of the indictment, and so *the variance from the circumstance is not material.*[4] But if the evidence be of death *in a manner essentially different* from that which is alleged; as, if the allegation be of stabbing or shooting, and the evidence be of death by poisoning; or the allegation be of death by blows inflicted by the prisoner, and the proof be that the deceased was knocked down by him and killed by falling on a stone, — the indictment is not supported.[5] And whatever be the act of violence alleged, it must appear in evidence that the death was the consequence of that act. But if it be proved that blows were given by a lethal weapon, and were followed by insensibility or other symptoms of fatal danger, and afterwards by death, this is sufficient to throw on the prisoner the burden of proving that the death proceeded from some other cause.[6]

§ 141. **Contributing Causes.** Where the death is charged to have proceeded from a particular artificial cause, and the proof is that it was only *accelerated by that cause*, but in fact *proceeded from another artificial cause*, the evidence does not support the charge. Thus, where the charge was of causing the death of a child by exposing it to cold, and the proof was that it was found exposed in a field alive, but with a mortal contusion on its head, and that it died in a few hours afterwards; it was held, that if

"cutting with a hatchet," or, by "striking and cutting with an instrument unknown," evidence may be given of shooting with a pistol: People *v.* Colt, 3 Hill (N. Y.) 432. And if the charge be of shooting with a leaden bullet, it is supported by proof of shooting with a load of duck shot: Goodwin's Case, 4 Sm. & M. 520.

[3] 2 Hale P. C. 185; R. *v.* Tye, Russ. & Ry. 345; R. *v.* Culkin, 5 C. & P. 121; R. *v.* Waters, 7 id. 250; R. *v.* Grounsell, ib. 788; R. *v.* Martin, 5 id. 128. And see R. *v.* Hickman, ib. 151; R. *v.* O'Brian, 2 C. & K. 115; R. *v.* Warman, ib. 195; *ante*, Vol. I. § 65.

[4] R. *v.* Thompson, 1 Moody C. C. 139; R. *v.* Kelly, ib. 113. If the allegation be of shooting with a leaden bullet, and the proof be that there was no bullet, but that the injury proceeded from the wadding; *quære*, whether the charge is supported by the evidence. And see R. *v.* Hughes, 5 C. & P. 126.

[5] [So, where the indictment alleged that the prisoner assaulted the deceased, and "in some way and manner, and by the use of some means and instruments to the jury unknown," killed her, and the evidence was that the deceased died from fright caused by the violence of the accused, but there was no proof that actual personal violence was the sole and immediate cause of the death, the conviction was sustained: Cox *v.* People, 80 N. Y. 500.]

[6] U. S. *v.* Wiltberger, 3 Wash. 515.

the death was only accelerated by the exposure, the charge was not supported.[1] So, if the indictment charges that the death was occasioned by *two jointly co-operating causes*, as by starving and beating, both must be proved or the indictment fails.[2] But if the charge be of killing by the act of the prisoner as the cause, and the proof is that the deceased was sick, and must soon have died from his disease, as a *natural* consequence, the violent act of the prisoner only having *accelerated* his death, the charge is nevertheless supported.[3]

§ 142. **Indirect Murder.** *Forcing a person to do an act which causes his death*, renders the death the guilty deed of him who compelled the deceased to do the act. And it is not material whether the force were applied to the body or the mind; but, if it were the latter, it must be shown that there was the apprehension of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; and it need not appear that there was *no* other way of escape; but it must appear that the step was taken to avoid the threatened danger, and was such as a reasonable man might take.[1] But if the charge be that the prisoner "did compel and force" another person to do an act which caused the death of a third party, this allegation will require the evidence of personal affirmative force, applied to the party in question. Thus, where it was stated in the indictment that the prisoner "did compel and force" A and B to leave working at the windlass of a coal-mine, by means of which the bucket fell on the head of the deceased, who was at

[1] Stockdale's Case, 2 Lewin C. C. 220; 1 Russ. on Crimes, 566, 5th (Eng.) ed. 650.

[2] Ibid.; R. *v.* Saunders, 7 C. & P. 277.

[3] State *v.* Morea, 2 Ala. 275; {Com. *v.* Fox, 7 Gray (Mass.) 585. An assault with the hands and feet only, upon a person whom the prisoner knew, or had reasonable cause to believe, was so feeble that the attack might hasten her death, is enough to warrant a conviction of murder. Otherwise, if the criminal did not know, or have reasonable cause to believe, the deceased to be so feeble: ibid.}

[1] R. *v.* Pitts, Carr. & Marshm. 284, per Erskine, J.; R. *v.* Evans, 1 Russ. on Crimes, 489, 5th (Eng.) ed. 650; R. *v.* Waters, 6 C. & P. 328. If a shipmaster knowingly and maliciously compels a sick or disabled seaman to go aloft, while he is in such a state of debility and exhaustion that he cannot comply without danger of death or enormous bodily injury, and the seaman falls from the mast and is drowned or killed, it is murder in the master, whether the means of compulsion were moral or physical: U. S. *v.* Freeman, 4 Mason 505. {But if a seaman in good health, in the ordinary course of his duty is at work on the royal yard arm, and falls, by accident, into the sea, and the captain refuses to heave to the vessel, lower boats, or make any attempt to save the man, although it might have been done without extreme danger to the vessel and the lives of those on board, yet, if the refusal is not prompted by express malice, the captain is guilty only of manslaughter; and if, on the evidence, there is a reasonable doubt whether the seaman was not killed by the fall, the jury should acquit: U. S. *v.* Knowles, 4 Sawy. C. C. 517.}

the bottom of the mine, and killed him; and the evidence was that A and B were working at one handle of the windlass, and the prisoner at the other, all their united strength being requisite to raise the loaded bucket, and that the prisoner let go his handle and went away, whereupon the others, being unable to hold the windlass alone, let go their hold, and so the bucket fell and killed the deceased; it was held, that this evidence was not sufficient to support the indictment.[2]

§ 143. **Place.** In regard to the *place* where the crime was committed, it is material to prove that it was done in the *county* where the trial is had; for, by the common law, murder, like all other offences, can be inquired of only in the county where it was committed. Hence, the indictment should be so drawn that it may judicially appear to the court that the offence was committed within the county, this being the limit of their jurisdiction; and the uniform course, in capital cases, has always been to state also the town or parish where it was done; but it is not material, at this day, to prove the town or parish, in any case, unless where it is stated as matter of local description, and not as venue.[1] Neither is it material, as we have already seen, to prove the precise *time* when the crime was perpetrated, if it be alleged and proved that the death took place within a year and a day after the injury or mortal stroke was inflicted.[2]

§ 144. **Malice aforethought.** The chief characteristic of this crime, distinguishing it from every other species of homicide, and therefore indispensably necessary to be proved, is *malice prepense* or *aforethought.*[1] This term, however, is not re-

[2] R. *v.* Lloyd, 1 C. & P. 301.

[1] 2 Hawk. P. C. c. 25, § 84; 2 Russ. on Crimes, 800, 801, 5th (Eng.) ed. vol. iii. 403; Com. *v.* Springfield, 7 Mass. 13. By the common law, as recited in the Stat. 2 & 3 Ed. VI. c. 24, § 2, if the mortal stroke or injury was given in one county, and the death happened in another, the party could not be tried in either; but, by that statute, provision was made that the trial might be had in either of the counties; and the like rule is adopted generally in the United States. The reason for this strictness in regard to the place of trial was, that anciently the jurors decided causes upon their own private knowledge, as well as upon the evidence given by others, and therefore were summoned *de vicineto.* See Stephen on Pleading, pp. 153, 297, 301 (Am. ed. 1824).

[2] *Supra*, § 120.

[1] [The meaning of the word "malice" has thus been defined by Mr. Stephen (Dig. Crim. Law, art. 223) :— "Malice aforethought means any one or more of the following states of mind : (a) an intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not. (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference, whether death or grievous

stricted to spite or malevolence towards the deceased in particular; but, as we have stated in a preceding section, it is undersood to mean that general malignity and recklessness of the lives and personal safety of others which proceed from a heart void of a just sense of social duty and fatally bent on mischief.[2] And whenever the fatal act is committed deliberately, or without adequate provocation, the law presumes that it was done in malice;[3] and it behooves the prisoner to show, from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to murder.[4] In showing this, the idea or meaning of what the

bodily harm is caused or not, or by a wish that it may not be caused. (c) An intent to commit any felony whatever. (d) An intent to oppose by force any officer of justice on his way to, in, or returning from, the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace, or dispersing an unlawful assembly, provided that the person killed is such an officer so employed." For a discussion of the subject of criminal intent, see Holmes's Common Law, Lecture II.}

[2] See *supra*, § 14; 4 Bl. Comm. 198; Foster 256, 257; 2 Stark. Evid. 516, 4th (Am.) ed. 903; U. S. *v.* Ross, 1 Gall. 628; [State *v.* Becker, 9 Houst. 411; Johnson *v.* State, 92 Ga. 36. Where an attempt to commit murder by poisoning in one State is erroneously supposed to have been successful, and the prisoner brings the supposed corpse into another State and beheads it, he may be convicted of murder in the latter State: Jackson *v.* Com., 38 S. W. 1091, Ky.]

[3] [Davis *v.* State, 51 Neb. 301; State *v.* Weeden, 133 Mo. 70; Pointer *v.* U. S., 151 U. S. 396; People *v.* Sliney, 137 N. Y. 570; State *v.* Workman, 39 S. C. 151; Clarke *v.* State, 23 S. 671, Ala.; State *v.* Tommy, 53 P. 157, Wash.] {The doctrine of York's Case has been very much questioned. See *ante*, §§ 13, 14, and notes, and Vol. I. §§ 18, 34. However correct the principle may be that the law presumes malice from the fact of homicide if nothing else appears on the evidence, yet it rarely happens that the mere fact of homicide is the only fact proved. Generally there are attendant circumstances, *e. g.* the place, the character of the attack, the relative position or strength of the parties, etc., from which some inference may logically be drawn by the jury as to whether the accused did or did not commit the act of homicide with felonious intent, and when any such circumstances are proved in the case, the presumption of felonious intent, if indeed there is such a presumption, disappears, and the whole question of felonious intent lies open to the jury, who must be satisfied beyond a reasonable doubt from all the facts in the case that the homicide was with such intent before they can legally convict the accused: Hawthorne *v.* State, 58 Miss. 778; State *v.* Trivas, 32 La. Ann. 1086; Territory *v.* McAndrews, 3 Montana, 158; State *v.* McDonnell, 32 Vt. 491, p. 498; State *v.* Swayze. 30 La. Ann. Pt. II. 1323. But cf. as affirming the doctrine of York's Case in language at least, Brown *v.* State, 4 Tex. App. 275. As to the effect of evidence raising a reasonable doubt of malice, see *ante*, § 29, notes.}

[4] R. *v.* Greenacre, 8 C. & P. 35, per Tindal, C. J.; 4 Bl. Comm. 200; *supra*, § 13; York's Case, 9 Met. 103. Such is also the rule in Scotland: Alison's Crim. Law of Scotland, 48, 49. It also seems to be the rule of the Roman civil law: "Omne malum factum prave semper præsumitur actum; nisi ratione personæ contraria omnino oriatur presumptio." Mascard. De Probat. Concl. 223, n. 5. "Si homicidium committatur, præsumitur in dubio dolose committi, licet potuisset patrari ad defensionem." Id. Concl. 1007, n. 62. "Omne malum præsumitur pessime factum, nisi probetur contrarium." Id Concl. 1163, n. 23. [Absence of motive is a circumstance in favor of the accused to be considered by the jury: Pointer *v.* U. S., 151 U. S. 396.]

{See Com. *v.* Hawkins, 3 Gray (Mass.) 463; U. S. *v.* Mingo, 2 Curt. C. C. 1; U. S. *v.* Armstrong, ib. 446. If the design to kill be formed deliberately for ever so short a time before the infliction of the mortal wound, the offence is murder: State *v.* McDonnell, 32 Vt. 491; People *v.* Bealoba, 17 Cal. 389; Donnelly *v.* State, 2 Dutch. 463 and

law terms *malice* is carefully to be kept in view; and the evidence is to be directed not merely to prove that he entertained no ill-will towards the deceased in particular, but to show that, in doing the act which resulted fatally, he was not unmindful, but, on the contrary, was duly considerate and careful of the lives and safety of all persons.

§ 145. **Malice, Express and Implied.** Malice is said to be either *express* or *implied*. *Express malice* is proved by evidence of a deliberately formed design to kill another; and such design may be shown from the circumstances attending the act, such as the deliberate selection and use of a lethal weapon,[1] knowing it to be such; a preconcerted hostile meeting, whether in a regular duel, with seconds, or in a street fight mutually agreed on or notified and threatened by the prisoner; privily lying in wait, a previous quarrel or grudge, the preparation of poison, or other means of doing great bodily harm, or the like.[2] *Implied* or *constructive malice* is an inference or conclusion of law upon the facts found by the jury: and, among these, the actual intention of the prisoner becomes an important fact; for though he may not have intended to take away life, or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act, from which the law raises the presumption of malice.[3] Thus, if one attempts to kill or maim A, and in the attempt, by accident, kills B,[4] who was his dearest friend or darling child; or if one, in the attempt to procure

601; State *v.* Shoultz, 25 Mo. 128; Com. *v.* Webster, 5 Cush. (Mass.) 304; Wright *v.* Com., 33 Gratt. (Va.) 880; Binns *v.* State, 66 Ind. 428; [Allen *v.* U. S., 164 U. S. 492; Daughdrill *v.* State, 113 Ala. 7; State *v.* Straub, 16 Wash. 111; State *v.* Gin Pom, 16 Wash. 425; State *v.* Davis, 9 Houst. 407; Lawrence *v.* State, 36 S. W. 90, Tex. Cr. App.; Perry *v.* State, 30 S. E. 903, Ga.; Com. *v.* Eckerd, 174 Pa. 137; People *v.* Tuczkewitz, 149 N. Y. 240; State *v.* McCormac, 116 N. C. 1033; Carleton *v.* State, 43 Neb. 373.] This, however, does not render it less necessary to allege and prove the express malice, or deliberation and premeditation, and malice aforethought, which is necessary in order to support a conviction for murder in the first degree. The cases to this point are collected in Wharton, Homicide, § 177. See the dissenting opinion of Clerke, J., in Sanchez *v.* People, 22 N. Y. 147, to the point that, under the influence of a strong passion, a man may be so far *incapax doli* as to plan a deliberate homicide without legal malice prepense.}

[1] [Cobb *v.* State, 115 Ala. 18; Compton *v.* State, 110 id. 24; State *v.* Davis, 9 Houst. 407; Brown *v.* Com., 19 S. E. 447, Va. *Contra*, State *v.* Earnest, 56 Kan. 31.]

[2] 4 Bl. Comm. 198, 199. And see State *v.* Zellers, 2 Halst. 220; Stone's Case, 4 Humph. 27. Where the crime is charged to have been committed with the actual and premeditated design to kill the deceased, this has been regarded as of the essence of the charge, and held necessary to be proved: People *v.* White, 24 Wend. 520.

[3] 2 Stark. on Evid. 515, 516, 4th (Am.) ed. 902, 903; Foster 255–257; [State *v.* Foster, 136 Mo. 653; Reddick *v.* Com., 33 S. W. 416, Ky.]

[4] [Brown *v.* State, 147 Ind. 28; State *v.* McGonigle, 14 Wash. 594; Richards *v.* State, 35 Tex. Cr. App. 38; Com. *v.* Breycssee, 160 Pa. 451.]

an abortion, causes the death of the mother; or if, in a riot or fight, one of the parties accidentally kills a third person, who interfered to part the combatants and preserve the peace, — the law implies malice, and the slayer is held guilty of murder.[5] And though other agents intervene between the original felonious act and its consummation, as, if A gives poisoned food to B, intending that he should eat it and die, and B, ignorant of the poison, and against the will and entreaty of A, gives it to a child, who dies thereby,[6] or it is voluntarily tasted by an innocent third person, by way of convincing others of his belief that it is not poisoned, as in the case of the apothecary, into whose medicine, prepared by him for a sick person, another had purposely mingled poison,[7] — the law still implies malice, and holds the wrong-doer guilty of murder.

§ 146. **Malice, when presumed.** Malice is also a legal presumption, where an *officer of justice is resisted* while in the execution of his office, and in such resistance is killed. And this rule is extended to all executive officers; such as sheriffs, marshals, and their deputies, coroners, constables, bailiffs, and all others authorized to execute process and preserve the peace, and to all persons aiding them therein as well as to the watchmen, and officers and men in the department of police, and their assistants. The rule also extends not only to the scene of action, and while the officer is engaged in the particular duty of his office which called him thither, but also to the time while he is going to and returning from the places *eundo*, *morando*, *et redeundo*. It also applies to all persons knowingly aiding, abetting, and taking part in the act of resistance. But the rule is limited to cases where the officer is in the due execution of his duty, having sufficient authority for the purpose; and where his official character or his right to act is either actually known, or may well be presumed from the circumstances; or where the slayer, not knowing the officer or the circumstances, interfered to help a fight, by aiding one party against the other, and not

[5] Foster 261, 262; 1 Hale P. C. 438, 441; 1 Hawk. P. C. b. 1, c. 81, § 54; {State *v.* Gilman, 69 Me. 163. If one attempts to commit suicide, and in that attempt kills another, the slayer is guilty of criminal homicide, although the attempt to commit suicide may not even be punishable; for the act which he attempted to do is unlawful and criminal: Com. *v.* Mink, 123 Mass. 422. For a full and learned discussion of the criminal law of suicide, see the same case.}

[6] Saunders's Case, Plowd. 473.

[7] Gore's Case, 9 Rep. 81

to preserve the peace and prevent mischief.[1] This rule is also applied in the case of private persons killed in attempting to arrest a criminal whenever the circumstances were such as to authorize the arrest.[2]

§ 147. **Malice. Gross Recklessness.** Malice may also be proved by evidence of *gross recklessness of human life*, whether it be in the act of *wanton sport*, such as purposely and with intent to do hurt, riding a *vicious horse* into a crowd of people, whereby death ensues; or by *casting stones*, or other heavy bodies likely to create danger, over a wall or from a building, with intent to hurt the passers-by, one of whom is killed;[1] or where a parent or master *corrects a child* in a savage and barbarous manner, or with an instrument likely to cause death, whereof the child dies;[2] or where, in any manner, the life of another is knowingly, cruelly, and grossly endangered, whether by actual violence, or by inhuman *privation* or *exposure*, and death is caused thereby.[3] So, where death ensues in a combat upon *provocation sought by the slayer;* or upon a *punctilio* proposed by him, such as challenging the deceased to take a pin out of his sleeve if he dared.[4] So, if the provocation be by *words* or *gestures only*, and the stroke be with a lethal weapon, or in a manner likely to kill, this is evidence of malice; unless the words or gestures be accompanied by some act indicating an intention of following them up by an actual assault, in which case the offence is reduced to manslaughter.[5] So, whatever be the provocation, if afterwards, and before the fatal stroke, sufficient time had elapsed for the *passion to subside*, this is proof that the killing

[1] See 1 Russ. on Crimes, pp. 532–538, 592–635, 5th (Eng.) ed. 707–759, where this subject is fully treated; a more extended discussion of it being foreign from the plan of this work. See also 2 Wharton, Crim. Law, 7th ed. §§ 1030–1042; *supra*, § 123; Com. *v.* Drew, 4 Mass. 391, 395.

[2] In what cases a private person may make an arrest, see *supra*, § 123, n.

[1] 3 Inst. 57, as limited by Holt, C. J., 1 Ld. Raym. 143; 1 Hale P. C. 475; 4 Bl. Comm. 192, 200; 1 East C. C. 231.

[2] Foster 262; 1 Hale P. C. 474; Grey's Case, J. Kely. 64.

[3] See Alison's Crim. Law of Scotland, pp. 3, 4; 1 Hale P. C. 431, 432; 1 East C. C. 225; Calm. 548, per Jones, J.; R. *v.* Walters, Carr. & Marshm. 164; 1 Russ. on Crimes, 488; Squire's Case, ib. 490; Stockdale's Case, 2 Lewin C. C. 220; R. *v.* Huggins, 2 Stra. 882; Castel *v.* Bambridge, ib. 854, 856. {Or where one fires a pistol into a railroad car in which he knows there are passengers (Aiken *v.* State, 10 Tex. App. 610), or into a crowd (State *v.* Edwards, 71 Mo. 312), or fires a pistol at night through a window into a lighted room in which several people are sitting: Washington *v.* State, 60 Ala. 10;} [Russell *v.* State, 44 S. W. 159, Tex. Cr. App.]

[4] 1 Hale P. C. 457.

[5] Watts *v.* Brains, Cro. El. 778; J. Kely. 131; 1 Hale P. C. 455, 456; 1 Russ. on Crimes, 515, 5th (Eng.) ed. 682, 683; State *v.* Merrill, 2 Dev. 269.

was of malice.[6] But when *express malice* is once proved to have existed, *its continuance is presumed* down to the time of the fatal act; and the burden of proof is on the slayer to repel this presumption by showing that the wicked purpose had afterwards, and before the fatal act, been abandoned.[7] And where such expressly malicious intent is proved, the provocation immediately preceding it, whatever may have been its nature, is of no avail to mitigate the offence.

§ 148. **Intoxication.** It is a settled principle that *drunkenness* is not an excuse for a criminal act, committed while the intoxication lasts, and being its immediate result.[1] But the condition of the prisoner in this respect has sometimes been deemed a material inquiry, in order to ascertain whether he has been guilty of the specific offence of which he is indicted; as, for example, whether he be guilty of murder in the first or only in the second degree. Malicious homicides, it is well known, are distinguished by the statutes of several of the United States, into cases of the first and the second degrees, for which different punishments are assigned; and though there is some diversity in the descriptions of these cases, yet in substance it will be found, that murders, committed with the deliberate and premeditated purpose of killing, or in the attempt to commit any other crime, punished with death or perpetual confinement in the State penitentiary, are of the first degree; and that all others are murders of the second degree.[2] Whenever, therefore, in an indictment of murder in the first degree, the chief ingredient is the deliberately formed purpose of taking life, it has been held, in some of the United States, that evidence that the prisoner was so drunk as to be utterly incapable of forming

[6] The subject of provocation, and when it reduces the crime to manslaughter, has already been considered. See *supra*, §§ 122–127. And see State *v.* Hill, 4 Dev. & Bat. 491.

[7] State *v.* Johnson, 1 Ired. 354; State *v.* Tilly, 3 id. 424; Shoemaker *v.* State, 12 Ohio 43; Com. *v.* Green, 1 Ashm. 289. And see *ante*, Vol. I. § 42.

[1] *Ante*, Vol. II. § 374; *supra*, § 6; State *v.* Bullock, 13 Ala. 413; [Com. *v.* Gilbert, 165 Mass. 45; State *v.* McDaniel, 115 N. C. 807;] {U. S. *v.* McGlue, 1 Curt. C. C. 1; State *v.* Tatro, 50 Vt. 483; People *v.* Williams, 43 Cal. 344, 346; Com. *v.* Hawkins, 3 Gray (Mass.) 466. If the prisoner relies upon delirium tremens as a defence, he must show that *at the time of the act* he was under a paroxysm of that disorder: State *v.* Sewell, 3 Jones (N. C.) Law, 245. See the whole subject of intoxication as a defence thoroughly examined by Denio and Harris, JJ., in People *v.* Rogers, 18 N. Y. 9.}

[2] Murray's Case, 2 Ashm. 41; Williams's Case, ib. 69; Com. *v.* Prisonkeeper, ib. 227; Mitchell's Case, 5 Yerg. 340; Dale's Case, 10 id. 551; Swan's Case, 4 Humph. 136; Jones's Case, 1 Leigh 598; Whiteford's Case, 6 Rand. 721; Clark's Case, 8 Humph. 671.

such deliberately premeditated design, is admissible in proof that this offence has not been committed.[3] But whether this will be generally admitted as a sound and safe rule of criminal law, can be known only from future decisions in other States.[4]

§ 149. **Declarations of Prisoner; Res Gestæ.** It is not competent for the prisoner to give in evidence his own account of the transaction, related immediately after it happened, even though no person was present at the occurrence; for his account of it was no part of the *res gestæ*.[1]

[3] Cornwell's Case, Mart. & Yerg. 157; Swan's Case, 4 Humph. 136. And see State *v.* McCants, 1 Speers 384; [Wilson *v.* State, 37 A. 954, N. J. L.; People *v.* Leonardi, 143 N. Y. 360.]

[4] {The rule stated by the author seems to have been adopted in a large number of the States: State *v.* Trivas, 32 La. Ann. 1086; Com. *v.* Platt, 11 Phila. (Pa.) 421; Jones *v.* Com., 75 Pa. St. 403; Willis *v.* Com., 32 Gratt. (Va.) 929; Pirtle *v.* State, 9 Humph. (Tenn.) 663; State *v.* Johnson, 40 Conn. 136; State *v.* Harlow, 21 Mo. 446; Malone *v.* State, 49 Ga. 210; People *v.* Williams, 43 Cal. 344; Clark *v.* State, 40 Ind. 263; Blyn *v.* Com., 1875, 10 Am. L. Reg. N. S. 577; Eastwood *v.* People, 3 Park. Cr. Rep. 25; Rogers *v.* People, ib. 632. And see *ante*, § 6, n.

Proof of the intoxication of the defendant, however, is not admissible simply on the question of criminal intent: State *v.* Edwards, 71 Mo. 312; [State *v.* O'Reilly, 126 id. 597; State *v.* Morgan, 40 S. C. 345. But see Hill *v.* State, 42 Neb. 503.] In State *v.* Cross, 27 Wis. 332, it was held that drunkenness does not mitigate a crime in any respect; and Richardson, J., dissenting, that the jury could not give it any weight in determining whether a homicide was wilful, deliberate, or premeditated.

If intoxication has reached such a point as to render it probable that the accused was physically unable to commit the offence with which he is charged, this may be shown by evidence of such intoxication: Ingalls *v.* State, 48 Wis. 647.}

[1] State *v.* Tilly, 3 Ired. 424. And see *ante*, Vol. I. § 108.

LARCENY.

§ 150. **Definition.** The most approved *definition* of this offence, at common law, is that which is given by Mr. East; namely, "the wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a *felonious intent* to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner."[1] But even this definition, though admitted by Parke, B., to be the most complete of any, was thought by him to be defective, in not stating what was the meaning of the word "*felonious*," in that connection; which, he proceeded to say, "might be explained to mean that there is no color of right or excuse of the act;" adding, that the "*intent*" must be to deprive the owner not temporarily, but permanently, of his property.[2]

[1] 2 East P. C. 553; 2 Russ. on Crimes, p. 2, 5th (Eng.) ed. 123. And see Hammon's Case, 2 Leach C. C. (4th ed.) 1089, per Grose, J. The old English lawyers described larceny as "Contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit:" Bracton, lib. 3, c. 32, § 1. Fleta defines it in Bracton's own words: Fleta, lib. 1, c. 38, § 1. The Roman civil law was larger than the common law in its comprehension of this crime. "Furtum est contrectatio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam *usus* ejus *possessionisve:*" Inst. lib. 4, tit. 1, § 1. In Sanders's edition of the Institutes (London, 1853), *ubi supra*, larceny is defined as follows: "Furtum est contrectatio rei fraudulosa, vel ipsius rei, vel etiam usus ejus possessionisve." To this definition the learned editor has appended the following note: "The definition of theft includes the term *contrectatio rei*, to show that evil intent is not sufficient: there must be an actual touching or seizing of the thing; *fraudulosa*, to show that the thing must be seized with evil intent; and *rei, usus, possessionis*, to show the different interests in a thing that might be the subject of theft. It might seem that it would have made the definition more complete to have said *contrectatio rei alienæ*. Perhaps the word *alienæ* was left out because it was quite possible that the *dominus* or real owner of a thing should commit a theft in taking it from the possessor, as, for instance, in the case of a debtor stealing a thing given in pledge; and yet the *res* was scarcely *aliena* to the *dominus*. Many texts after the words *contrectatio fraudulosa*, add *lucri faciendi gratia*, i. e., with a design to profit by the act, whether the profit be that of gaining a benefit of one's self, or that of inflicting an injury on another. These words are found in the passage of the Digest (xlvii. 2, l. 3) from which this definition of theft is taken; but the authority of the manuscripts seems against admitting them here."

Even the *misuse* of a thing bailed was sometimes criminal. "Placuit tamen, eos, qui rebus commodatis aliter uterenter quam utendas acceperint, ita furtum committere, si se intelligant id invito domino facere, eumque, si intellexisset, non permissurum:" Inst. *ub. sup.* § 7.

[2] R. *v.* Holloway, 2 C. & K. 942, 946; 1 Denison C. C. 370; 13 Jur. 86; McDaniel's Case, 8 Sm. & M. 401.

§ 151. **Indictment.** In the *indictment* for this offence, it is alleged, that *A. B.* (the prisoner), *on* ——, *at* ——, such and such goods (specifying the *things* stolen and their *value*), of the goods and chattels of *one C. D.* then and there being found, *feloniously* did *steal*, *take*, and *carry away*. And ordinarily these allegations are material to be proved by the prosecutor.[1]

§ 152. **Name of Prisoner.** The mere *name of the prisoner*, as we have already seen,[1] needs no proof, unless it be put in issue by a plea in abatement. It is only necessary to show his identity with the person who committed the offence. Nor is the *time* material to be proved, unless the prosecution is limited by statute to a particular time. But the *place* must be so far proved, as to show that the larceny was committed in the county in which the trial is had.[2] And in legal contemplation, where goods are stolen in one county and carried into another, whether immediately or long afterwards, the offence may be prosecuted in either county; for every asportation is in law a new caption.[3] This rule, however, is limited to simple larceny; for if it be a compound offence, such as stealing from a store or dwelling-house, or if it be robbery from the person, *that* offence must be laid and proved in the county where the store or house was situated, or where the person was assaulted and robbed.[4] Whether

[1] {"Stealing" imports larceny without the words "take and carry away:" Gay *v.* State, 20 Tex. 504. An indictment for an attempt to commit larceny, which charges the prisoner with attempt to steal "the goods and chattels of A," without further specifying the goods intended to be stolen, is sufficiently certain: R. *v.* Johnson, 10 Cox C. C. 13. A thief and a receiver of stolen goods may be jointly indicted: Com. *v.* Adams, 7 Gray (Mass.) 43.

A man is not to be convicted of larceny if it is doubtful whether he was accessory before or after the fact: R. *v.* Munday, 2 F. & F. 170.}

[1] *Supra*, § 22.

[2] For the reason of this ancient rule, see Co. Litt. 125 *a*; Stephen on Plead. 298–302.

[3] 1 Hale P. C. 507, 508; Anon., 4 Hen. VII. 5 *b*, 6 *a*; Bro. Abr. Coron. p. 171; Com. *v.* Dewitt, 10 Mass. 154; Cousin's Case, 2 Leigh 708; State *v.* Douglass, 17 Me. 193; State *v.* Somerville, 21 id. 14, 19; Com. *v.* Rand, 7 Met. 475; {State *v.* Smith, 66 Mo. 61; Connell *v.* State, 2 Tex. App. 422; Jones *v.* State, 53 Ind. 235; Myers *v.* People, 26 Ill. 173; Haskins *v.* People, 16 N. Y. 344;} [State *v.* Wade, 55 Kan. 693; Com. *v.* Rubin, 165 Mass. 453; Hurlbut *v.* State, 72 N. W. 471, Neb.] That the lapse of time between the first taking and the carrying into another county is not material, see Parkins's Case, 1 Moody C. C. 45; 1 Lewin C. C. 316.

[4] 1 Hale P. C. 507, 508; 2 id. 163; 1 Hawk. P. C. c. 33, § 9; 2 Russ. on Crimes, 116, 5th (Eng.) ed. 270; {Smith *v.* State, 55 Ala. 59. When the indictment is for larceny in a building, a statutory form of compound larceny, it must be proved that the property is not only in the building, but that the building is its protection, *i. e.* that it is not in the possession and charge of any person, so as to constitute the crime of larceny from the person. Thus in Com. *v.* Lester, 129 Mass. 101, the facts were that the defendant came into a watchmaker's shop and asked to see some watches, and the watches were taken from a show-case and passed to the defendant. The witness who testified to these facts was not sure whether the defendant held the watches in his

the indictment for larceny can be supported, where the goods are proved to have been originally stolen in another State and brought thence into the State where the indictment is found, is a point on which the decisions are contradictory.[5] But if the

hand or whether they were lying on the counter. While the storekeeper's attention was distracted the defendant ran off with the watches, but was overtaken and caught with them in his possession. The property and watches were in charge of the storekeeper at the time of the theft. The counsel for the defendant requested the judge to instruct the jury that as matter of law, this evidence was insufficient to warrant them in finding the defendant guilty of larceny in a building, but the facts constituted the offence of simple larceny only and not larceny in a building. The judge, however, refused this request, and instructed them that if the property was stolen by being taken by the defendant at a time when the owner's attention was for any cause diverted from it, so that it was not under his immediate control, then the larceny would be in the building, and that, if the owner's attention was in this case diverted from the immediate oversight of the property and the defendant took advantage of such diversion, to take the property, the offence of larceny in a building was proved. The Supreme Court sustained exceptions to this ruling, saying, "The watches in this case were a part of the owner's stock in trade usually kept by him in the building. But his testimony, which was the only evidence to the point, is to the effect that he was in charge of the property when the defendant came in and asked to look at some watches, and he handed the watches to the defendant, that he was not sure whether the defendant held the watches in his hand or whether they were lying on the showcase, and that they were stolen while he turned partially around to place something on the shelf behind him. If they were upon the showcase when stolen, it would be at least doubtful whether they must not, under the circumstances, be considered as rather in the possesion of the owner than under the protection of the building. If by the act of the owner they were in the hands of the defendant, they certainly derived no protection from the building. As the evidence left it wholly uncertain whether they were on the showcase or in the defendant's own hands, it did not warrant a conviction of larceny in a building."}

[5] In the affirmative, see Com. *v.* Cullins, 1 Mass. 116; Com. *v.* Andrews, 2 id. 14; Com. *v.* Rand, 7 Met. 475, 477; State *v.* Ellis, 3 Conn. 185; Hamilton's Case, 11 Ohio 435; Simmons *v.* Com., 5 Binn. 617; 1 Leading Crim. Cases, 212; People *v.* Gardiner, 2 Johns. 477; People *v.* Schenck, ib. 479. In New York, the rule has since been changed by statute, upon which the case of People *v.* Burke, 11 Wend. 129, was decided. A similar statute has been enacted in Alabama: State *v.* Seay, 3 Stewart 123; Murray *v.* State, 18 Ala. 727. And see Simpson's Case, 4 Humph. 456; R. *v.* Prowes, 1 Moody C. C. 349. But in R. *v.* Madge, 9 C. & P. 29, which was decided upon the authority of R. *v.* Prowes, the learned judge apparently doubted the soundness of that case, in principle. {In the affirmative are Watson *v.* State, 36 Miss. 593; State *v.* Johnson, 2 Or. 115; State *v.* Newman, 9 Nev. 48; [State *v.* Morrill, 68 Vt. 60.] In the negative are Lee *v.* State, 64 Ga. 203; Maynard *v.* State, 14 Ind. 427; State *v.* Reonnals, 14 La. Ann. 278; State *v.* Le Blanch, 2 Vroom (N. J.) 82; State *v.* Brown, 1 Hayw. (N. C.) 100; Simpson *v.* State, 4 Humph. (Tenn.) 456; [Strouther *v.* Com., 92 Va. 789.] The same conflict of decision exists, as to whether, when goods are stolen in a *foreign country* and brought into one of the United States, the accused is guilty of larceny in the State. Thus it was held in the case of State *v.* Bartlett, 11 Vt. 650, that where oxen were stolen in Canada and brought into Vermont, a conviction of larceny in the latter State was proper. See also State *v.* Underwood, 49 Me. 181, to the same point. But see Com. *v.* Uprichard, 3 Gray (Mass.) 434. In that case the theft was committed in one of the British Provinces, and the goods brought into Massachusetts by the thief, who was there convicted of larceny. The court, however, ordered a new trial, on the ground that the facts did not sustain such a charge; and Shaw, C. J., after stating that the main argument for the conviction rested on the rule, that, when property has been stolen in one county and carried by the thief into another county, he may be indicted in either, said, "But in principle these cases are not strictly analogous. If the offence is committed anywhere in the realm of England, in whatever county, the same law is violated, the same punishment is due, the rules of evidence and of law governing every step of the proceedings are the same, and it is a

original taking were such as the common law does not take cognizance of, as, if the goods were taken on the high seas, an indictment at common law cannot be sustained in any county.[6] It may here be added, that in order to render the offence cognizable in the county to which the goods are removed, it is necessary that they continue specifically the same goods; for if their nature be changed after they are stolen in one county, and before they are removed to another, the offence in the latter county becomes a new crime, and must be prosecuted as such. Thus, where a brass furnace, stolen in one county, was *there* broken in pieces, and the pieces were carried into *another* county, in which *latter* county the prisoner was indicted for larceny of a brass *furnace there;* he was acquitted upon this evidence; for it was not a brass *furnace*, but only *broken pieces of brass*, that he had in *that* county.[7] So, if a joint larceny be committed in one county where the goods are divided, and each thief takes his separate share into another county, this evidence will not support a joint prosecution in the latter county, for there the larceny was several.[8]

§ 153. **Value.** Nor is it necessary to prove the *value* of the goods stolen, except in prosecuting under statutes which have made the value material, either in constituting the offence, or

mere question where the trial shall be had. But the trial, wherever had, is exactly the same, and the results are the same. A conviction or acquittal in any one county is a bar to any indictment in every other; so that the question is comparatively immaterial. . . . It has, then, been argued that the same rule ought to apply to foreign governments as to the several States of the Union. . . . Perhaps if it were a new question in this Commonwealth, this argument might have some force in leading to another decision in regard to the several American States. But supposing it to be established by these authorities as a rule of law in this Commonwealth, that goods stolen in another State and brought by the thief in this State, are to be regarded technically as goods stolen in this Commonwealth, we think this forms no sufficient ground for carrying the rule further, and applying it to goods stolen in a foreign territory, under the jurisdiction of an independent government, between which and our own there is no other relation than that effected by the law of nations. Laws to punish crimes are essentially local, and limited to the boundaries of the States prescribing them. Indeed this case, and the cases cited, proceed on the ground that the goods were actually stolen in this State. . . . It is only by assuming that bringing stolen goods from a foreign country into this State makes the act larceny here, that this allegation can be sustained; but this involves the necessity of going to the law in force in Nova Scotia to ascertain whether the act done there was felonious, and, consequently, whether the goods were stolen; so that it is by the combined operation of the force of both laws that it is made felony here." See also, in support of these views, Stanley *v.* State, 24 Ohio St. 166, — a well-considered and valuable case.]

[6] 3 Inst. 113; 2 Russ. on Crimes, 119, 5th (Eng.) ed. 273.

[7] R. *v.* Halloway, 1 C. & P. 127. [So one who kills a cow without intending to steal it, and subsequently steals the carcass, cannot be convicted of "cattle stealing:" Nightengale *v.* State, 94 Ga. 395.]

[8] R. *v.* Barnett, 2 Russ. on Crimes, 117, 5th (Eng.) ed. 271.

in awarding the punishment.[1] But the goods must be shown to be of some value,[2] at least to the owner; such as reissuable bankers' notes, or other notes completely executed, but not delivered or put in circulation;[3] though to third persons they might be worthless.[4] It is not essential to prove a pecuniary value, capable of being represented by any current coin, or of being sold; it is sufficient if it be of valuable or economical utility to the general or special owner.[5] If the subject is a bank-note, the stealing of which is made larceny by statute, it must be proved to be genuine;[6] and if it be a note of a bank in another State, the existence of the bank must also be proved; and this may be shown, presumptively, by evidence, that notes of that description were actually current in the country.[7]

§ 154. **Points in Case for Prosecution.** But the main points necessary to be proved in every indictment for this crime, are, 1st, *the caption and asportation;* 2dly, *with a felonious intent;* 3dly, *of the goods and chattels of another person* named or described in the indictment. And *first*, of the *caption and asportation.* This, in the sense of the law, consists in removing the goods from the place where they were before, though they be not quite carried away;[1] as if they be taken from one room into another in the owner's house, or removed from a trunk to the floor, or from the head to the tail of a wagon; or if a horse be taken in one part of the owner's close and led to another, the thief being surprised before his design was entirely accom-

[1] See Hope *v.* Com., 9 Met. 134 ; {State *v.* Arlin, 27 N. H. 116.}

[2] Phipoe's Case, 2 Leach C. C. (4th ed.) 680 ; {Com. *v.* Riggs, 14 Gray (Mass.) 376 ;} [Rose *v.* State, 23 S. 638, Ala. That the burden of proof as to value is on the defendant, see State *v.* Harris, 119 N. C. 811.]

[3] R. *v.* Clark, Russ. & Ry. 181 ; 2 Leach C. C. (4th ed.) 1036 ; Ranson's Case, ib. 1090 ; Vyse's Case, 1 Moody C. C. 218 ; 2 Russ. on Crimes, 79, n. *g*, 5th (Eng.) ed. 225 ; Com. *v.* Rand, 7 Met. 475. See R. *v.* Powell, 14 Eng. Law & Eq. 575 ; 2 Denison C. C. 403. [Or unissued postage stamps : Jolly *v.* U. S., 170 U. S. 402.]

[4] {It has been held that a railroad passenger ticket which has not been dated or stamped, and is therefore useless as a ticket, was not the subject of larceny: State *v.* Hill, 1 Houst. Cr. Cas. (Del.) 420.}

[5] R. *v.* Bingley, 5 C. & P. 602; R. *v.* Morris, 9 id. 347 ; R. *v.* Clark, Russ. & Ry. 181. See R. *v.* Perry, 1 Denison C. C. 69 ; 1 C. & K. 725 ; R. *v.* Watts, 18 Jur. 192 ; 24 Eng. Law & Eq. 573 ; 6 Cox C. C. 304.

[6] State *v.* Tilley, 1 Nott & McC. 9 ; State *v.* Cassados, ib. 91 ; State *v.* Allen, R. M. Charlt. 518.

[7] 1 Hale C. C. 508 ; 3 Inst. 108 ; R. *v.* Simson, J. Kely. 31 ; R. *v.* Coslet, 1 Leach C. C. (4th ed.) 236 ; 2 East P. C. 556 ; R. *v.* Amier, 6 C. & P. 344 : State *v.* Wilson, Coxe 439 ; R. *v.* Walsh, 1 Moody C. C. 14. And see Alison's Crim. Law of Scotland, pp. 265–270.

[1] [State *v.* Taylor, 138 Mo. 66 ; State *v.* Gilbert, 68 Vt. 188.]

plished.[2] If it appear that every part of the thing taken was removed from the space which that part occupied, though the whole thing were not removed from the whole space which the whole thing occupied, it is a sufficient asportation.[3] On this ground, in the instances just mentioned, it was thus held. So, where the prisoner had lifted a bag from the bottom of the boot of a coach, and was detected before he got it out of the boot, it was held a complete asportation.[4] And it was so held where the prisoner ordered the hostler to lead from the stable and to saddle another man's horse, representing it as his own, but was detected while preparing to mount in the yard;[5] for in each of these cases the prisoner had, for the moment, at least, the entire and absolute possession of the goods. But, on the other hand, where the prisoner was indicted for stealing four pieces of linen cloth, and it was proved that they were packed in a bale, which was placed lengthwise in a wagon, and that the prisoner had only raised and set the bale on one end, in the place where it lay, and had cut the wrapper down, but had not taken the linen out of the bale; this was resolved, for the above reason, to be no larceny.[6]

§ 155. **Thief's Possession.** It must also be shown that the goods were *severed from the possession or custody of the owner*

[2] People *v.* Johnson, 4 Denio 364; R. *v.* Manning, 17 Jur. 23; 14 Eng. Law & Eq. 548, 1 Pearce C. C. 21.

[3] 2 Russ. on Crimes, 6, 5th (Eng.) ed. 126.

[4] R. *v.* Walsh, 1 Moody C. C. 14.

[5] R. *v.* Pitman, 2 C. & P. 423. Allowing a trunk of stolen goods to be sent as part of his luggage, on board a vessel in which the prisoner had taken passage, has been held a sufficient reception by him of the stolen goods: State *v.* Scovel, 1 Rep. Const. Ct. 274.

[6] Cherry's Case, 2 East P. C. 556. See R. *v.* Wallis, 3 Cox C. C. 67. {It is not necessary to prove that the carrying away was by the hand of the party accused, for if he procured an innocent agent to take the property, by which means the accused became possessed of it, he will himself be a principal offender. Thus in Com. *v.* Barry, 125 Mass. 390, the facts were that A, in accordance with a preconcerted plan with B, who had a valise checked at a railway station, entered the baggage room of the station, and presenting a check corresponding with the one on the valise, obtained permission from the baggage master to place a package in the valise. While the attention of the baggage master was called away by B, A exchanged the checks on the valise and a trunk, which was standing underneath the valise, and immediately went out of the room. By means of this substitution of checks the trunk was carried to a different station from that intended by the owner, so that B, who went on the same train with it, took it away at its arrival at the station, and rifled it of its contents. It was held that this was larceny, the court saying, "The real question was whether the defendant at that time (*i. e.* the exchange of checks), feloniously, and with intent to steal, set in motion an innocent agency, by which the trunk and contents were to be removed from the possession of the true owner and put into the defendant's possession, and whether such purpose was actually accomplished."}

and in the possession of the thief, though it be but for a moment.[1] Thus, where goods in a shop were tied by a string, the other end of which was fastened to the counter, and the thief took the goods and carried them towards the door as far as the string would permit, and was then stopped, this was held not to be a severance from the owner's possession, and consequently no felony.[2] And the like decision was given, where one had his keys tied to the strings of his purse, in his pocket, and the thief was detected with the purse in his hand, which he had taken out of the pocket, but it was still detained by the keys attached to the strings and hanging in the pocket.[3] Upon the same principle, in an indictment for robbery, where the prosecutor's purse, of which the prisoner attempted to rob him, was tied to his girdle, and in the struggle the girdle broke, and the purse fell to the ground, but was never touched by the prisoner, it was ruled to be no taking.[4] But where the prisoner snatched at the prosecutor's ear-ring, and tore it from her ear, but in the struggle it fell into her hair, where she afterwards found it, this was held a sufficient taking, for it was once in the prisoner's possession.[5]

§ 156. **Restitution no Defence.** The crime being completed by the taking and asportation with a felonious intent, though the possession be retained but for a moment, it is obvious that *restitution of the goods to the owner*, though it be the result of contrition in the thief, does not do away the offence. Thus, if one, having taken another's purse, but finding nothing in it worth stealing, restores it to the owner, or throws it away; or, the contents being valuable, hands it back to the owner, saying, "if you value your purse, take it back again and give me the

[1] Where the prosecutor's servant took fat from his loft and placed it on a scale in his candle-room, endeavoring to induce the prosecutor to buy it as fat sent by the butcher, this was held a sufficient taking to constitute larceny: R. *v.* Hall, 2 C. & K. 947; 1 Denison, C. C. 381.

[2] Anon., 2 East P. C. 556.

[3] Wilkinson's Case, 1 Hale P. C. 508. {The seizing the pocket-book in the hand, though before it is removed from the pocket, the thief is seized, and lets go the pocket-book, is larceny: Com. *v.* Luckis, 99 Mass. 431;} [Files *v.* State, 36 Tex. Cr. App. 206.]

[4] 1 Hale P. C. 533; 3 Inst. 69. And see Lapier's Case, 2 East P. C. 557; 1 Leach C. C. (4th ed.) 360.

[5] R. *v.* Lapier, 2 East P. C. 557; 1 Leach C. C. (4th ed.) 360; R. *v.* Simpson, 6 Cox C. C. 422; 29 Eng. Law & Eq. 530. {As to possession as evidence of theft, see Vol. I. § 34; *ante*, §§ 31–33. Declarations and acts of the prisoner, made at the time of the discovery, are admissible to explain the possession: Com. *v.* Rowe, 105 Mass. 590. See also *ante*, § 32.}

contents;" the taking, and consequently the offence, is nevertheless complete.[1]

§ 157. **Felonious Intent.** In the *second* place, as to the *felonious intent.* And here a distinction is to be observed between larceny and mere *trespass*, on the one hand, and *malicious mischief* on the other. If the taking, though wrongful, be not fraudulent, it is not larceny, but is only a trespass; and ought to be so regarded by the jury, who alone are to find the intent, upon consideration of all the circumstances. Thus, if it should appear that the prisoner took the prosecutor's goods openly, in his presence or the presence of other persons, and not by robbery; or, having them in possession, avowed the fact before he was questioned concerning them; or if he seized them upon a real claim of title; or took his tools to use, or his horse to ride,[1] and afterwards returned them to the same place, or promptly informed the owner of the fact; or, having urgent and extreme necessity for the goods, he took them against the owner's will, at the same time tendering to him, in good faith, their full value in money; or took them by mistake[2] arising from his own negligence, — these circumstances would be pregnant evidence to the jury that the taking was without a felonious intent, and therefore but a mere trespass.[3] On the other hand, where the prisoner's sole object was to destroy the property, from motives of revenge and injury to the owner, and without the expectation of benefit or gain to himself, this also is not larceny, but malicious mischief.[4] For it seems to be of the essence of the crime of larceny, that it be committed *lucri causa*, or with the motive of gain or advantage to the taker; though it is not necessary that it be a pecuniary advantage; it is sufficient if any other benefit to him or to a third person is expected to

[1] 1 Hale P. C. 533; 3 Inst. 69; 2 East P. C. 557.

[1] [People *v.* Brown, 105 Cal. 66.]

[2] [Ignorance of the defendant as to the ownership of the goods is immaterial if he knows that the property is not his: Tervin *v.* State, 37 Fla. 396.]

[3] 1 Hale P. C. 509; 2 East P. C. 661–663; {State *v.* Bond, 8 Iowa 540.} Where the goods were taken under a claim of right, if the prisoner appears to have had any fair color of title, or if the title of the prosecutor be brought into doubt at all, the court will direct an acquittal; it being improper to settle such disputes in a form of process affecting men's lives, liberties, or reputation: 2 East P. C. 659.

[4] R. *v.* Godfrey, 8 C. & P. 563, per Ld. Abinger. In the law of Scotland, if the property is *taken away*, with intent to detain it from the owner, the offence will amount to larceny, though the object was to destroy it, which is accomplished. The offence is reduced to malicious mischief, only where the property is maliciously destroyed without being removed: Alison's Crim. Law of Scotland, p. 273. [And see State *v.* McKee, 53 P. 733, Utah.]

accrue.[5] Thus, where one clandestinely took a horse from a stable and backed him into a coal-pit a mile off, thereby killing him, that his existence might not contribute to furnish evidence against another person who was charged with stealing the horse; this was deemed a sufficient *lucrum* or advantage to constitute the crime of larceny.[6] So, if the motive be to procure personal ease, or a diminution of labor to the taker; as, where a servant, by means of false keys, took his master's provender and gave it to his horses with that intent; this also has been held sufficient.[7] But where a carrier broke open a parcel intrusted to him, and took therefrom two letters which he opened and read from motives of personal curiosity, or of political party zeal, and to prevent them from arriving in due season at their destination, this, however illegal, was deemed no felony.[8]

§ 158. **Husband and Wife.** If it appear that the goods were *delivered to the prisoner by the wife of the owner*, this is *prima facie* evidence that the taking was not felonious; for as the wife has no present legal title to the goods of the husband, but only a contingent expectancy of title, she can exercise no control over them, except as his agent; and such agency, and the consent of the husband, may generally be presumed, in the absence of other circumstances, where the prisoner, acting in good faith, received the goods at her hands.[1] At most, in such a case, he would be but a mere trespasser. But this evidence would be

[5] [Taking a gun from a guard in order to escape is not larceny: Mahoney *v.* State, 33 Tex. Cr. App. 388.]

[6] R. *v.* Cabbage, Russ. & Ry. 292; 1 Leading Crim. Cases, 436; 2 Russ. on Crimes, p. 3, 5th (Eng.) ed. 124. But see R. *v.* Godfrey, 8 C. & P. 553, where Lord Abinger seemed to think that the gain might be expected to accrue to the party himself. [See Stegall *v.* State, 32 Tex. Cr. App. 100.] {But it is held under the statute in Indiana that an intent to defraud the owner, though without benefit to the thief, is larceny: Keely *v.* State, 14 Ind. 36; also Hamilton *v.* State, 35 Miss. 214. Taking a horse found astray upon the taker's land, with intent to conceal it until the owner should offer a reward, or with intent to induce the owner to sell it as an estray for less than its value, is larceny: Com. *v.* Mason, 105 Mass. 163.}

[7] R. *v.* Morfit, Russ. & Ry. C. C. 307; 1 Leading Crim. Cases, 438; 2 Russ. on Crimes, p. 3, 5th (Eng.) ed. 124; R. *v.* Handley, Car. & Marshm. 547; R. *v.* Privett, 2 C. & K. 114; 1 Denison C. C. 193; 2 Cox C. C. 40. And see R. *v.* Jones, 1 Denison C. C. 188; 2 C. & K. 236; 2 Cox C. C. 6; R. *v.* Richards, 1 C. & K. 532; State *v.* Hawkins, 8 Porter 461.

[8] R. *v.* Godfrey, 8 C. & P. 563.

[1] People *v.* Schuyler, 6 Cowen 572; Dalton's Just. 504. {When goods are thus taken, the question must always be left to the jury, whether the person assisting her does so *animo furandi* or not: R. *v.* Avery, 8 Cox C. C. 184. Where the party so assisting, however, is the adulterer, proof that he knew the property to be that of the husband, and with such knowledge took the property into his own possession with the intention of committing adultery, will support a conviction: R. *v.* Flatman, 14 Cox C. C. 396; R. *v.* Berry, 8 id. 117; R. *v.* Mutters, 10 id. 50; R. *v.* Harrison, 12 id. 19; R. *v.* Taylor, ib. 627; R. *v.* Middleton, ib. 260, 417.}

rebutted by showing that the prisoner acted in bad faith, and with knowledge that the husband's consent was wanting, or with reason to presume that the taking was against his will; as, if he joined with her in clandestinely taking the goods away; or if he take both the wife and the goods; or if she, being an adulteress, living with the prisoner, bring the husband's goods alone to the prisoner, he knowingly receiving them into his personal custody and possession.[2]

§ 159. **Goods found.** If the goods were *found* by the prisoner, the old rule was, that his subsequent conversion of them to his own use was no evidence of a felonious intent in the taking.[1] But this rule, in modern times, is received with some qualifications. For if the finder knows who is the owner of the lost chattel, or if, from any mark upon it, or from the circumstances under which it was found, the owner could reasonably have been ascertained, then the fraudulent conversion of it to the finder's use is sufficient evidence to justify the jury in finding the felonious intent, constituting a larceny.[2] On this ground, hackney-coachmen and passenger-carriers have been found guilty of larceny, in appropriating to their own use the parcels and articles casually left in their vehicles by passengers;[3] servants have

[2] People *v.* Schuyler, 6 Cowen 572; Dalton's Just. 504; R. *v.* Featherstone, 6 Cox C. C. 376; Leading Crim. Cases, 199; 26 Eng. Law & Eq. 570; R. *v.* Tolfree, 1 Moody C. C. 243; R. *v.* Tollett, Car. & Marshm. 112; R. *v.* Rosenberg, 1 Car. & K. 233. And see 1 Russ. on Crimes, 22, 23; 2 id. 87, 5th (Eng.) ed. vol. i. 148; vol. ii. 155; R. *v.* Thompson, 14 Jur. 488; 1 Denison C. C. 549; 4 Cox C. C. 191; Temple & Mew C. C. 294; 1 Eng. Law & Eq. 542.

[1] 3 Inst. 108.

[2] R. *v.* Thurborn, 1 Denison C. C. 388; 2 C. & K. 831; 1 Temple & Mew C. C. 67; R. *v.* Preston, 2 Denison C. C. 353; 5 Cox C. C. 390; 8 Eng. Law & Eq. 589; Merry *v.* Green, 7 M. & W. 623; State *v.* Weston, 9 Conn. 527; R. *v.* Riley, 17 Jur. 189; 1 Pearce C. C. 144; 14 Eng. Law & Eq. 544; {Reed *v.* State, 8 Tex. App. 40; Neely *v.* State, ib. 64; Brooks *v.* State, 35 Ohio St. 46; State *v.* Clifford, 14 Nev. 72; State *v.* Levy, 23 Minn. 104; Wolfington *v.* State, 53 Ind. 343; People *v.* Swan, 1 Park. Cr. R. 1; People *v.* Kaatz, 3 id. 129; R. *v.* Davis, 36 Eng. Law & Eq. 607; R. *v.* Knight, 12 Cox C. C. 102; [State *v.* Hayes, 98 Iowa 619.] But see People *v.* Cogdell, 1 Hill 94. But it seems that if there are no such marks, the finder is not bound to any particular degree of diligence to find the owner. It is sufficient if there does not appear to be any attempt to conceal the goods, or any circumstances which indicate a felonious intent: State *v.* Dean, 49 Iowa 73.}

[3] R. *v.* Lamb, 2 East P. C. 664; R. *v.* Wynne, ib.; R. *v.* Sears, 1 Leach C. C. (4th ed.) 415, n. There is a clear distinction between property mislaid, that is, put down and left in a place to which the owner would be likely to return for it, and property lost. In R. *v.* West, 6 Cox C. C. 415, 29 Eng. Law & Eq. 525, a purchaser by mistake left his purse on the prisoner's stall in a market, without the prisoner or himself knowing it. The prisoner afterwards seeing it there, but not at the time knowing whose it was, appropriated it, and subsequently denied all knowledge of it when inquiry was made by the owner. It was held, that the prisoner was guilty of larceny, as the purse was not, strictly speaking, lost property, and, therefore, it was not necessary to inquire whether the prisoner had used reasonable means to find the owner. In

been convicted for the like appropriation of money or valuables, found in or about their masters' houses;[4] and so it has been held where a carpenter converted to his own use a sum of money found in a secret drawer of a bureau, delivered to him to be repaired.[5] In a word, the omission to use the ordinary and well-known means of discovering the owner of goods lost and found raises a presumption of fraudulent intention, more or less strong, against the finder, which it behooves him to explain and obviate; and this is most readily and naturally done by evidence that he endeavored to discover the owner, and kept the goods safely in his custody until it was reasonably supposed that he could not be found; or that he openly made known the finding, so as to make himself responsible for the value to the owner when he should appear.[6] In cases of this class, it is material for the prosecutor to show that the felonious intent was contemporaneous with the finding;[7] for if the prisoner, upon finding the article, took it with the intention of restoring it to the owner when discovered, but afterwards wrongfully converted it to his own use, this is merely a trespass, and not a felony.[8] And the principle is the same, where he came to the possession in any other lawful manner; as, for example, where the goods were inadvertently left in his possession, or where he took the goods for safety, during a conflagration or the like, but afterwards wrongfully concealed and appropriated them to his own use.[9]

R. *v.* Pierce, 6 Cox C. C. 117, it was held, that the doctrine of lost property did not apply to the baggage of a passenger, left by him by mistake in a railway carriage, and if a servant of the company find it there, and do not take it to the station-house, or to a superior officer, but appropriates it to his own use, he is guilty of larceny. See R. *v.* Dixon, 25 Law J. N. S. M. C. 39; 36 Eng. Law & Eq. 597.

[4] R. *v.* Kerr, 8 C. & P. 176.

[5] Cartwright *v.* Green, 8 Ves. 405; 2 Leach C. C. (4th ed.) 952.

[6] 2 East P. C. 665; Tyler's Case, Breese 227; State *v.* Ferguson, 2 McMullan 502.

[7] [Cady *v.* State, 45 S. W. 568, Tex. Cr. App.]

[8] Milburne's Case, 1 Lewin 251; R. *v.* Leigh, 2 East P. C. 694; People *v.* Anderson, 14 Johns. 294; [Griggs *v.* State, 58 Ala. 425; Rountree *v.* State, ib. 381; Keely *v.* State, 14 Ind. 36; [Beckham *v.* State, 100 Ala. 15.] The rule of the Roman civil law substantially agrees with what is stated in the text: "Qui alienum quid jacens, lucri faciendi causa sustulit furti obstringitur, sive scit cujus sit, sive ignoravit; nihil enim ad furtum minuendum facit, quod cujus sit ignoret. Quod si dominus id derelinquit, furtum non fit ejus, etiamsi ego furandi animum habuero; nec enim furtum fit, nisi sit cui fiat; in proposito autem nulli fit; quippe cum placeat Sabini et Cassii sententia existimantium, statim nostram esse desinere rem, quam derelinquimus. Sed si non fuit derelictum, putavit tamen derelictum furti non tenetur. Sed si neque fuit neque putavit, jacens tamen tulit, non ut lucretur, sed redditurus ei cujus fuit, non tenetur furti:" Dig. lib. 47, tit. 2, l. 43, §§ 4–7.

[9] R. *v.* Leigh, 2 East P. C. 694; People *v.* McGarren, 17 Wend. 460. In R. *v.*

§ 160. **Intent.** A felonious intent may also be proved by evidence that the goods were *obtained from the owner by stratagem, artifice, or fraud.* But here an important distinction is to be observed between the crime of larceny, and that of obtaining goods by false pretences. For supposing that the fraudulent means used by the prisoner to obtain possession of the goods were the same in two separate cases, but in the one case the owner intended to part with his property absolutely, and to convey it to the prisoner, but in the other he intended only to part with the temporary possession for a limited and specific purpose, retaining the ownership in himself; the latter case alone would amount to the crime of *larceny*,[1] the former constituting only the offence of *obtaining goods by false pretences.*[2] Thus, obtaining a loan of silver money, in exchange for gold coins to be sent to the lender immediately, but which the prisoner had not, and did not intend to procure and send, was held no felony, but a misdemeanor;[3] and so it was held, where the prisoner obtained the loan of money by means of a letter written by himself in the name of another person known to the lender.[4] But

Riley, 17 Jur. 189, 14 Eng. Law & Eq. 544, the rule was thus stated by Pollock, C. B.: "If the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful, though not felonious, and then, *animo furandi*, he disposes of the chattel, it is larceny." In the case before him, the prisoner had ignorantly driven off the prosecutor's lamb with his own flock, but afterwards feloniously sold it; and his conviction was held right. The mere possession of goods which have been lost is not *prima facie* evidence that they were taken feloniously: Hunt *v.* Com., 13 Gratt. (Va.) 757. A prosecutor found a check, and, being unable to read, showed it to the prisoner. The prisoner told him it was only an old check of the Royal British Bank and kept it. He afterwards made excuses for not giving it up to the prosecutor, withholding it from him in the hopes of getting the reward that might be offered for it. It was held that these facts did not show such a taking as was necessary to constitute larceny: R. *v.* Gardner, 9 Cox C. C. 253. A lady wishing to get a railway ticket, finding a crowd at the pay place at the station, asked the prisoner, who was nearer in to the pay place, to get a ticket for her, and handed him a sovereign to pay for it. He took the sovereign, intending to steal it, and, instead of getting the ticket, ran away. Held, that he was guilty of larceny at common law: R. *v.* Thompson, ib. 244.} [See State *v.* Davenport, 38 S. C. 348.]

[1] [State *v.* Skinner, 29 Or. 599; People *v.* Shaughnessy, 110 Cal. 598; Doss *v.* People, 158 Ill. 660; Com. *v.* Rubin, 165 Mass. 453.]

[2] [State *v.* Reese, 49 La. Ann. 1337; People *v.* Berlin, 9 Utah 383.] {In Watson *v.* State, 36 Miss. 593, it was held that the bill of sale, under which the prisoner claimed, being procured from a weak-minded old woman, under his care and protection, by false and fraudulent representations, without any consideration and under pretence of protecting the property for her benefit, was competent evidence to show the prisoner's original felonious intent, and, in pursuance of such intent, depriving the owner of the property constituted the offence of larceny. See also Com. *v.* Eichelberger, 119 Pa. St. 264.}

[3] R. *v.* Coleman, 2 East P. C. 672; 1 Leach C. C. (4th ed.) 339, n. And see Mowrey *v.* Walsh, 8 Cowen 238.

[4] R. *v.* Atkinson, 2 East P. C. 673. So, where the defendant obtained goods of a tradesman by means of a forged order from a customer: R. *v.* Adams, 1 Denison

where the goods were obtained from the owner's servant, the prisoner falsely pretending that he was the person to whom the servant was directed to deliver them, it was held to be larceny.[5] For in the two former cases, the owner intended to part with his money; but in the latter case, the taking from the servant was tortious, he having only the care and custody of the goods for a special purpose. The rule is the same, where goods are fraudulently taken away during the pendency of a sale, but before it is completed by delivery;[6] or where they are obtained under the guise of receiving them in pledge;[7] the owner, in these cases, not intending, at the time, to devest himself of all legal title to the goods, but the prisoner intending to deprive him of that title.

§ 161. **Ownership.** As every larceny includes a trespass, which involves a violation of another's possession, it is essential for the prosecutor to prove that the goods were the *property of the person named*[1] *as the owner*, and were taken from his *posses-*

C. C. 38. {A question has been made whether one who obtains money by offering counterfeit money in exchange for it, or who is given a larger bank-bill, in payment for an article, than its price, with the expectation that the overplus will be returned as change, but keeps the bill, and does not give back the change, or who is given by mistake a larger bank-bill than the person making the purchase meant to give, and gives change only for a smaller bill, is guilty of larceny. The objection in each case has been made that the party defrauded intended to part with the property absolutely and convey it to the accused, and therefore the crime cannot be held to be larceny. The better opinion, however, seems to be that the owner of the bill intended to part with the property only conditionally, the condition being that the proper change is returned to him, or that the money which he gets in return is genuine. The condition not being fulfilled, the intention is not to part with the property at all, and the crime is therefore larceny. Thus it has been held that when one handed a $100 bill, mistaking it for $10, in payment for an article which cost $2, and the person to whom it was given, knowing it to be a $100 bill, gave back but $8 in change, and kept the bill, he was guilty of larceny : State *v.* Williamson, 1 Houst. C. C. (Del.) 155. To the same effect, Baily *v.* State, 58 Ala. 414 ; Com. *v.* Barry, 124 Mass. 325 ; [Com. *v.* Flynn, 167 id. 460 ; Fleming *v.* State, 136 Ind. 149.] So, it has been held that a delivery of a chattel with the understanding that a $5 bill should be given in payment therefor, does not devest the owner of the property in the goods so as to prevent the person who ought to give the bill, but does not, from being guilty of larceny : State *v.* Anderson, 25 Minn. 66, the leading case in England of R. *v.* Middleton, 12 Cox C. C. 260 and 417.}

[5] R. *v.* Wilkins, 2 East P. C. 673 ; {R. *v.* Robins, 29 Eng. Law & Eq. 544 ; 6 Cox C. C. 420 ; Com. *v.* Wilde, 5 Gray (Mass.) 83 ; People *v.* Jackson, 3 Parker C. R. 590.}

[6] R. *v.* Sharpless, 1 Leach C. C. (4th ed.) 108 ; 2 East P. C. 675. And see R. *v.* Aikles, 1 Leach C. C. (4th ed.) 330 ; [R. *v.* Russett, 1892, 2 Q. B. 312.]

[7] R. *v.* Patch, 1 Leach C. C. (4th ed.) 273 ; 2 East P. C. 678 ; R. *v.* Moore, 1 Leach C. C. (4th ed.) 354 ; R. *v.* Watson, 2 id. 730 ; 2 East P. C. 679, 680. See also R. *v.* Johnson, 2 Denison C. C. 310 ; 14 Eng. Law & Eq. 570 ; {State *v* Watson, 41 N. H. 533 ; State *v.* Humphrey, 32 Vt. 569.}

[1] [Hix *v.* People, 157 Ill. 382.] If it appear that the owner is known by two names, indifferently, as, for example, Elizabeth and Betsey, the indictment will be proved, though only one of the names be stated therein : State *v.* Godet, 7 Ired. 210.

sion.[2] The property may be either general or special, and the possession may be actual or constructive; proof of either of these being sufficient to support this part of the indictment. For the general ownership of goods draws after it the legal possession, though they were in the actual custody of a servant or agent; and the lawful possession, with a qualified property as bailee or agent,[3] is sufficient proof of ownership, against a wrong-doer.[4] But it must appear that the goods were *stolen* from the prosecutor; and if he, being a witness, cannot swear to the loss of the articles alleged to have been stolen from him, the prisoner must be acquitted.[5] And if they were stolen by a person unknown, but after a lapse of time were found in the possession of the prisoner, who gave *a reasonable and probable*

But an indictment for stealing the goods of A is not supported by evidence that they were the goods of A & B, who were partners, even though they were in A's actual possession: State *v.* Hogg, 3 Blackf. 326; Com. *v.* Trimmer, 1 Mass. 476. If the property is alleged to be in A B, and it is proved to be in A B, junior, it is sufficient: State *v.* Grant, 22 Me. 171; *supra*, § 22. {But a charge for larceny containing divers counts, and in each stating a different owner of the property, is good; the averment of ownership being but a part of the mode of describing the property: People *v.* Connor, 17 Cal. 361. The interest of mortgagees of personal property, entitled to the possession, is sufficient to support an indictment for larceny: State *v.* Quick, 10 Iowa 451. In People *v.* Stone, 16 Cal. 369, it is held that a man may steal his own property, if, by taking it, it is his intent to charge a bailee with it.}

[2] {The owner of a watch placed it with a watchmaker for repairs. Another person fraudulently induced the latter to send it to the owner by mail, and then by fraud obtained it from the postmaster of the place to which it was sent. Held, that he was rightfully convicted of larceny from the owner: R. Kay, 1 Dears. & Bell 231. A false pretence is a lie told or acted to influence the mind. A trick is an appeal to the senses: Cox, Serj., Dep. Asst. Judge, in R. *v.* Radcliffe, 12 Cox C. C. 474; s. c. reported and commended in ib. 208. It is not sufficient to allege that the goods stolen were the property of the estate of a deceased person: People *v.* Hall, 19 Cal. 425.}

[3] And although the goods have in fact been parted with by the bailee, but under a mistake, as his special property in them is not thereby devested, if a larceny of them be then committed, they may still be laid to be the property of the bailee: R. *v.* Vincent, 2 Denison C. C. 464; 9 Eng. Law & Eq. 548; 3 C. & K. 246.

[4] 2 East P. C. 554; 1 Hawk. P. C. c. 33, §§ 2, 3. Hence the general owner may be guilty of larceny, by stealing his own goods in the possession of his agent or bailee, with intent to charge the latter with the value: 2 East P. C. 558; Palmer's Case, 10 Wend. 165; Wilkinson's Case, Russ. & Ry. 470; [State *v.* Fitzpatrick, 9 Houst. 385. It is larceny for the owner of goods attached to take them from the constable with felonious intent: Whiteside *v.* Loney, 171 Mass. 431.]

[5] R. *v.* Dredge, 1 Cox C. C. 235. In R. *v.* Burton, 6 id. 293, 24 Eng. Law & Eq. 551, the prisoner was found coming out of a warehouse, where a large quantity of pepper was kept, with pepper of a similar quality in his possession. He had no right to be in the warehouse, and on being discovered, said, "I hope you will not be hard with me," and took some pepper out of his pocket and threw it upon the ground. There was no evidence of any pepper having been missed from the bulk. It was held, that there was sufficient evidence to go to the jury of the *corpus delicti*. Jervis, C. J., said: "It could not have been intended to lay down a principle in R. *v.* Dredge;" and Maule, J., in pointing out the distinction between that case and the case at bar, said: "There the prisoner was in a shop, where he might lawfully be; here he was where he ought not to be. The boy, in that case, kept to the property; the man, in this, abandoned it and threw it down. In this case the man admitted he had done something wrong."

account of the manner in which he came by them, it will be incumbent on the prosecutor to negative this explanation.[6]

§ 162. **Same Subject.** If the *goods are in the hands of a bailee* of the owner, and the bailee fraudulently applies them to his own use during the continuance of the bailment, this is not larceny, because here was no technical trespass, the possession of the bailee being lawful and exclusive, as against the general owner. But to constitute larceny in such a case, it is incumbent on the prosecutor to show that the contract of bailment was already terminated, either by lapse of time or other circumstances. Ordinarily, the bailment, *prima facie*, is proved by the prisoner, by evidence that the goods were legally in his possession at the time of the unlawful appropriation charged. This proof may be rebutted, 1st, by showing that the prisoner, though he had the custody of the goods, was a mere *servant* of the owner, having no special property therein, and being under no special contract respecting them; but his possession being that of his master; as, where a butler has charge of his master's plate, or a servant is sent on an errand with his master's horse, or goods, or money, or receives goods or money for his master from another person, which he fraudulently applies to his own use; this is larceny.[1] Or, 2dly, it may be rebutted by showing that the prisoner *originally* obtained the possession of the goods with a felonious intent, *by fraud and deceit*,[2] or by *threats* or

[6] R. *v.* Crowhurst, 1 Car. & Kir. 370; Hall's Case, 1 Cox C. C. 231; State *v.* Furlong, 19 Me. 225. And see 2 East P. C. 656, 657; *supra*, § 32; R. *v.* Cooper, 3 C. & K. 318. {But see also R. *v.* Wilson, 1 Dears. & Bell 157. Other goods may be proved to have been taken at the same time, and found with those described in the indictment, in the defendant's possession; and such goods may be exhibited to the jury, and taken by them to their room: Com. *v.* Riggs, 14 Gray (Mass.) 376. So, where there is a sufficient description of property to constitute the offence, evidence may be given of the taking of other property insufficiently described, as a circumstance attanding the offence: Haskins *v.* People, 16 N. Y. 344.}

[1] 2 East P. C. 564–570; 1 Hale P. C. 506, 667, 668; U. S. *v.* Clew, 4 Wash. 700; Com. *v.* Brown, 4 Mass. 580, 586; State *v.* Self, 1 Bay 242; People *v.* Call, 1 Denio 120; 2 Russ. on Crimes, 153–166; R. *v.* Hayward, 1 Car. & Kir. 518; R. *v.* Goode, Car. & M. 582; R. *v.* Beaman, ib. 595; R. *v.* Jones, ib. 611; R. *v.* M'Namee, 1 Moody C. C. 368; R. *v.* Watts, 14 Jur. 870; 1 Eng. Law & Eq. 558; R. *v.* Spear, 2 Leach C. C. (4th ed.) 825; 2 Russ. on Crimes, 155, 156; R. *v.* Hawkins, 1 Denison C. C. 584; 14 Jur. 513; 1 Eng. Law & Eq. 547. R. *v.* M'Namee, *ubi supra*, has been doubted. See R. *v.* Hey, 2 C. & K. 988; Temple & Mew C. C. 213; [Washington *v.* State, 106 Ala. 58.] {The landlord of a hotel offered a gun to a guest to go out shooting. The guest accepted the offer and went out, and did not return with the gun, but disposed of it for his own use. Held, to be larceny: Richards *v.* Com., 13 Gratt. (Va.) 803.}

[2] [See People *v.* Montarial, 53 P. 355, Cal.; Crum *v.* State, 148 Ind. 401; People *v.* Martin, 74 N. W. 653, Mich.]

duress; as, if he hired a horse, under pretence of a journey, but with intent, at the time, to convert him to his own use; or the like.[3] In such cases it must appear that the owner had no intention to part with his ultimate title or property in the goods, but only to part with the possession; for if he was induced by fraud to sell the goods, the prisoner, as we have seen, is only guilty of a misdemeanor.[4] Or, 3dly, the evidence of bailment may be rebutted by proof that *the contract had been determined by the wrongful act of the bailee*, previous to the act of larceny. A familiar illustration of this point is where a carrier breaks open a box or package intrusted to him. Here the breaking open of the box is an act clearly and unequivocally evincing his determination and repudiation of the bailment, and his custody of the goods becomes thereby in law the possession of the owner; after which, his conversion of part or all of the goods to his own use is a felonious caption and asportation of the goods of another, which constitutes the crime of larceny. If he sells the entire package, in its original state, without any other act, though the privity of contract is thereby determined, yet here is no caption and asportation of that which at the time was the entire property of another, but only a breach of trust.[5] And where several

[3] R. *v.* Pear, 2 East P. C. 685; R. *v.* Charlewood, ib. 689; R. *v.* Semple, ib. 691; 1 Leach C. C. (4th ed.) 420; Starkie's Case, 7 Leigh 752; J. Kely. 82; Blunt's Case, 4 Leigh 689; State *v.* Gorman, 2 N. & McC. 90; Bank's Case, Russ. & Ry. 441; R. *v.* Brooks, 8 C. & P. 295; R. *v.* Thristle, 2 C. & K. 842; R. *v.* Brooks, *ubi supra*, is overruled; R. *v.* Janson, 4 Cox C. C. 82; [Givens *v.* State, 32 Tex. Cr. R. 457.]

[4] *Supra*, §§ 1, 160. And see R. *v.* Robson, Russ. & Ry. 413; R. *v.* Williams, 6 C. & P. 390; R. *v.* Wilson, 8 id. 111; R. *v.* Rodway, 9 id. 784.

[5] The distinction between the two cases is clear, though exceedingly refined; and is well explained by Mr. Starkie. "The distinction," he observes, "which has constantly been recognized, although its soundness has been doubted, seems to be a natural and necessary consequence of the simple principle upon which this branch of the law rests; and although it may, at first sight, appear somewhat paradoxical and unreasonable that a man should be less guilty in stealing the whole than in stealing a part, yet such a distinction will appear to be well warranted, when it is considered how necessary it is to preserve the limits which separate the offence of larceny from a mere breach of trust, as clear and definite as the near and proximate natures of these offences will permit; and that the distinction results from a strict application of the rules which distinguish those offences. If the carrier were guilty of felony in selling the whole package, so would every other bailee or trustee, and the offence of larceny would be confounded with that of a mere breach of trust and indefinitely extended. On the other hand, in taking part of the goods after he has determined the privity of contract, the case comes within the simple definition of larceny, for there is a felonious caption and asportation of the goods of another, which stands totally clear of any bailment. It is true that the sale and delivery of the whole package by the carrier, being inconsistent with the object of the bailment, determines the privity of contract; but then the question arises, what caption and asportation constitute the larceny, for these are in all cases essential to the offence. A mere intention on the part of the carrier to convert the goods, unaccompanied by any overt act, whereby he disaffirms the contract, is insufficient; and the act of conversion itself, such as the delivery of the

articles constitute the subject of an entire contract for bailment, such as bags of wheat, to be kept in a warehouse;[6] barilla or corn, to be ground;[7] several packages, or a quantity of staves, to be carried;[8] or garments to be sold,[9] — the abstraction of one of the parcels, or articles, or a portion of the bulk, and converting it to the use of the bailee, has been held to amount to a breaking of bulk, sufficient to terminate the bailment, and to constitute larceny.[10] Or, 4thly, the evidence of bailment may be rebutted by proof that the contract had previously been *terminated by performance*, according to the intent of the parties; as, where goods, sent by a carrier, had reached their place of destination, and been there delivered; but afterwards were stolen by the carrier.[11] But it is to be noted, that proof of the delivery, or that the bailee had parted with the possession, is material; for if goods are borrowed or hired for a special purpose, as, for example, a horse to go to a particular place, and after that purpose is accomplished, and before the goods are returned to the owner, the hirer, or borrower, upon a new and not an original intention, fraudulently converts them to his own use, this is held not to amount to the crime of larceny.[12]

whole of the entire package to a purchaser, is insufficient, because it is merely contemporaneous with the extinction of the privity of contract, which is not determined, except by the conversion itself; but if the package be first broken, and by that overt act the contract be determined, a subsequent caption and asportation, either of part, or, as it seems, of the whole of the goods, is a complete larceny within the definition, unaffected by any bailment. This distinction is explained by Lord Hale upon the principle above stated: 1 Hale P. C. 504, 505; 2 East P. C. 697. Kelynge, C. J., explains it upon the ground of a presumed previous felonious intention on the part of the carrier, when he first took the goods; but this is not satisfactory, since the same presumption would arise when the carrier disposed of the whole of the package:" 2 Stark. Evid. 4th Am. ed. *838, n. (*x*). And see 1 Hale P. C. 504, 505; 2 East P. C. 664, 685, 693, 694, 697, 698; R. *v.* Brazier, Russ. & Ry. 337; 2 Russ. on Crimes, 59, 5th (Eng.) ed. 135; R. *v.* Madox, Russ. & Ry. 92; Cheadle *v.* Buell, 6 Ohio 67; R. *v.* Jones, 7 C. & P. 151; R. *v.* Jenkins, 9 id. 38; R. *v.* Cornish, 6 Cox C. C. 432; {State *v.* Fairclough, 29 Conn. 47. In Nichols *v.* People, 17 N. Y. 114, it was held that a carrier, who had converted to his own use several pigs of iron out of a larger number placed in his charge, might be convicted of larceny. Denio and Comstock, JJ., dissenting.}

[6] Brazier's Case, Russ. & Ry. C. C. 337.

[7] Com. *v.* James, 1 Pick. 375; 1 Roll. Abr. 73.

[8] Com. *v.* Brown, 4 Mass. 580; Dame *v.* Baldwin, 8 id. 518; R. *v.* Howell, 7 C. & P. 325. So is the law of Scotland: Alison's Crim. Law of Scotland, p. 252.

[9] R. *v.* Poyser, 2 Denison C. C. 233; 5 Cox C. C. 241; 4 Eng. Law & Eq. 565.

[10] The Roman law proceeded on a similar principle. "Si rem apud te depositam, furti faciendi causa contrectaveris, desine possidere:" Dig. lib. 42, tit. 2, l. 3, § 18. See acc. R. *v.* Poyser, 2 Denison C. C. 233; 5 Cox C. C. 241; 4 Eng. Law & Eq. 565; 3 Chitty, Crim. Law, 920; 2 Whart. Crim. Law, 7th ed. § 1862.

[11] 1 Hale P. C. 504, 505.

[12] R. *v.* Banks, Russ. & Ry. 441; overruling R. *v.* Charlewood, 2 East P. C. 690, 1 Leach C. C. (4th ed.) 409, as to this point. And see 2 Russ. on Crimes, 56, 57, 5th (Eng.) ed. 134, 135; R. *v.* Thristle, 2 C. & K. 842.

§ 163. **Feræ Naturæ.** By the common law, neither *wild animals* unreclaimed and unconfined, nor things *annexed to or savoring of the realty* and unsevered, could be the subject of larceny. If the animal were already dead, or reclaimed, or captured and confined, it should be so alleged in the indictment; for if the allegation be general for stealing such an animal, which is known to be *feræ naturæ*, it will be presumed to have been alive and at large; and evidence of the stealing a dead or tamed animal will not support the indictment.[1] And in regard to things once part of the realty, it must be proved that they were severed before the act of larceny was committed upon them. If the severance and asportation were one continued act of the prisoner, it is only a trespass; but if the severance were the act of another person, or if, after a severance by the prisoner, any interval of time elapsed, after which he returned and took the article away, the severance and asportation being two distinct acts, it is larceny.[2]

[1] Rough's Case, 2 East P. C. 607; Edward's Case, Russ. & Ry. C. C. 497; R. *v.* Halloway, 7 C. & P. 128; ib. 127, n. *b*. And see Com. *v.* Chace, 9 Pick. 15; 1 Leading Crim. Cases, 66; R. *v.* Brooks, 4 C. & P. 131; 1 Hawk. P. C. c. 33, § 26, p. 144; R. *v.* Cheafor, 5 Cox C. C. 367; 1 Leading Crim. Cases, 64; 8 Eng. Law & Eq. 598; 2 Denison C. C. 361; R. *v.* Howell, 2 Denison C. C. 362, n.; 1 Leading Crim. Cases, 65, n.

{It has been held that a dog is not the subject of larceny: State *v.* Holder, 81 N. C. 527; State *v.* Lymus, 26 Ohio St. 400; People *v.* Campbell, 4 Park. (N. Y.) C. R. 386. [*Contra*, Hurley *v.* State, 30 Tex. Cr. App. 333; Hamby *v.* Samson, 74 N. W. 918, Iowa.] Fish, unless captured, or in some way reduced into the possession of some one, are not the subjects of larceny: State *v.* Krider, 78 N. C. 481. Peafowls are subjects of larceny. An indictment for stealing any animal, which does not state whether it is dead or alive, is not supported by evidence that it was dead when stolen; even if it is an animal which has the same appellation whether dead or alive: Com. *v.* Beaman, 8 Gray (Mass.) 497. Oysters planted in a bed, and not naturally growing there, are subjects of larceny: State *v.* Taylor, 3 Dutch. (N. J.) 117. And the indictment need not aver that they had been gathered, or were in the actual possession of the prosecutor: ibid. Rabbits and grouse become property of the owners of the soil upon which they are killed by the owners. But if poachers kill them, put them away, and leave them for a while, and then return to take them, this is no larceny: 12 Cox C. C. 59.} [As to larceny of bees, see State *v.* Repp, 73 N. W. 829, Iowa.]

[2] Hale P. C. 510; 2 East P. C. 587; Lee *v.* Risdon, 7 Taunt. 191, per Gibbs, C. J. The Roman law does not seem to recognize this distinction, but adjudges the act of severance and asportation to be theft in both cases. "Eorum quæ de fundo tolluntur, utputa arborum, vel lapidum, vel arenæ, vel fructuum, quos quis fraudandi animo decerpsit, furti agi posse nulla dubitatio est:" Dig. lib. 47, tit. 2, l. 25, § 2. {In general, statutory provisions have been made in most States to cover the case of felonious taking and asportation of things annexed to the realty: Harberger *v.* State, 4 Tex. App. 26; [Clement *v.* Com., 47 S. W. 450, Kv.] Where, however, the common-law rule prevails, such taking is not larceny: Bell *v.* State, 4 Baxt. (Tenn.) 426.}

LIBEL.

§ 164. **Definition.** The difficulty of defining this offence at common law has often been felt and acknowledged. Lord Lyndhurst thought it hardly possible to define it; observing that any definition he had ever seen was faulty, and wanting in the requisites of a logical definition, either in its vagueness and generality, or in its omission of essential particulars.[1] Yet all text-writers on this subject have undertaken to define, or at least to describe it, and this with a degree of precision probably sufficient for all practical purposes. According to Russell, and to the authorities to which he refers, the crime of Libel and Indictable Slander is committed by the publication of writings blaspheming the Supreme Being; or turning the doctrines of the Christian religion into contempt and ridicule; or tending, by their immodesty, to corrupt the mind, and to destroy the love of decency, morality, and good order; or wantonly to defame or indecorously to calumniate the economy, order, and constitution of things which make up the general system of the law and government of the country; to degrade the administration of government or of justice; or to cause animosities between our own and any foreign government, by personal abuse of its sovereign, its ambassadors, or other public ministers; and by malicious defamations, expressed in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is living, and thereby to expose him to public hatred, contempt, and ridicule.[2] This

[1] See his testimony before the Lords' Committee, in Cooke on Defamation, App. No. 2, p. 482. Mr. Hamilton ventured to define it as "a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals." *Arguendo*, in People *v.* Croswell, 3 Johns. Cas. 337, 354. This was subsequently approved by the court, as a definition "drawn with the utmost precision." See Steele *v.* Southwick, 9 Johns. 215; Cooper *v.* Greeley, 1 Denio 347. Mr. Starkie, in more general terms, defines the offence as "the wilful and unauthorized publication of that which immediately tends to produce mischief and inconvenience to society." But this comprehensive definition he afterwards expands into the several species of this crime, which he describes with sufficient particularity. See 2 Stark. on Slander, p. 129.

[2] 3 Russ. on Crimes, 5th (Eng.) ed. 177. And see Stark. on Slander, 3d ed. pp.

descriptive catalogue embraces all the several species of this offence which are indictable at common law; all of which, it is believed, are indictable in the United States, either at common law or by virtue of particular statutes.

§ 165. **Same Subject.** In several of the United States this offence, in its more restricted acceptation, as committed against an individual, has been *defined by statute.* Thus, in Maine, it is enacted, that "a libel shall be construed to be the malicious defamation of a person, made public either by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one that is dead, and tending to scandalize or provoke his surviving relatives or friends." [1] Definitions of the like import are found in the statute-books of some other States;[2] and would doubtless be recognized in all, as expressive of the law of the land; the common law, in regard to what constitutes a libel, being adopted in all the States, except so far as it may have been altered by statutes or constitutional provisions.[3]

§ 166. **Indictment.** The *indictment* for this offence sets forth the libellous *writing* or *act;* the *malicious intent;* its *object,* or *the person* whom it was designed to disgrace or injure;[1] the *publication* of the writing, with proper *innuendoes,* referring the libellous matter to its alleged object; and the *place* of publication. The place, however, is not necessary to be proved, except so far as it is essential to the jurisdiction, and where it is locally descriptive of the offence.[2]

577–621; Cooke on Defamation, pp. 69–80; Holt on Libels, pp. 74–249; 2 Kent Comm. 16–26.

[1] See Me. Rev. Stats. 1871, c. 129, § 1.

[2] Such, in substance, are the definitions in Iowa, Rev. Code of 1880, § 4097; Arkansas, Digest of Stats. 1874, § 1540; Georgia, Code, 1882, § 2974; California, Stat. 1850, c. 99, § 120; 1 Hitt. Code, ¶ 5045; Illinois, Rev. Stats. 1880, p. 383, § 177.

[3] Com. *v.* Chapman, 13 Met. 68; Dexter *v.* Spear, 4 Mason 115; White *v.* Nichols, 3 How. S. C. 266, 291; Com. *v.* Clapp, 4 Mass. 163, 168; Usher *v.* Severance, 20 Me. 9; Hillhouse *v.* Dunning, 6 Conn. 391; Steele *v.* Southwick, 9 Johns. 214; Colby *v.* Reynolds, 6 Vt. 489; McCorkle *v.* Binns, 5 Binn. 340; State *v.* Farley, 4 McCord 317; Torrance *v.* Hurst, Walker 403; Armentront *v.* Moranda, 8 Blackf. 426; Newbraugh *v.* Curry, Wright 47; Taylor *v.* Georgia, 4 Ga. 14; State *v.* White, 6 Ired. 418; 7 id. 180; Robbins *v.* Treadway, 2 J. J. Marsh. 540; 1 Kent Comm. Lect. 24, p. 620 (7th ed.); State *v.* Henderson, 1 Rich. 179.

[1] [A libel on two or more persons contained in one writing is a single offence: State *v.* Hoskins, 60 Minn. 168.]

[2] *Supra,* § 12; *infra,* § 173.

§ 167. **Written and Printed Libels.** In the case of a *written* or *printed libel*, the proof must agree with the indictment in every particular essential to the identity, such as dates, names of persons, and the precise words used, — a variance in any of these particulars being fatal.[1] But a literal variance alone is not fatal where the omission or addition of a letter does not make it a different word.[2] Thus, "undertood," for "understood,"[3] "reicevd," for "received,"[4] and the like, are immaterial variances; and a diversity in the spelling of a name is not material, where it is *idem sonans*, as, "Segrave," for "Seagrave."[5] This rule applies more strictly to cases where the libellous writing is set forth *in hæc verba*, as it ought always to be, where it is in the power of the prosecutor.[6] But where the paper is in the prisoner's exclusive possession, or has been destroyed by him, and perhaps in some other cases, where its production is out of the power of the prosecutor (in all which cases it should be so stated in the indictment), inasmuch as it may be sufficient to state the purport or substance of the libel, secondary evidence may be received of its contents.[7]

§ 168. **Proof of Malice.** In the *proof of malice*, it is not necessary, in the opening of the case on the part of the government, to adduce any particular evidence to this point, where the publication or *corpus delicti*, as charged, is in itself defamatory; for in such cases the law infers malice, unless something is drawn from the circumstances attending it to rebut that inference.[1] But where the intent is equivocal, or the act com-

[1] See *ante*, Vol. I. §§ 56, 58, 65 *et seq.*; 3 Russ. on Crimes, 5th (Eng.) ed. 218; {Com. *v.* Harmon, 2 Gray (Mass.) 289. But if the indictment does not set forth the whole of the libellous instrument, as it need not, proof of the remainder will not constitute a variance, unless the effect of the remainder is to vary the meaning of the part set forth: ibid. An indictment alleging that defendant published a libel on November 21 may be supported by evidence of its publication in a newspaper dated November 19. *Aliter*, if it had been alleged to have been published in a newspaper dated the 21st: Com. *v.* Varney, 10 Cush. (Mass. 402.}

[2] R. *v.* Drake, 2 Salk. 660, per Powers, J., approved, as "the true distinction," per Ld. Mansfield, Cowp. 230; State *v.* Bean, 19 Vt. 530; State *v.* Weaver, 13 Ired. 491.

[3] R. *v.* Beach, Cowp. 229.

[4] R. *v.* Hart, 2 East P. C. 977; 1 Leach C. C. (4th ed.) 145.

[5] Williams *v.* Ogle, 2 Stra. 889.

[6] Com. *v.* Wright, 1 Cush. 46; 1 Leading Crim. Cases, 296; Wright *v.* Clements, 3 B. & Ald. 503; 1 Leading Crim. Cases, 312.

[7] Com. *v.* Houghton, 8 Mass. 107, 110; State *v.* Bonney, 34 Me. 223; People *v.* Kingsley, 2 Cowen 522. And see U. S. *v.* Britton, 2 Mason 464, 467, 468; Johnson *v.* Hudson, 7 Ad. & El. 233, n.

[1] R. *v.* Creevey, 1 M. & S. 273, 282; R. *v.* Lord Abingdon, 1 Esp. 226; Jones *v.* Stevens, 11 Price 235; White *v.* Nichols, 3 How. S. C. 291; [State *v.* Nichols, 15 Wash. 1; Benton *v.* State, 59 N. J. L. 551.] Malice, in this connection, does not

plained of is not plainly and of itself defamatory, some substantive evidence of malice should be offered.[2] Such evidence is also necessary on the part of the prosecution, where the defence set up to the charge of a libellous publication is, that it was privileged.[3] If the communication was of a class absolutely privileged, proof of actual malice is inadmissible, as it consti-

necessarily imply personal ill-will: Com. *v.* Bonner, 9 Met. 410; Com. *v.* Snelling, 15 Pick. 340. {Other libellous publications of a similar character, against the same person, are evidence of intent, but not of publication: Com. *v.* Harmon, *supra;* State *v.* Riggs, 39 Conn. 498. Seymour, J., *contra*, as to last point.

[2] Stuart *v.* Lovell, 2 Stark. 93. See as to the proof of malice, *ante*, [Vol. I. § 14 *o*;] Vol. II. § 418.

[3] White *v.* Nichols, 3 How. S. C. 286. In this case, privileged communications were distributed, by Mr. Justice Daniel, into four classes: "1. Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral; or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship, as a caution; or a letter written confidentially to persons who employed A as a solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which the writer of the letter was also interested. 2. Any thing said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances:" ibid. The learned judge, in delivering the opinion of the court, concluded the first part of his elaborate investigation with the following comprehensive statement of its results: "The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto: 1. That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining, beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognized as privileged communications, must be understood as exceptions to this rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore, *prima facie*, relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence as to such cases is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude, then, that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding, libellous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that, in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice:" ib. p. 291. As to the privileged communications, see further, *ante*, Vol. II. §§ 421, 422; {Farnsworth *v.* Storrs, 5 Cush. (Mass.) 412; Sheckell *v.* Jackson, 10 id. 25; Barrows *v.* Bell, 7 Gray (Mass.) 301; Van Wyck *v.* Aspinwall, 17 N. Y. 190; Gassett *v.* Gilbert, 6 Gray (Mass.) 94; Davison *v.* Duncan, 40 Eng. Law & Eq. 215.}

tutes no answer or bar to the privilege.[4] Such is the case of matter necessarily published in the due discharge of official or public duty. But where the publication is only *prima facie* privileged, as in the case of a character given of a servant, or of advice confidentially given, or the like, the defence of privilege may be rebutted by proof of actual malice.[5] Thus, it may be shown, that the same communication was voluntarily made by the defendant on other occasions, when it was not called for; or that he has at other and subsequent times published other libellous matter relating to the same subject, or other copies of the same libel.[6] Other publications, also, contained in the same paper, and relating to the same libel, or expressly referred to in the writing set forth in the indictment and explanatory of its meaning, may be read in evidence, they being in the nature of parts of the *res gestæ*, and showing the real meaning and intent of the party.[7]

§ 169. **Publication.** Though the indictment for a libel in writing or print should charge the defendant with having *composed*, *written*, *printed*, and *published* it, yet it is not necessary to prove all these; for it is not perfectly clear that it is legally criminal to compose and write libellous matter if it be not published;[1] and it is well settled that the charge will be supported by proof of the publication alone,[2] this being of the essence of the offence. *Publication consists* in communicating the defamatory matter to the mind of another, whether it be privately to the party injured alone, with intent to provoke him to a breach of the peace,[3] or to others, with intent to injure the individual

[4] Cooke on Defamation, p. 148.

[5] Sands *v.* Robinson, 12 S. & M. 704.

[6] Rogers *v.* Clifton, 3 B. & P. 587; Bromage *v.* Prosser, 4 B. & C. 247, 256; Stuart *v.* Lovell, 2 Stark. 93; Chubb *v.* Westley, 6 C. & P. 436; Finnerty *v.* Tipper, 2 Campb. 72; Thomas *v.* Croswell, 7 Johns. 264, 270; R. *v.* Pearce, 1 Peake Cas. 75; Plunkett *v.* Cobbett, 5 Esp. 136; [State *v.* Heacock, 76 N. W. 654, Iowa; *ante*, Vol. I. § 14*o*.]

[7] R. *v.* Lambert, 2 Campb. 398; Cook *v.* Hughes, Ry. & M. 112; R. *v.* Slaney, 5 C. & P. 213.

[1] In R. *v.* Paine, 5 Mod. 163, 167, it was held that the making of a libel was an offence, though it never be published. In R. *v.* Burdett, 4 B. & Ald. 95, Lord Tenterden, and Holroyd, J., were of opinion that the writing of a libel, with intent to defame, was of itself a misdemeanor; though the latter seemed to lay stress on the fact of a subsequent publication, as evidence of the intent. Best, J., said nothing on this point, as it was not necessary to the judgment; and Bayley, J., after stating it, observed that the case seemed hardly ripe for discussing that question. See also 3 Russ. on Crimes, 5th (Eng.) ed. 211; Stark. on Slander, 3d ed. 691; 1 Hawk. P. C. c. 73, § 11; Roscoe, Crim. Evid. 7th (Am.) ed. 672.

[2] R. *v.* Hunt, 2 Campb. 583; R. *v.* Williams, ib. 646; {Com. *v.* Morgan, 107 Mass. 199.}

[3] 1 Hawk. P. C. c. 73, § 11; 3 Russ. on Crimes, 5th (Eng.) ed. 209, 213; State *v.*

in question, or to perpetrate more extensive mischief. And, generally speaking, all persons who knowingly participate in the act of publication are equally liable to prosecution for this offence.

§ 170. **Same Subject.** It will be sufficient, therefore, in *proof of publication*, to show that the defendant wrote the libel which is found in another's possession, until this fact is otherwise accounted for;[1] and if a letter containing a libel have a post-mark upon it, and the seal be broken, this is *prima facie* evidence of its publication.[2] If the libel be in a newspaper, the act of printing it, if not otherwise explained by circumstances,[3] delivering a copy to the proper officer at the stamp-office,[4] and payment to the stamp-officer for the duties on the advertisements in the same paper,[5] have each been held sufficient evidence of publication. Proof that the printed libel was sold in the shop of the defendant, though it were without his actual knowledge, the sale being by a servant, in his absence, is sufficient evidence of publication by the master, unless he can rebut it by proof that the sale was not in the ordinary course of the servant's employment, and that the book was clandestinely brought into the shop and sold, or that the sale was contrary to his express orders, and that some deceit or surprise was practised upon him; or that he was absent under such circumstances as utterly negatived any presumption or privity or connivance on his part; as, for example, if he were in prison, to which his servants could have no access, or the like.[6] In these cases, the agency of the servant may be proved by evidence of his general employment in that department of the defendant's business; but where the act of publication, whether by sale, or by writing and sending a letter, was done by another not thus generally employed, the agency must be particularly proved.[7]

Avery, 7 Conn. 267, 269; R. *v.* Wegener, 2 Stark. 245; Hodges *v.* State, 5 Humph. 112.

[1] R. *v.* Beare, 1 Ld. Raym. 414; Lamb's Case, 9 Co. 59; R. *v.* Lovett, 9 C. & P. 462.

[2] Shipley *v.* Todhunter, 7 C. & P. 680; Warren *v.* Warren, 1 C. M. & R. 250. And see *ante*, Vol. I. § 40.

[3] Baldwin *v.* Elphinstone, 2 W. Bl. 1038; [State *v.* Mason, 26 Or. 273.]

[4] R. *v.* Amphlit, 4 B. & C. 35.

[5] Cook *v.* Ward, 6 Bing. 409.

[6] *Ante*, Vol. I. § 36, and cases there cited; Holt on Libels, 293–296; Woodfall's Case, 1 Hawk. P. C. c. 73, § 10, n.; 2 Stark. on Slander, 30–34; R. *v.* Almon, 5 Burr. 2686; 1 Leading Crim. Cases, 241; Com. *v.* Nichols, 10 Met. 259; Com. *v.* Buckingham, 2 Wheeler, C. C. 198; Thacher's Crim. Cases, 29.

[7] Harding *v.* Greening, 8 Taunt. 42; *ante*, [Vol. I. §§ 36, 234;] Vol. II. tit. Agency, §§ 64, 65.

§ 171. **Same Subject; Admission.** If the evidence of publication be an *admission of the defendant* that he was the author of the libel, "errors of the press and some small variations excepted," the burden of proof is on the defendant to show that there were material variances.[1] He who procures another to publish a libel is guilty himself of the publication, and he who disperses a libel is also guilty of the publication, though he did not know its contents. The apparent severity of this rule, and of that which renders the owner of a shop responsible as the publisher of libels sold therein without his knowledge, is justified, on the score of high public expediency, or necessity, to prevent the circulation of defamatory writings, which, otherwise, might be dispersed with impunity.[2]

§ 172. **Same Subject.** Evidence that the defendant *dictated the libel to another*, or communicated it verbally to him, *with a view to its publication*, is also sufficient to charge him with the publication.[1] Thus, where the defendant, meeting the reporter for one of the public prints, communicated to him the defamatory matter, saying that "it would make a good case for a news-

[1] R. *v.* Hall, 1 Stra. 416.

[2] 1 Hawk. P. C. c. 73, § 10; 1 Russ. on Crimes, 250, 251. This rule is now modified in England, the defendant being permitted by Stat. 6 & 7 Vict. c. 96, § 7, to prove that the publication was made without his authority, consent, or knowledge, and did not arise from his want of due care or caution. {Under the English statute, it has been held that the general authority given by the proprietors of a newspaper to the editors or editor, allowing them or him the management and oversight of the paper, is not, *per se*, evidence that the proprietors had authorized or consented to the publication of the libel within the meaning of the statute: R. *v.* Holbrook, L. R. 3 Q. B. Div. 60.

In Com. *v.* Morgan, 107 Mass. 199, the court recognizes the justice of this rule, which is enacted by the English statute, and says: "The rule thus made positive law is in strict accordance with those just principles which ought to limit criminal liability for the acts of another, and which have been recognized in the decisions of this court. Criminal responsibility on the part of the principal for the act of his agent or servant in the course of his employment, implies some degree of moral guilt, or delinquency manifested either by direct participation in or assent to the act, or by want of proper care and oversight, or other negligence, in reference to the business which he has thus entrusted to another." In that case the defendant was proved to be the publisher of the newspaper in which the libel was printed, and he offered to prove that he had never seen the libel nor was aware of its publication, until it was pointed out to him after its publication, by a third person; but this offer was rejected in the Superior Court and the ruling sustained in the Supreme Court, on the ground that the offer did not go far enough to rebut the presumption of guilt arising from the publication of the libel; the facts offered might be true, and yet be consistent with the fact that the conduct of the newspaper was under his actual direction and control, at a time when he was neither absent from home nor confined by sickness, and when his want of knowledge would necessarily imply criminal neglect to exercise proper care and supervision over the subordinates in his employ; or with such information as should have put him on inquiry; or with the fact that the general character of the newspaper encouraged publications of that nature.}

[1] [State *v.* Osborn, 54 Kan. 473. But see Vol. II. § 414.]

paper;" and accompanied him to an adjacent tavern, where a more detailed account was given, for the express purpose of inserting it in the newspaper with which the reporter was connected; after which the reporter drew up an account of the matter, which was inserted in the paper; this was held sufficient proof of a publication by the defendant. But the newspaper was not admitted to be read in evidence, until the paper written by the reporter was produced, that it might appear that the written and the printed articles were the same.[2]

§ 173. **Place of Publication.** The *publication* must be proved to have been made *within the county* where the trial is had.[1] If it was contained in a newspaper printed in another State, yet it will be sufficient to prove that it was circulated and read within the county.[2] If it was written in one county, and sent by post to a person in another, or its publication in another county be otherwise consented to, this is evidence of a publication in the latter county.[3] Whether, if a libel be written in one county, with intent to publish it in another, and it is accordingly so published, this is evidence sufficient to charge the party in the county in which it was written, is a question which has been much discussed, and at length settled in the affirmative.[4]

§ 174. **Colloquium.** The *colloquium* may be proved by witnesses, having knowledge of the parties and circumstances, who thereupon testified their belief that the libellous matter has the reference mentioned in the indictment;[1] but it may also be proved by other circumstances, such as admissions by the defendant in other publications, etc.[2] It is not necessary to show that the libel would be understood by all persons to apply to the party alleged: it is sufficient if it were so understood by the witnesses themselves, who knew him.[3] But they must understand it so from the libel itself; for if its application to the

[2] Adams *v.* Kelly, Ry. & M. 157. As to publication, see further, *ante*, Vol. II. §§ 415, 516.

[1] 3 Russ. on Crimes, 5th (Eng.) ed. 219; Nicholson *v.* Lathrop, 3 Johns. 139.

[2] Com. *v.* Blanding, 3 Pick. 304.

[3] 3 Russ. on Crimes, 5th (Eng.) ed. 219; 12 St. Tr. 331, 332; R. *v.* Watson, 1 Campb. 215; R. *v.* Johnson, 7 East 65; [Baker *v.* State, 97 Ga. 452.]

[4] R. *v.* Burdett, 4 B. & Ald. 95, per Abbott, C. J., and Beat and Holroyd, JJ., Bayley, J., *dubitante*.

[1] [Libelling a class is sufficient to constitute the crime: Jones *v.* State, 43 S. W. 78, Tex. Cr. App.]

[2] 2 Stark. on Slander, 51; Chubb *v.* Westley, 6 C. & P. 436. And see *ante*, Vol. II. § 417. See Goodrich *v* Davis, 11 Met. 473–485.

[3] [State *v.* Mason, 26 Or. 273.] [In order to show the defamatory sense of the words,

party injured be known or understood only by reference to other writings for which the defendant is not responsible, this will not be sufficient.[4]

§ 175. **Innuendoes.** It is sometimes said that the *innuendoes*, also, must be proved; but this inaccuracy arises from not considering their precise nature and office. In an indictment for this offence, the *averment* states all the facts, *dehors* the writing, which are essential to the proper understanding of the libel itself; the *colloquium* asserts that the libel was written of and concerning the party injured, with reference to the matters so averred; the *innuendo* is merely explanatory of the subject-matter sufficiently expressed before, and of that only; and as it cannot extend the sense of the words beyond their own proper meaning, it is not the subject of proof.[1] Whether the libel relates to the matters so averred, is a question of fact for the jury.[2]

§ 176. **Truth as a Defence.** Whether, by the common law, the defendant, in an indictment for a defamatory libel on the person, could give the *truth in evidence*, in his justification, is a question which has been much debated in this country. By the common law as held in England the truth of the libel was not a justification; but this has been recently modified by a statute, permitting the defendant, in an indictment or information for a defamatory libel, in addition to the plea of not guilty, to put in a special plea of the truth of the matters charged; upon which plea the truth may be inquired into; and if the jury find the matter to be true, and that the publication thereof was for the public benefit, it constitutes a good defence to the prosecution.[1] In several of the United States this doctrine of the common law, though denied by some judges, was recognized by the general current of judicial decisions, as of binding force in this country; but it has since been modified in some States, and

and the meaning of the defendant in the language used, when it is ambiguous, or consists of expressions not in common use, but having a known meaning among certain persons, the State may introduce as witnesses those persons who know the application of the words: Com. *v.* Morgan, 107 Mass. 199.]

[4] Bourke *v.* Warren, 2 C. & P. 307.

[1] Com. *v.* Snelling, 15 Pick. 335; R. *v.* Horne, Cowp. 683, 684; Van Vechten *v.* Hopkins, 5 Johns. 211, 220–223. And see May *v.* Brown, 3 B. & C. 113.

[2] Ibid.

[1] Stat. 6 & 7 Vict. c. 96, § 6. See Cooke on Defamation, p. 467; and the Report of the Lords' Committee, with the evidence before them on the subject of libel, ib., pp. 471–512. The other English statutes in melioration and amendment of the law of libel may be found at large in the same work, App. No. 1, pp. 403–407.

totally abrogated in others, by constitutional or statutory provisions; so that it is no longer to be admitted as a rule of American law.[2] On the contrary, it will now be found, that, to an extent more or less limited, as will be shown, the truth of a defamatory publication brings it within the class of privileged communications.

§ 177. **Same Subject.** Thus, in some of the United States, it is enacted that the truth may be given in evidence, in all criminal prosecutions for libel. But this, it is conceived, is to be understood of libels defamatory of the person, and not to scandalous libels of a more general character. And the same construction should probably be given to all other enactments which permit the truth to be shown in prosecutions for this offence. In the statutes of some States, it is simply declared that the truth may, in those cases, be given in evidence;[1] in others, it is said that it shall be a justification;[2] but doubtless the effect of both expressions is the same. Again, it is provided in the *constitutions* of several States, that the truth shall be admissible in evidence as a justification, in prosecutions for those publications which concern the official conduct of men in public office, or the qualifications of candidates for public office, or, more generally, where the matter is proper for public information;[3] other cases, it seems, being left at common law, except where it may be otherwise provided by statute. And other States have provided, either in constitutional or statutory enactments, that the truth shall constitute a good defence, in all cases, provided it is found to have been published from good motives and for justifiable ends.[4] It thus appears, that, in nearly all the United

[2] See Kent, Comm. 19–24.

[1] See Connecticut, Const. art. 1, § 7; New Jersey, Revision 1877, p. 381, § 21; Missouri, Const. art. 13, § 16; Mississippi, Rev. Code, 1871, § 2707; How. & Hut. Dig. pp. 668, 669; Georgia Code, § 5018, Prince's Dig. p. 644; Cobb's Dig. vol. ii. p. 812; Texas, Stat. Dec. 21, 1836, § 33; Hartley's Dig. art. 2373, p. 724; Rev. Stat. 1879, Crim. Proced. c. 1, art. 11.

[2] See Vermont, Rev. Stat. 1839, c. 25, § 68; but see Rev. Laws, 1880, § 1646; Maryland, Stat. 1803, c. 54, Rev. Code, 1878, art. 64, § 76; North Carolina, Rev. Stat. 1837, c. 35, § 13; Tennessee, Stat. 1805, c. 6, § 2, Car. & Nich. Dig. p. 439; Arkansas, Const. art. 2, § 8; Rev. Stat. 1837, div. 8, c. 44, art. 2, § 3, p. 280. In Illinois, the truth is a justification in all cases, except in libels tending to blacken the memory of the *dead*, or to expose the *natural* defects of the living: Rev. Stat. 1845, Crim. Code, § 120.

[3] See Ohio, Const. art. 8, § 6; Indiana, Const. art. 1, § 10; Alabama, Const. art. 6, § 14, Stat. 1807, Toulm. Dig. tit. 17, c. 1, § 46; Pennsylvania, Const. art. 9, § 7; Kentucky, Const. art. 10, § 8; Delaware, Const. art. 1, § 5; Arkansas, Const. art. 2, § 8; Maine, Const. art. 1, § 4; Texas, Const. 1845, art. 1, § 6; Illinois, Const. art. 8, § 23; Tennessee, Const. art. 11, § 19.

[4] See Massachusetts, Rev. Stat. 1836, c. 133, § 6, Pub. Stat. p. 1201; New York,

States, the right to give the truth in evidence, in criminal prosecutions for libels, is, to a greater or less extent, secured by express law; and probably would not now, in any of them, be denied. It may here be added, that, by the act of Congress of July 14, 1798, libels on the Government, or Congress, or the President, were made indictable in the courts of the United States, and the truth was permitted to be given in evidence, by the defendant, in his justification. This act, though of limited duration, has been regarded as declaratory of the sense of Congress, that in prosecutions of that kind it was a matter of common right for the defendant to show that the matter published was true.[5]

§ 178. **Defence.** In his *defence*, it is competent for the defendant to show that he did not participate in the publication; or, if it was done by his servant, that it was against his express orders, or out of the course of the servant's employment, or while the master was absent, under circumstances rendering it physically and morally impossible for him to prevent it; or that it was done by deceiving and defrauding the master. Or he may show, by other passages in the same book or newspaper relating to the matter, or referred to in the libel itself, that the libel was not defamatory, or criminal, in the sense imputed to it.[1] He may also show that the publication was privileged, as being made in the course of his public or social duty.[2] But a

Const. art. 7, § 8; Rev. Stat. vol. i. p. 95, § 21; Rhode Island, Const. art. 1, § 20; Michigan, Const. art. 1, § 7; Wisconsin, Const. art. 1, § 3; Iowa, Rev. Code, 1851, art. 2769; Florida, Const. art. 1, § 15, Thompson's Dig. p. 498; California, Const. art. 1, § 9; Stat. 1850, c. 99, § 120. In Maine, the truth will justify any publication respecting public men, or proper for public information, irrespective of the motive of publication; but to justify the publication of any other libel, it must be free from any corrupt or malicious motive: Rev. Stat. 1840, c. 165, § 5; Rev. Stat. 1871, c. 129, § 4. In Illinois, it is enacted, that "in all prosecutions for a libel, the truth thereof may be given in evidence in justification, except libels tending to blacken the memory of the dead, or expose the natural defects of the living:" Rev. Stat. 1845, c. 30, § 120. In New Hampshire, it is held as common law, that if there was a lawful occasion for the publication, and the matter published is true, the motive is immaterial; and that though the matter be not true, yet the publication may be excused, by showing that it was made on a lawful occasion, upon probable cause, and from good motives: State *v.* Burnham, 9 N. H. 34. {Mass. Pub. Stat. c. 214, § 13, provides that the defendant may give in evidence in his defence, upon the trial, the truth of the matter contained in the publication charged as libellous, and such evidence shall be deemed a sufficient justification, unless malicious intention is proved.} [Where the truth is a defence the defendant is not bound to prove the truth beyond a reasonable doubt: Manning *v.* State, 37 Tex. Cr. App. 180; on the contrary, the prosecution must show the falsity of the libellous matter beyond a reasonable doubt: McArthur *v.* State, 59 Ark. 431.]

[5] See Laws U. S., vol. i. p. 596 (Peters's ed.); 2 Kent Comm. 24.

[1] R. *v.* Lambert, 2 Campb. 398.

[2] *Supra*, §§ 167, 176; Goodnow *v.* Tappan, 1 Ohio 60. [The evidence upon which

subsequent publication of the same matter, when not required by such duty, as, for example, the printing of a speech delivered in a legislative assembly, or the like, is not privileged.[3] Whether the printer of legislative documents, containing official reports defamatory in their nature, could protect himself under the allegation of privilege, by showing that he published them by order of the legislature, is a question which at one time greatly agitated the British public; but at length it was settled that the order of the legislature was no defence to an action at law.[4]

§ 179. **Law; Fact; Rights of Jury.** The *right of the jury*, in criminal cases, and particularly in trials for libel, has also been the subject of much discussion. It was formerly held, that, where there were no circumstances which raised a question of justification in point of law, the jury were bound to find the defendant guilty, if they found the fact of publication and the truth of the *innuendoes;* these two matters of fact being all which they were permitted to inquire into.[1] In the United States, this doctrine is not known to have been received, but, on the contrary, it has been so distasteful as to have occasioned express constitutional and statutory provisions, to the effect that, in all such cases, the jury may render a general verdict upon the whole matter under the issue of not guilty.[2] The language of the constitutions of some States is, that "the jury shall be judges of," and in other States, "shall have the right to determine," the law and the facts. In many of the constitutions it is provided that the jury may do this "under the direction of the court," [3] or, "after having received the direction of

the publication was made is admissible in order to rebut evidence of malice in the case of a privileged communication: People *v.* Glassman, 12 Utah 238.]

[3] R. *v.* Creevey, 1 M. & S. 273, 278; R. *v.* Lord Abingdon, 1 Esp. 226; Oliver *v.* Lord Bentinck, 3 Taunt. 456.

[4] Stockdale *v.* Hansard, 9 Ad. & El. 1.

[1] See R. *v.* Dean of St. Asaph, 3 T. R. 429–432, n., where the practice is historically stated and vindicated by Lord Mansfield. The excitement which grew out of this and some other cases caused the passage of the statute of 32 Geo. III. c. 60, which *declares*, that in an indictment or information for a libel, upon the issue of not guilty, the jurors may return a general verdict upon the whole matter, and not upon the fact of publication and the truth of the innuendoes alone. [See *ante*, Vol. I. § 81 *f.*]

[2] [Whether the language is libellous is for the court on demurrer to the indictment; for the jury on the trial of the case: State *v.* Norton, 89 Me. 290.]

[3] Such are the constitutional provisions in Ohio, Const. art. 8, § 6; Indiana, Const. art. 1, § 10; Alabama, Const. art. 6, § 14; Pennsylvania, Const. art. 9, § 7; Kentucky, Const. art. 10, § 8; Connecticut, Const. art. 1, § 7; Missouri, Const. art. 13, § 16; Illinois, Const. art. 8, § 23; Tennessee, Const. art. 11, § 19.

the court,"[4] or, "as in other cases;"[5] but in other constitutions the provision is unqualified.[6] Upon these provisions a further question has been raised, whether the jury were bound to follow the directions of the court, in matters of law, or were at liberty to disregard them, and determine the law for themselves. On this point, the decisions are not entirely uniform; and some of them are not perfectly clear, from the want of discriminating between the *power* possessed by the jury to find a general verdict, contrary to the direction of the court in a matter of law, without being accountable for so doing, and their *right* so to do, without a violation of their oath and duty. But the weight of opinion is vastly against the right of the jury, in any case, to disregard the law as stated to them by the court; and, on the contrary, is in favor of their duty to be governed by such rules as the court may declare to be the law of the land; the meaning of the constitutional provisions being merely this, that the jury are the sole judges of all the facts involved in the issue, and of the application of the law to the particular case.[7]

[4] See Maine, Const. art. 1, § 4; Iowa, Rev. Stat. 1851, § 2772.

[5] See Delaware, Const. art. 1, § 5.

[6] See Arkansas, Const. art. 2, § 8; California, Const. art. 1, § 9; New York, Const. art. 7, § 8; Michigan, Const. art. 1, § 7; Florida, Const. art. 1, § 15; Wisconsin, Const. art. 1, § 3; Texas, Const. (1845) art. 1, § 6. In this last-mentioned State, in the Constitution of 1836, Declaration of Rights, art. 4, the words, "under the direction of the court," were added; but in the revised Constitution of 1845, they were omitted.

[7] This question was very fully and ably considered in U. S. *v.* Battiste, 2 Sumn. 243; Com. *v.* Porter, 10 Met. 263; Pierce *v.* State, 13 N. H. 536; U. S. *v.* Morris, 4 Am. Law Journ. N. S. 241; in which cases the other American and the English authorities are reviewed. And see *ante*, Vol. I. § 49; Townsend *v.* State, 2 Blackf. 151; Warren *v.* State, 4 id. 150; Armstrong *v.* State, ib. 247; Hardy *v.* State, 7 Mo. 607; People *v.* Pine, 2 Barb. S. C. 566. {If the defendant admit that the publication is libellous, he cannot complain that that question is not submitted to the jury: State *v.* Goold, 62 Me. 509. It has been considerably discussed in recent cases, how far corporations will be held responsible, as such, for the publication of libels by their directors or agents in the due course of the business of the corporation. It was held, in Whitfield *v.* South Eastern Railway Company, 1 Ellis, B. & Ellis, 115, s. c. 4 Jur. N. S. 688, that the company are responsible for the publication of a libel by the directors, in giving instructions by telegraph to their agents at the different stations, that the plaintiff's bank had stopped payment. So the corporation will be held responsible for circulating libellous matter in a report of its directors, with the accompanying evidence, even when made to the stockholders: Philadelphia, Wilmington, & Baltimore Railway Co. *v.* Quigley, 21 How. (U. S.) 202.} [Where the jury are "judges of the law and the facts," the court is not bound to express any opinion as to the character of the publication: Benton *v.* State, 59 N. J. L. 551.]

MAINTENANCE.

§ 180. **Maintenance; Champerty.** This crime is said to consist in the unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hinderance of common right.[1] It is of two kinds: namely, *Ruralis*, or in the country; and *Curialis*, or in the courts. The former is usually termed *Champerty;* and is committed where one upholds a controversy, under a contract to have part of the property or subject in dispute. The latter alone is usually termed *Maintenance;* and is committed where one officiously, and without just cause, intermeddles in and promotes the prosecution or defence of a suit in which he has no interest, by assisting either party with money, or otherwise.[2] Both species of this crime are, in some form or other, forbidden by statutes, in nearly all the United States; but the common law is still conceived to be in force where it has not been abrogated by the statute.[3]

§ 181. **Indictment.** The indictment charges, in substance, that the defendant unjustly and unlawfully maintained and upheld a certain suit, pending in such a court (describing them), to the manifest hinderance and disturbance of justice. If the

[1] 1 Hawk. P. C. c. 83, § 1; 1 Inst. 368 *b;* 2 Inst. 212.

[2] Ibid.; Thallhimer *v.* Brinckerhoff, 3 Cowen 623; 20 Johns. 386; 1 Russ. on Crimes, 175, 5th (Eng.) ed. 351; Holloway *v.* Lowe, 7 Port. 488.

[3] Wolcott *v.* Knight, 6 Mass. 421; Everenden *v.* Beaumont, 7 id. 78; Swett *v.* Poor, 11 id. 553; Thurston *v.* Percival, 1 Pick. 416; Brinley *v.* Whiting, 5 id. 359; Key *v.* Vattier, 1 Ham. 132; Rust *v.* Larue, 4 Litt. 417; Brown *v.* Beauchamp, 5 Monroe 416. In Ohio and in Illinois, it has been held, that a conveyance by one who is disseised, is not void for champerty: Hall *v.* Ashby, 9 Ham. 96; Willis *v.* Watson, 4 Scam. 64. {In New York, the statutes contain all the law in force on the subject: Sedgwick *v.* Stanton, 4 Kern. (N. Y.) 289. The act of Henry VIII. is not rigidly enforced in this country: Wood *v.* McGuire, 21 Ga. 583. See Danforth *v.* Streeter, 28 Vt. 490. The common law of maintenance is not recognized in Connecticut (Richardson *v.* Rowland, 40 Conn. 565); nor New Jersey (Schomp *v.* Schenck, 40 N. J. L. 195); but *contra*, Greenman *v.* Cohee, 61 Ind. 201; Thompson *v.* Reynolds, 73 Ill. 11. Nor, independent of statutes, does it seem to be much regarded elsewhere: Richardson *v.* Rowland, *supra*, and note to s. c. 14 Am. L. Reg. N. s. 78.} [For the distinction between the civil and the criminal law of champerty see Rees *v.* De Bernardy, 1896, 2 Ch. 437. The offence of maintenance consists in maintaining a civil, not a criminal suit: Grant *v.* Thompson, 18 Cox Cr. Cas. 100, 15 Rep. 290. For the rules governing champerty in civil actions see Harriman on Contracts, p. 109.]

offence was strictly champerty, and consisted in the buying of a pretended or disputed title or claim to property from a grantor or vendor out of possession, the facts are specially stated in the indictment. In either case, the charge, being properly made, is supported *prima facie* by evidence of the specific facts alleged; as, that the defendant assisted another with money to carry on his cause; or did otherwise bear him out in the whole or part of the expense of the suit; or induced a third person to do so;[1] or bargained to carry on a suit, in consideration of having part of the thing in dispute;[2] or purchased the interest of a party in a pending suit;[3] or the like.

§ 182. **Defence.** The defendant, in his *defence*, may avoid the charge, by evidence that the act was *justifiable;* as, that he already had an *interest* in the suit, in which he advanced his money, though it were but a contingent interest;[1] or, that he was nearly *related* by blood or marriage to the party whom he upheld, even though he were but a *step-son;*[2] or, was related socially, as a master or servant;[3] or, that he assisted the party because he was a poor man, and from motives of charity;[4] or, that the defendant was interested with others in the general *question* to be decided, and that they merely contributed to the expense of obtaining a judicial determination of that question.[5]

§ 183. **Same Subject.** If the defendant is charged with knowingly *buying or selling land in possession by another under an adverse claim of title*, with intent to disturb that possession, the charge may be resisted by evidence that such possession was

[1] 1 Hawk. P. C. c. 83, §§ 4, 5; 1 Russ. on Crimes, 175, 5th (Eng.) ed. 351.

[2] Thallhimer *v.* Brinckerhoff, 3 Cowen 623; Lathrop *v.* Amherst Bank, 9 Met. 489. {A guarantee by an attorney of a claim left with him for collection is not champertous: Gregory *v.* Gleed, 33 Vt. 405. Nor the transfer by assignment to the attorney of the subject-matter of the suit, for the purpose of security for his charges, although it seems an absolute sale would be champertous: Anderson *v.* Radcliffe, 1 Ellis, B. & E. 806. That the agreement for the compensation of the plaintiff's attorney is champertous, is not a defence of which the defendant can avail himself: Robinson *v.* Beall, 26 Ga. 17. An agreement by an attorney with his client, to prosecute at his own cost for a share of the proceeds, is champertous: Orr *v.* Tanner, 12 R. I. 94; Martin *v.* Clarke, 8 R. I. 389; Stearns *v.* Felker, 28 Wis. 594. But see Cross *v.* Bloomer, 6 Baxt. (Tenn.) 741, and *ante*, § 180, n.; Vol. II. § 139, n.}

[3] Arden *v.* Patterson, 5 Johns. Ch. 44.

[1] Thallhimer *v.* Brinckerhoff, 3 Cowen 623; Williamson *v.* Henley, 6 Bing. 299; 1 Hawk. P. C. c. 83, §§ 12–19; Wickham *v.* Conklin, 8 Johns. 220.

[2] Campbell *v.* Jones, 4 Wend. 306, 310. If he is heir apparent, it is sufficient, however remotely related: 1 Hawk. P. C. c. 83, § 20.

[3] 1 Hawk. P. C. c. 83, §§ 23, 24.

[4] Perine *v.* Dunn, 3 Johns. Ch. 508.

[5] Gowen *v.* Nowell, 1 Greenl. 292; Frost *v.* Paine, 12 Me. 111. [As to what constitutes sufficient interest, see Alabaster *v.* Harness, 1895, 1 Q. B. 339.]

not of a nature to throw any doubt upon the title; as, if it were under a mere quitclaim deed, from a naked possessor or occupant, who claimed no title;[1] or, that the adverse possession was of only a small proportion of the land, and that the entire agreement of sale was made in good faith, and not with the object of transferring a disputed title;[2] or, that the purchase was made for the purpose of confirming his own title;[3] or the like. The party selling is presumed to know of the existence of an adverse possession, if there be any;[4] but this may be rebutted by counter evidence on the part of the defendant.[5]

[1] Jackson *v.* Hill, 5 Wend. 532; Jackson *v.* Collins, 3 Cowen, 89.

[2] Van Dyck *v.* Van Beuren, 1 Johns. 345; {Dawley *v.* Brown, 79 N. Y. 390; Danforth *v.* Streeter, 2 Wms. (Vt.) 490. But an agreement between A and B, whereby B undertook to recover certain real estate and reinvest A in the possession thereof, and A agreed to convey two-thirds of his interest to B when this was done, was held champertous: Coleman *v.* Billings, 89 Ill. 183.}

[3] Wilcox *v.* Calloway, 1 Wash. 38. {A devise or conveyance between near relations, of land held adversely or in litigation, is good and not champertous: Morris *v.* Henderson, 37 Miss. 492. The policy prohibiting the sale of lands in the adverse possession of another, is not applicable to judicial and official sales: Hanna *v.* Renfro, 32 Miss. 125; Cook *v.* Travis, 20 N. Y. 400.}

[4] Hassenfrats *v.* Kelly, 13 Johns. 466; Lane *v.* Shears, 1 Wend. 433; Etheridge *v.* Cromwell, 8 Wend. 629.

[5] Ibid. And see Jackson *v.* Demont, 9 Johns. 55; Swett *v.* Poor, 11 Mass. 549, 554.

NUISANCE.[1]

§ 184. **Definition.** Common nuisances are a species of offence against the public order and economical regimen of the State; being either the doing of a thing to the annoyance of all the citizens, or the neglecting to do a thing which the common good requires.[2] More particularly, it is said to comprehend endangering the public personal safety or health; or doing, causing, occasioning, promoting, maintaining, or continuing what is noisome and offensive, or annoying and vexatious, or plainly hurtful to the public,[3] or is a public outrage against common decency or common morality, or tends plainly and directly to the corruption of the morals, honesty, and good habits of the people; the same being without authority or justification by law.[4] Hence, it is indictable, as a common nuisance, to carry on an offensive trade or manufacture in a settled neighborhood or place of usual public resort or travel, whether the offence be to the sight or smell or hearing;[5] or, to expose the citizens to a contagious disease, by carrying an infected person through a

[1] [See also Vol. II., §§ 465–476.]

[2] 1 Hawk. P. C. c. 75, § 1; 4 Bl. Comm. 166; 1 Russ. on Crimes, 5th (Eng.) ed. 418. {What amount of annoyance or inconvenience will constitute a nuisance, being a question of degree, dependent on varying circumstances, cannot be precisely defined: Columbus Gas, etc. Co. *v.* Freeland, 12 Ohio St. 392.} [Smoke is not a nuisance *per se:* St. Louis *v.* Heitzeberg, etc. Co., 141 Mo. 375. Polluting a stream is a nuisance: Nolan *v.* New Britain, 69 Conn. 668. Dumping garbage in a Great Lake, 15 miles from shore, is not in itself a nuisance: Kuehn *v.* Milwaukee, 92 Wis. 263.]

[3] {And the indictment must show in some way how the nuisance is hurtful to the public or some part of it: State *v.* Houck, 73 Ind. 37.}

[4] Report of Massachusetts Commissioners on Crim. Law, tit. Common Nuisance, § 1. {Profane cursing and swearing in public is indictable as a common nuisance. It should be alleged in the indictment that the offence was committed in such a place and manner that it might be heard: State *v.* Barham, 79 N. C. 646; State *v.* Powell, 70 id. 67; State *v.* Pepper, 68 id. 259; [Com. *v.* Linn, 158 Pa. 22.] And a single instance of profane swearing will not constitute the offence: State *v.* Jones, 9 Ired. (N. C.) 38; State *v.* Graham, 3 Sneed (Tenn.) 134.}

[5] R. *v.* Pappineau, 2 Stra. 686; R. *v.* Neville, 1 Peake 91; People *v.* Cunningham, 1 Denio 524. {And the smell need not be injurious to health, but only offensive to the senses: State *v.* Wetherall, 5 Harring. (Md.) 487, State *v.* Rankin, 3 S. C. 438; [State *v.* Woodbury, 67 Vt. 602.] Where a railroad authorized by its charter to be made at one place is made at another, it is a mere nuisance on every highway it touches in its illegal course: Attorney-General *v.* Lombard, etc. Ry. Co., 10 Phila. (Pa.) 352; Com. *v.* Erie & North-East. R. R. Co., 27 Pa. St. 339.}

frequented street, or opening a hospital in an improper place;[6] or, to make or keep gunpowder in or near a frequented place, without authority therefor;[7] or, to make great noises in the night, by a trumpet, or the like, to the disturbance of the neighborhood;[8] or, to keep a disorderly house;[9] or, a house of ill-fame;[10] or, indecently to expose the person;[11] or, to be guilty of open lewdness and lascivious behavior;[12] or, to be frequently and publicly drunk, and in that state exposed to the public view;[13] or, to be a common scold;[14] or, a common eavesdropper;[15] or, to obstruct a public highway.[16] Many of these, and some others, which are also offences by the common law, are forbidden by particular statutes, upon which the prosecutions are ordinarily founded.[17]

[6] R. *v.* Vantandillo. 4 M. & S. 73; R. *v.* Burnett, ib. 272; Anon., 3 Atk. 750.

[7] R. *v.* Taylor, 2 Stra. 1167; People *v.* Sands, 1 Johns. 78. {See also R. *v.* Lister, 1 Dears. & B. 209, where it was held a nuisance to keep a large quantity of naphtha, a highly inflammable substance, stored in large quantities, in a thickly populated neighborhood.} [But see State *v.* Paggett, 8 Wash. 579. The display of fireworks in a street is a nuisance: Speir *v.* Brooklyn, 139 N. Y. 6. A pipe-line for oil is not a nuisance simply because it increases the rate of insurance on other property: Benton *v.* Elizabeth, 39 A. 683, N. J. L.]

[8] R. *v.* Smith, 1 Stra. 704; Com. *v.* Smith, 6 Cush. 80. [See Davis *v.* Davis, 21 S. E. 906, W. Va. Proof that one inhabitant has been annoyed has been held sufficient under a municipal by-law: Innes *v.* Newman, 1894, 2 Q. B. 292.]

[9] R. *v.* Higginson, 2 Burr. 1232; 13 Piek. 362; State *v.* Bertheol, 6 Blackf. 474; State *v.* Bailey, 1 Foster (N. H.) 343. [Or a gambling-house: Hill *v.* Pierson, 43 Neb. 503.]

[10] 1 Hawk. P. C. c. 74; id. c. 75, § 6; {Com. *v.* Ballou, 124 Mass. 26.}

[11] R. *v.* Sedley, 1 Keb. 630; Sid. 168; R. *v.* Crunden, 2 Campb. 89; State *v.* Roper, 1 Dev. & Bat. 208. An indecent exposure, though in a place of public resort, if visible only by one person, no other person being in a position to see it, is not indictable as a common nuisance: R. *v.* Webb, 3 Cox C. C. 183; 1 Leading Crim. Cases, 442; 1 Denison C. C. 328; 2 C. & K. 933; Temp. & Mew C. C. 23; R. *v.* Watson, 2 Cox C. C. 376; 1 Leading Crim. Cases, 445, n. {But it is not necessary that the exposure should be made in a place open to the public. If the act is done where a great number of persons may see it, and several do see it, it is sufficient: R. *v.* Thallman, 9 Cox C. C. 388.} An indictment for this offence need not conclude to the common nuisance: Com. *v.* Haynes, 2 Gray 72. But see R. *v.* Webb, *ubi supra;* R. *v.* Holmes, 17 Jur. 562; 1 Leading Crim. Cases, 452; 3 C. & K. 360; 6 Cox C. C. 216; 20 Eng. Law & Eq. 597.

[12] 1 Hawk. P. C. c. 5, § 4; 1 Russ. on Crimes, 5th (Eng.) ed. 434; Grisham *v.* State, 2 Yerg. 589; State *v.* Moore, 1 Swan 136.

[13] Smith *v.* State, 1 Humph. 396; State *v.* Waller, 3 Murph. 229. See Com. *v.* Boon, 2 Gray 74.

[14] 1 Hawk. P. C. c. 75, §§ 5, 14; 4 Bl. Comm. 168; 1 Russ. on Crimes, 5th (Eng.) ed. 438.

[15] 4 Bl. Comm. 168; 1 Russ. on Crimes, 5th (Eng.) ed. 438.

[16] 4 Bl. Comm. 167; 1 Hawk. P. C. c. 76; {State *v.* Harden, 11 S. C. 360. A permanent fruit stand, so erected as to encroach on the sidewalk of a public street in a thickly populated city is a nuisance: State *v.* Berdetta, 73 Ind. 185;} [Costello *v.* State, 108 Ala. 45.]

[17] See, for the law of common nuisances, 2 Whart. Crim. Law, §§ 2362–2428, and cases there cited. {So to sell liquor illegally: Meyer *v.* State, 42 N. J. L. 145. So where, under a city ordinance, it is illegal to allow stagnant water to remain upon

§ 185. **Indictment.** The indictment for this offence states the facts which form the subject of the charge, alleging it to be to the common nuisance of all the citizens of the State or Commonwealth.[1] But if the subject be one which in its nature necessarily tends to the injury of all the citizens, such as obstructing a river described as a public navigable river, or a way described as a public highway, or the like, it is said to be sufficient, without any more particular allegation of common nuisance..[2]

§ 186. **Proof.** In *proof of the charge*, evidence must be adduced to show, 1st, that the act complained of was done by the defendant; and this will suffice, though he acted as the agent or servant and by the command of another;[1] 2d, that it was to the common injury of the public, and not a matter of mere private grievance.[2] And this must be shown as an existing fact, and not by evidence of reputation.[3] If the act done or neglected is charged as a common nuisance on the ground that it is offensive, annoying, or prejudicial to the citizens, it must be shown to be actually and substantially so; for groundless apprehension is not sufficient; and mere fear, though reasonable, has been said not to create a nuisance;[4] neither is slight, uncertain, and rare damage.[5]

§ 187. **Defence.** In the *defence*, it is of course competent to give evidence of any facts tending to disprove or to justify the

land, or in cellars, this is an indictable offence : Com. *v.* Colby, 128 Mass. 91. [And see Rochester *v.* Simpson, 134 N. Y. 414.] So it is a nuisance to maintain a ruinous building, without regard to the fact whether the owner had or had not reason to believe it in danger of falling : Chute *v.* State, 19 Minn. 271. Discordant singing is not a nuisance, though it disturbs the congregation, if the singer is conscientiously taking part in religious services : State *v.* Linkhaw, 69 N. C. 214.}

[1] The indictment should conclude to the *common* nuisance of *all* the citizens, etc. : Com. *v.* Faris, 5 Rand. 691 ; Com. *v.* Smith, 6 Cush. 80; Hayward's Case, Cro. El. 148 ; Com. *v.* Boon, 2 Gray 74, 75 ; Graffins *v.* Com., 3 Pa. 502 ; Dunnaway *v.* State, 9 Yerg. 350. But see Com. *v.* Haynes, 2 Gray 72 ; [Com. *v.* Megibben Co., 40 S. W. 694, Ky.]

[2] 1 Hawk. P. C. c. 75, §§ 3–5 ; 1 Russ. on Crimes, 329 ; [Com. *v.* Enright, 98 Ky. 635. See Innes *v.* Newman, 1894, 2 Q. B. 292.]

[1] State *v.* Bell, 5 Port. 365 ; State *v.* Mathis, 1 Hill (S. C.) 37 ; {Com. *v.* Mann, 4 Gray (Mass.) 213.}

[2] [State *v.* Luce, 9 Houst. 396; State *v.* Wolfe, 17 S. E. 528, N. C. See Innes *v.* Newman, 1894, 2 Q. B. 292.]

[3] Com. *v.* Stewart, 1 S. & R. 342 ; Com. *v.* Hopkins, 2 Dana 418.

[4] Anon, 3 Atk. 751, per Ld. Hardwicke. And see 1 Russ. on Crimes, 5th (Eng.) ed. 422 ; Report Mass. Comm. tit. Common Nuisance, § 2; R. *v.* White, 1 Burr. 333. {Under a statute making a house used for prostitution, gambling, or the sale of intoxicating liquors, a common nuisance, proof that the nuisance was kept and maintained for two hours is sufficient to support the indictment : Com. *v.* Gallagher, 1 Allen (Mass.) 592.}

[5] R. *v.* Tindall, 6 Ad. & El. 143 ; 1 Nev. & Per. 719. See R. *v.* Charlesworth, 16 Q. B. 1012; 22 Eng. Law & Eq. 235.

charge.[1] But the defendant will not be permitted to show that the public benefit resulting from his act is equal to the public inconvenience which arises from it; for this would be permitting a private person to take away a public right, at his discretion, by making a specific compensation.[2] But it seems that such evidence may be admitted to the court, in mitigation of a discretionary fine or penalty.[3] If the charge is for obstructing a public river, by permitting his sunken ship to remain there, the defendant may show that the ship was wrecked and sunken without his fault;[4] and the same principle, it is conceived, will apply to any other case of accidental obstruction. The navigable or public character of the river or highway may also be controverted by evidence.[5]

[1] {But no length of time will justify a public nuisance: 1 Russ. on Crimes (7th Am. ed.) 330; Mills *v.* Hall, 9 Wend. (N. Y.) 315; People *v.* Cunningham, 1 Den. (N. Y.) 536; but *quære*, House *v.* Metcalf, 27 Conn. 631. And it is no defence to an indictment for carrying on a noxious trade, that it had been carried on for more than twenty years before the neighborhood became so inhabited and used by the public as to make it a common nuisance: Com. *v.* Upton, 6 Gray (Mass.) 472. And see Douglass *v.* State, 4 Wis. 387; State *v.* Phipps, 4 Ind. 515. Nor is it a defence that the public benefit is equal to the public inconvenience: State *v.* Kaster, 35 Iowa 221. A structure authorized by the legislature cannot be a public nuisance: People *v.* Law, 34 Barb. (N. Y.) 494. See also Com. *v.* Reed, 34 Pa. St. 275; Stoughton *v.* State, 5 Wis. 291; Griffing *v.* Gibb, 1 McAll. C. C. (Cal.) 212; [State *v.* Barnes, 40 A. 374, R. I. But the exercise of a right given by the legislature in an improper manner may be a nuisance: Peck *v.* Michigan City, 49 N. E. 800, Ind.] In State *v.* Freeport, 43 Me. 198, it is held that if a bridge, built under due authority, across a navigable river, obstruct navigation more than is reasonably necessary, it is a nuisance, and the subject of indictment.}

[2] R. *v.* Ward, 4 Ad. & El. 384, overruling R. *v.* Russell, 6 B. & C. 566; 8 Dowl. & Ryl. 566, in which the contrary had been held. And see acc. Respublica *v.* Caldwell, 1 Dall. 150. See also R. *v.* Randall, Car. & M. 496; R. *v.* Morris, 1 B. & Ad. 441; R. *v.* Betts, 16 Q. B. 1022; 22 Eng. Law & Eq. 240; R. *v.* Sheffield Gas Co., 22 Eng. Law & Eq. 200. {See Redfield on Railways, vol. ii. §§ 225, 226.}

[3] State *v.* Bell, 5 Port. 365.

[4] R. *v.* Watts, 2 Esp. 675. *Quære*, whether it is not requisite for the defendant, in such cases, to show that he has relinquished and abandoned all claim or right of property in the wreck. And see Brown *v.* Mallett, 5 C. B. 599, 617–620.

[5] Com. *v.* Chapin, 5 Pick. 199. {It seems that nothing can be a "nuisance" to which the agency of man does not contribute; for example, a bar in a stream formed by natural causes seems to be no nuisance: Mohr *v.* Gault, 10 Wis. 513. When a public nuisance has become the subject of judicial investigation, the power of a private citizen to remove it is gone: Com. *v.* Erie & North-East R. R. Co., 27 Pa. St. 379.}

PERJURY.

§ 188. **Definition.** This crime is the subject of statute provisions, to a greater or less extent, in all the United States; and in some statutes it is particularly defined; but cases, not provided for by statute, are understood to remain offences at common law. The crime, as *described in the common law*, is committed when a *lawful oath* is administered, in some *judicial proceedings* or *due course of justice*, to a person who *swears wilfully, absolutely, and falsely*,[1] in a *matter material* to the issue or point in question.[2] Where the crime is committed at the instigation or procurement of another, it is termed *subornation of perjury*, in the party instigating it; and is equally punishable by the common law.[3] And though the person thus instigated to take a false oath does not take it, yet the instigator is still liable to punishment.[4]

§ 189. **Indictment.** The *indictment* for perjury will of course specify all the facts essential to this offence; namely, 1st, the *judicial proceedings* or *due course of justice*, in which the oath was taken; 2dly, the *oath*, lawfully taken by the prisoner; 3dly, the *testimony* which he gave; 4thly, its *materiality* to the issue or point in hand; and, 5thly, its *wilful falsehood.*

§ 190. **Judicial Proceeding.** In regard to the *character of the proceeding* in which the oath is taken, it may be stated, as the general principle, that wherever an oath is required in the regular administration of justice, or of civil government under the general laws of the land, the crime of perjury may be committed.

[1] {The allegation of wilfulness and corruptness is essential, and the omission of it is fatal: State *v.* Davis, 84 N. C. 787; Bell *v.* Senneff, 83 Ill. 122. Upon this point, evidence of the intoxication of the accused is admissible, if it tends to show that he could not have sworn wilfully and corruptly: Lytle *v.* State, 31 Ohio St. 196.}

[2] 3 Inst. 164; 4 Bl. Comm. 137; 1 Hawk. P. C. c. 69, § 1; 2 Russ. on Crimes, 596, 5th (Eng.) ed. vol. iii. p. 1; 2 Whart. Crim. Law, 7th ed. § 2198.

[3] Com. *v.* Douglass, 5 Met. 241; *post*, § 200, n.

[4] 1 Hawk. P. C. c. 69, § 10. Though a party who is charged with subornation of perjury knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, he cannot be convicted: Com. *v.* Douglass, 5 Met. 241.

It has therefore been held sufficient, if it be proved that the crime was committed by the prisoner, in his testimony orally as a witness in open court, or in an information or complaint to a magistrate, or before a commissioner or a magistrate, in his deposition; or before a State magistrate, under an act of Congress;[1] in any lawful court whatever, whether of common law or equity;[2] or court ecclesiastical;[3] of record or not of record;[4] and whether it be in the principal matter in issue or in some incidental or collateral proceeding, such as before the grand jury or in justifying bail,[5] or the like; and whether it be as a witness, or as a party, in his own case, where his testimony or affidavit may lawfully be given.[6] And where, upon qualification for any office or civil employment, of honor, trust, or profit, an oath is required of the person, stating some matter of fact, a wilful and corrupt false statement in such matter is perjury.[7] It is sufficient, if it appear *prima facie* that the court had jurisdiction of the matter,[8] and that the judge, magistrate, or officer before whom the oath was taken was, *de facto*, in the ordinary exercise of the office;[9] such evidence on the part of the prosecution devolving on the prisoner the burden of showing the con-

[1] 1 Hawk. P. C. c. 69, § 3; 2 Chitty, Crim. Law, 443, 445; R. *v.* Gardner, 8 C. & P. 737; Carpenter *v.* State, 4 How. (Miss.) 163; U. S. *v.* Bailey, 9 Peters 238; [Shell *v.* State, 148 Ind. 50.] {Whether perjury in a naturalization proceeding before a State magistrate is punishable in the State courts, *quære*. See People *v.* Sweetman, 3 Parker C. R. 358; Rump *v.* Com., 30 Pa. St. 475. *Semble*, that taking a false oath before a court-martial is perjury at common law: R. *v.* Heane, 4 B. & S. 947.}

[2] See note 1, *supra;* 5 Mod. 348; Crew & Vernon, Cro. Car. 97, 99; Poultney *v.* Wilkinson, Cro. El. 907. {If the alleged perjury consists in swearing to a bill in equity, the indictment must show that the law required the verification of an oath. When the oath is not taken on the trial of a cause, the allegation that it was "lawfully required" is insufficient: People *v.* Gaige, 26 Mich. 30.}

[3] Shaw *v.* Thompson, Cro. El. 609; 1 Hawk. P. C. c. 69, § 3.

[4] 2 Roll. Abr. 247, Perjury, pl. 2; 1 Hawk. *ubi supra;* 5 Mod. 348; People *v.* Phelps, 5 Wend. 10.

[5] R. *v.* Hughes, 1 C. & K. 519; 1 Roll. Abr. 39, 40; Royson's Case, Cro. Car. 146; Com. *v.* White, 8 Pick. 455; State *v.* Offutt, 4 Blackf. 355; State *v.* Fassett, 16 Conn. 457; State *v.* Moffatt, 7 Humph. 250. [Or in obtaining a continuance: State *v.* Winstandley, 51 N. E. 92, Ind.]

[6] 1 Hawk. P. C. c. 69, § 5; Respublica *v.* Newell, 3 Yeates 407; State *v.* Steele, 1 Yerg. 394; State *v.* Johnson, 7 Blackf. 49. {But the oath taken by the master of a vessel before a notary public, as a verification of his protest, is not the subject of perjury: People *v.* Travis, 1 Buff. (N. Y.) Super. Ct. 545.}

[7] R. *v.* Lewis, 1 Stra. 70; Report Comm'rs Mass. on Crim. Law, tit. Perjury, § 13; State *v.* Wall, 9 Yerg. 347, was the case of a juror examined as to his competency.

[8] [If the judge has no jurisdiction of the proceeding it is not perjury: Butler *v.* State, 38 S. W. 46, Tex. Cr. App.]

[9] See *ante*, Vol. I. §§ 83, 92; State *v.* Hascall, 6 N. H. 352; State *v.* Gregory, 2 Murphy 69; R. *v.* Verelst, 3 Campb. 433; R. *v.* Howard, 1 M. & Rob. 187. [But see Walker *v.* State, 107 Ala. 5.]

trary. But this rule is applicable only to public functionaries; and, therefore, where the authority to administer the oath was derived from a special commission for that purpose, as in the case of a commission out of chancery to take testimony in a particular cause, or where it is delegated to be exercised only under particular circumstances, as in the case of commissioners in bankruptcy, whose power depends on the fact that an act of bankruptcy has been committed, or the like; the commission in the one case, or the existence of the essential circumstances in the other, must be distinctly proved.[10]

§ 191. **Competency of Witnesses.** The *competency of the witness* to testify, or the fact that he was not *bound to answer* the question propounded to him, or the erroneousness of the judgment founded upon his testimony, are of no importance; it is sufficient, if it be shown that he was admitted as a witness and did testify.[1] But if he were improperly admitted as a witness, in order to give jurisdiction to the court, it being a court of special and limited jurisdiction, his false swearing is not perjury.[2]

§ 192. **Proof of the False Oath.** 2dly. In *proof of the oath taken*, under the usual allegation that "he was sworn and examined as a witness," or, "sworn and took his corporal oath," it will be sufficient to give evidence that it was in fact taken in some one of the modes usually practised.[1] But if it be alleged that it was taken on the gospels, and the proof be that it was taken with an uplifted hand, the variance will be fatal; for the mode in such case is made essentially descriptive of the oath.[2] So, it is conceived it would be, if the allegation were that the party was sworn, and the proof were of a solemn affirmation; or the contrary. Nor is it a valid objection, that the oath was irregularly taken; as, for example, where the witness was sworn to testify the whole truth, when he should have been sworn only

[10] R. *v.* Punshon, 3 Campb. 96.

[1] Montgomery *v.* State, 10 Ohio 220; Haley *v.* McPherson, 3 Humph. 104; Sharp *v.* Wilhite, 2 id. 434; 1 Sid. 274; Shaffer *v.* Kintzer, 1 Binn. 542; R. *v.* Dummer, 1 Salk. 374; Van Steenbergh *v.* Kortz, 10 Johns. 167; State *v.* Molier, 1 Dev. 263; [State *v.* Hawkins, 115 N. C. 712.]

[2] Smith *v.* Bouchier, 2 Stra. 993; 10 Johns. 167.

[1] R. *v.* Rowley, Ry. & M. 302; 2 Chitty, Crim. Law, 309; R. *v.* McCarther, 1 Peake's Cas. 155; State *v.* Norris, 9 N. H. 96. [The presumption of regularity is not sufficient to prove that the defendant was sworn: Sloan *v.* State, 14 S. 262, Miss.]

[2] See *ante*, Vol. I. § 65; State *v.* Porter, 2 Hill (S. C.) 611. And see State *v.* Norris, 9 N. H. 96; R. *v.* McCarther, 1 Peake's Cas. 155.

to make true answers.[3] Where the oath was made to an answer in chancery, deposition, affidavit, or other *written paper*, signed by the party, the original document should be produced, with proof of his handwriting, and of that of the magistrate before whom it was sworn; which will be sufficient evidence of the oath to throw on the prisoner the burden of proving that he was personated on that occasion by a stranger.[4] If the affidavit were actually used by the prisoner in the cause in which it was taken, proof of this fact will supersede the necessity of proving his handwriting.[5] The rule in these cases seems to be this: that the proof must be sufficient to exclude the hypothesis that the oath was taken by any other person than the prisoner.[6] If the document appears to have been signed by the prisoner with his name, it will be presumed that he was not illiterate, and that he was acquainted with its contents: but, if he made his *mark* only, he will be presumed illiterate; in which case some evidence must be offered to show that it was read to him; and for this purpose the certificate of the magistrate or officer, in the *jurat*, will be sufficient.[7] It must also appear that the oath was taken in the *county* where the indictment was found and is tried; but the *jurat*, though *prima facie* evidence of the place, is not conclusive, and may be contradicted.[8]

§ 193. **Proof of Substance and Effect.** 3dly. As *to the testimony actually given*. If there are several distinct assignments of perjury upon the same testimony in one indictment, it will be sufficient if any one of them be proved;[1] and proof of the substance is sufficient, provided it is in substance and effect the

[3] State *v.* Keene, 26 Me. 33.

[4] R. *v.* Morris, 2 Burr. 1189; R. Benson, 2 Campb. 508; Crook *v.* Dowling, 3 Doug. 75; Ewer *v.* Ambrose, 4 B. & C. 25; Com. *v.* Warden, 11 Met. 406; *ante*, Vol. I. § 512; [State *v.* Madigan, 57 Minn. 425.] Where perjury was assigned upon an answer in chancery, to a bill filed by A "against B *and another*," and it appeared that in fact the bill was against B and *several others*, Lord Ellenborough held it nevertheless sufficient, and no variance in the proof upon the statute of 23 Geo. II. c. 11, § 1, which only required that such proceedings be set out according to their substance and effect: R. *v.* Benson, *supra*. The rule, it is conceived, is the same at common law.

[5] R. *v.* James, 1 Show. 397; s. c. Carth. 220. It was *Carthew's* report of this case which was denied by Ld. Mansfield, in Crook *v.* Dowling, *supra;* it not appearing that the affidavit, of which a copy only was offered, had been *used* by the prisoner. And see Rees *v.* Bowen, McCl. & Y. 383.

[6] R. *v.* Brady, 1 Leach C. C. (4th ed.) 327; R. *v.* Price, 6 East 323.

[7] R. *v.* Hailey, 1 C. & P. 258.

[8] R. *v.* Taylor, Skin. 403; R. *v.* Emden, 9 East 437; R. *v.* Spencer, 1 C. & P. 260. {An omission in an indictment, even by mistake of the verb implying that the prisoner testified, is fatal: State *v.* Leach, 27 Vt. 317.}

[1] State *v.* Hascall, 6 N. H. 352; {Com. *v.* Johns, 6 Gray (Mass.) 274.}

whole of what is contained in the assignment in question.[2] Whether it is necessary to prove all the testimony which the prisoner gave at the time specified, is a point which has been much discussed, the affirmative being understood to have been ruled several times by Lord Kenyon;[3] but it will be found, on examination of the cases, that he could have meant no more than that the prosecutor ought to prove all that the prisoner testified respecting the fact on which the perjury was assigned.[4] It is, however, conceived, that to require the prosecutor to make out a *prima facie* case, leaving the prisoner to show that in another part of his testimony he corrected that part on which the perjury is assigned, is more consonant with the regular course of proceeding in other cases, where matters, in excuse or explanation of an act *prima facie* criminal, are required to be shown by the party charged.[5]

§ 194. **Same Subject.** In proving what the prisoner orally testified, it is not necessary that it be proved *ipsissimis verbis*, nor that the witness took any note of his testimony; it being deemed sufficient to prove substantially what he said, and all that he said, on the point in hand.[1] Neither is it necessary, to a conviction of perjury, to prove that the testimony was given in an absolute and direct form of statement; but, under proper averments, it will be sufficient to prove that the prisoner swore falsely as to his impression, best recollection, or best knowledge and belief.[2] In such case, however, it will be not only necessary to prove that what he swore was untrue, but also to allege and prove that he knew it to be false;[3] or, at least, that he swore rashly to a matter which he had no probable cause for believing.[4]

§ 195. **Materiality.** 4thly. As to the *materiality* of the matter to which the prisoner testified, it must appear either to have

[2] R. *v.* Leefe, 2 Campb. 134.

[3] R. *v.* Jones, 1 Peake's Cas. 37 ; R. *v.* Dowlin, ib. 170.

[4] See acc. R. *v.* Rowley, Ry. & M. 299; where it was ruled by Littledale, J., and afterwards confirmed by all the judges.

[5] See 2 Russ. on Crimes, 658 ; 5th (Eng.) ed. vol. iii. pp. 82, 83 ; 2 Chitty, Crim. Law, 312 *b*; *ante*, Vol. I. § 79 ; R. *v.* Carr, 1 Sid. 418; [Hutcherson *v.* State, 33 Tex. Cr. App. 67.]

[1] R. *v.* Munton, 3 C. & P. 498 ; 2 Russ. on Crimes, 658.

[2] Miller's Case, 3 Wils. 420, 427 ; Patrick *v.* Smoke, 3 Strobh. 147 ; R. *v.* Pedley, 1 Leach C. C. (4th ed.) 325 ; 2 Chitty, Crim. Law, 312 ; 2 Russ. on Crimes, 597 ; 5th (Eng.) ed. vol. iii. p. 2 ; R. *v.* Schlesinger, 10 Q. B. 670 ; 2 Cox C. C. 200.

[3] R. *v.* Parker, Car. & M. 639 ; 2 Chitty, Crim. Law, 312, 320.

[4] Com. *v.* Cornish, 6 Binn. 249 ; [Lambert *v.* People, 76 N. Y. 220.]

been directly pertinent to the issue or point in question, or tending to increase or diminish the damages,[1] or to induce the jury or judge to give readier credit to the substantial part of the evidence.[2] But the *degree* of materiality is of no importance; for, if it tends to prove the matter in hand, it is enough, though it be but circumstantial.[3] Thus, falsehood, in the statement of collateral matters, not of substance, such as the day in an action of trespass, or the kind of staff with which an assault was made, or the color of his clothes, or the like, may or may not be criminal, according as they may tend to give weight and force to other and material circumstances, or to give additional credit to the testimony of the witness himself or of some other witness in the cause.[4] And therefore every question upon the cross-examination of a witness is said to be material.[5] In the answer to a bill in equity, matters not responsive to the bill may be material.[6] But where the bill prays discovery of a parol agreement, which is void by the Statute of Frauds, and which is denied in the answer, this distinction has been taken: that,

[1] [State *v.* Swafford, 98 Iowa 362.]

[2] 2 Russ. on Crimes, 600; 5th (Eng.) ed. vol. iii. p. 10; 1 Hawk. P. C. c. 69, § 8; R. *v.* Aylett, 1 T. R. 63, 69; Com. *v.* Parker, 2 Cush. 212; Com. *v.* Knight, 12 Mass. 273; R. *v.* Prendergast, Jebb C. C. 64; {Wood *v.* People, 59 N. Y. 117; Com. *v.* Grant, 116 Mass. 17;} [State *v.* Park, 57 Kan. 431; Hanscom *v.* State, 93 Wis. 273; State *v.* Hunt, 137 Ind. 537.] In a late case, Erle, J., said, he thought the law *ought* to be, that *whatever* is sworn deliberately, and in open court, should be the subject of perjury; though the law, as it exists, he added, is undoubtedly different: R. *v.* Philpotts, 5 Cox C. C. 336. {The testimony will be deemed material whenever it tends directly or circumstantially to prove the matters in issue. The materiality of the statement alleged to be false may either appear on the face of the indictment by examination of the alleged false testimony in its relations to the issue on trial, or its materiality may be averred in the indictment, and such averment of materiality is sufficient: State *v.* Vorhis, 52 N. J. L. 356. Whether the evidence was material or not was a question entirely for the court, and not at all for the jury: Gordon *v.* State, 48 id. 611;} [State *v.* Swafford, 98 Iowa 232; Stanley *v.* U. S., 1 Okl. 336.]

[3] R. *v.* Griepe, 1 Ld. Raym. 258; R. *v.* Rhodes, 2 id. 889, 890; State *v.* Hathaway, 2 N. & McC. 118; Com. *v.* Pollard, 12 Met. 225. See R. *v.* Worley, 3 Cox C. C. 535; R. *v.* Owen, 6 id. 105.

[4] 1 Hawk. P. C. c. 69, § 8; 2 Russ. on Crimes, 600; 5th (Eng.) ed. vol. iii. p. 10; R. *v.* Styles, Hetley 97; Studdard *v.* Linville, 3 Hawks 474; State *v.* Norris, 9 N. H. 96. False evidence, whereby, on the trial of a cause, the judge is induced to admit other material evidence, is indictable as perjury, even though the latter evidence be afterwards withdrawn by counsel: R. *v.* Philpotts, 3 C. & K. 135; 5 Cox C. C. 329; 2 Denison C. C. 302; 8 Eng. Law & Eq. 580. {It is not a sufficiently precise allegation upon which to found an indictment for perjury, that the prisoner swore that a certain event did not happen within two fixed dates, his attention not having been called to the particular day upon which the transaction was alleged to have taken place: R. *v.* Stolady, 1 F. & F. 518.}

[5] State *v.* Strat, 1 Murphey 124; R. *v.* Overton, 2 Moody C. C. 263; Car. & Marsh. 655; R. *v.* Lavey, 3 C. & K. 26. [But see Leak *v.* State, 61 Ark. 599. This rule holds only when the evidence of the witness in chief is material: Stanley *v.* U. S., 1 Okl. 336.]

[6] 5 Mod. 348.

where the statute is pleaded or expressly claimed as a bar, the denial of the fact is immaterial, and therefore no perjury; but that where the statute is not set up, but the agreement is incidentally charged, — as, for example, in a bill for relief, — the fact is material, and perjury may be assigned upon the denial.[7]

§ 196. **Time.** As it is the act of false swearing that constitutes the crime, and not the injury which it may have done to individuals, the materiality of the testimony is to be ascertained by reference to *the time when it was given*, the perjury being then, if ever, committed. If, therefore, an affidavit was duly sworn, but cannot be read, by reason of some irregularity in the *jurat*, or for some other cause is not used;[1] or if, after the testimony was given, some amendment of the issue, or other change in the proceedings, takes place, by means of which the testimony, which was material when it was given, has become immaterial,[2] — proof of its materiality at the time is still sufficient to support this part of the charge. Nor is it necessary to show that *any credit was given* to the testimony; it is enough to prove that it was in fact given by the prisoner.[3]

§ 197. **Proof of Materiality; Records; Parol Evidence.** Where the proof of materiality is found in the records of the court, or in the documents necessary to show the nature of the proceedings in which the oath was taken, this fact will appear in the course of proving the proceedings, as has already been shown. But where the perjury is assigned in the evidence given in the cause, it will be necessary, not only to produce the record, but to give evidence of so much of the state of the cause, and its precise posture at the time of the prisoner's testifying, as will show the materiality of his testimony. The indictment does not necessarily state how it became material, but only charges, generally, that it was so.[1]

[7] R. *v.* Yeates, Car. & Marsh. 132; R. *v.* Beneseck, 2 Peake's Cas. 93; R. *v.* Dunston, Ry. & M. 109. See Com. *v.* Parker, 2 Cush. 225. The *facts* being proved, the question, whether they are material or not, is a question of *law:* Steinman *v.* McWilliams, 6 Barr 170. {It seems that the materiality of the matter assigned is a question for the jury: R. *v.* Lavey, 3 C. & K. 26; Com. *v.* Pollard, 12 Met. (Mass.) 225. See R. *v.* Goddard, 2 F. & F. 361. But see apparently *contra*, R. *v.* Courtney, 7 Cox C. C. 111; R. *v.* Dunston, Ry. & M. 109;} [*ante*, note 2.]

[1] R. *v.* Hailey, 1 C. & P. 258; R. *v.* Crossley, 7 T. R. 315. And see State *v.* Lavalley, 9 Mo. 834.

[2] Bullock *v.* Koon, 4 Wend. 531.

[3] Hawk. P. C. c. 69, § 9; 2 Russ. on Crimes, 603; 5th (Eng.) ed. vol. iii. p. 22.

[1] State *v.* Mumford, 1 Dev. 519; {Kimmel *v.* People, 92 Ill. 457; [Scott *v.* State, 35 Tex. Cr. App. 11.] But *contra*, State *v.* Wakefield, 9 Mo. App. 326.}

§ 198. **Wilful Falsehood; Number of Witnesses.** 5thly. As to the *wilful falsity* of the matter testified. It was formerly held, that *two witnesses* were indispensable, in order to a conviction for perjury; as otherwise there would be only oath against oath: but this rule has been with good reason relaxed; and a conviction, as has been fully shown in a preceding volume, may be had upon any legal evidence of a nature and amount sufficient to outweigh that upon which perjury is assigned. This point having been fully treated in the place referred to, it is superfluous here to pursue it further.[1] It may, however, be added here, that it is only in proof of the *falsity* of what was testified, that more evidence than that of a single witness is required; one witness alone being sufficient to prove all the other allegations in the indictment.[2]

§ 199. **Same Subject.** In proof that the testimony was wilfully false, evidence may be given showing animosity and malice in the defendant against the prosecutor;[1] or that he had sinister and corrupt motives in the testimony which was falsely given. Thus, where perjury was assigned upon a complaint made by the defendant of threats on the part of the prosecutor to do him some great bodily harm, thereupon requiring sureties of the peace against him, — evidence was held admissible, showing that the real object of the defendant, in making that complaint, was to coerce the prosecutor to pay a disputed demand.[2] And if the false testimony given in a cause were afterwards retracted

[1] *Ante*, Vol. I. §§ 257–260; Com. *v.* Parker, 2 Cush. 212; U. S. *v.* Wood, 14 Peters 430; 1 Leading Crim. Cases, 482; R. *v.* Boulter, 3 C. & K. 236; 5 Cox C. C. 543; 1 Leading Crim. Cases, 494; 16 Jur. 135; 2 Russ. on Crimes, 649–654, 5th (Eng.) ed. vol. iii. pp. 72–80. And see R. *v.* Wheatland, 8 C. & P. 238; R. *v.* Champney, 2 Lewin C. C. 258; R. *v.* Hughes, 1 C. & K. 519; {R. *v.* Braithwaite, 8 Cox C. C. 254; State *v.* Head, 57 Mo. 252. It is not necessary that the evidence adduced to corroborate the first witness to an assignment of perjury should amount to a direct contradiction of the statement made by the prisoner, upon which the perjury is assigned: R. *v.* Towey, 8 Cox C. C. 328. Memorandum made by witness, at date of transaction, sufficient corroboration of witness: R. *v.* Webster, 1 F. & F. 515.} It is also to be noted, that declarations *in articulo mortis* are not admissible, even as corroborative or adminicular evidence, except in cases of homicide. See *ante*, Vol. I. § 156.

[2] Com. *v.* Pollard, 12 Met. 225; R. *v.* Lee, 2 Russ. on Crimes, 650, 5th (Eng.) ed. vol. iii. p. 80; State *v.* Hayward, 1 N. & McC. 546. It seems that perjury may be assigned upon a statement literally true, but designedly used to convey a false meaning, and actually understood in such false sense; the rule being, that, "If the words are false in the only sense in which they relate to the subject in dispute, it is sufficient to convict of perjury; though in another sense, foreign to the issue, they might be true:" 1 Gilb. Ev. by Lofft, p. 661; R. *v.* Aylett, 1 T. R. 63. Whether, if a witness swears to that which he believes to be false, but which is in fact true, he can be convicted of perjury, *quære*; and see 3 Inst. 166; Bract. lib. 4, fol. 289.

[1] R. *v.* Munton, 3 C. & P. 498.

[2] State *v.* Hascall, 6 N. H. 352.

in a cross-examination, or a subsequent stage of the trial; yet the indictment will be supported by proof that the false testimony was wilfully and corruptly given, notwithstanding the subsequent retraction.[3] But it must be clearly shown to have been wilfully and corruptly given, without any intention, at the time, to retract it; for it is settled, that a general answer may be subsequently explained so as to avoid the imputation of perjury. Thus, where perjury was assigned upon an answer in chancery, in which the defendant stated that she had received no money; and it was proved, that, upon exceptions being taken to this answer, she had put in a second answer, explaining the generality of the first, and stating that she had received no money before such a day, — it was held, upon a trial at bar, that nothing in the first answer could be assigned as perjury which was explained in the second.[4]

§ 200. **Same Subject.** The allegation that the oath was *wilfully and corruptly false* may also be supported by evidence that the prisoner *swore rashly to a matter which he never saw nor knew;* as, where he swore positively to the value of goods of which he knew nothing, though his valuation was correct;[1] or, where he swore falsely to a matter, the truth of which, though he believed, yet *he had no probable cause for believing*, and might with little trouble have ascertained the fact. Thus, where the prisoner, having been shot in the night in a riot, made complaint on oath before a magistrate against a particular individual, as having shot him; and two days afterwards testified to the same fact upon the examination of the same person upon that charge; upon which oath perjury was assigned; and, upon clear proof that this person was at that time at a place twenty miles distant from the scene, the *alibi* was conceded, and the prisoner's defence was placed upon the ground of honest mistake of the person, — the jury were instructed that they ought to acquit the prisoner, if he had any reasonable cause for mistaking the person; but that, if it were a rash and presumptuous oath, taken without any probable foundation, they ought to find him guilty, though he might not have been certain that the individual

[3] Martin *v.* Miller, 4 Mo. 47.

[4] R. *v.* Carr, 1 Sid. 418; 2 Keb. 576; 2 Russ. on Crimes, 666, 5th (Eng.) ed. vol. iii. p. 97. The same general principle is recognized in R. *v.* Jones, 1 Peake's Cas. 38; R. *v.* Dowlin, ib. 170; R. *v.* Rowley, Ry. & M. 299.

[1] 3 Inst. 166; {People *v.* McKinney, 3 Parker C. R. 510.}

charged was not the person who shot him. And this instruction was held right.[2]

§ 201. **Defence.** In DEFENCE against an indictment for perjury, it may be shown that the oath was given before a court or a magistrate having *no jurisdiction* in the cause or matter in question; as, for example, that the oath was given before a judge, out of the limits of the State in which he was commissioned;[1] or, in a suit previously abated by the death of the party;[2] or the like.[3] It may also be shown, that the testimony was given by surprise, or inadvertency, or under a mere *mistake*, for which the witness was not culpable, and in respect of which he ought to be charitably judged;[4] or, that it was in a point *not material* to the issue;[5] or that it was *true*. But if there be several assignments of perjury in the same indictment, and as to one of them no evidence is given by the prosecutor, no evidence will be admitted, on the part of the defendant, to prove that in fact the matter charged in the assignment to be false was in reality true.[6]

§ 202. **Witness; Party Injured.** In regard to the *competency of the party injured* as a witness to prove the perjury, it was formerly the course to exclude him, where it appeared that the result of the trial might probably be to his advantage in ulterior proceedings elsewhere. Thus, where he expected that the defendant would be the only witness, or a material witness against him in a subsequent trial;[1] or, where, by the ordinary course in chancery, he might, upon the conviction of the defendant, obtain

[2] Com. *v.* Cornish, 6 Binn. 249. {But a false swearing, "to the best of the opinion of the witness," to a statement which is not true and which the witness has no reasonable cause to believe to be true, but which he does believe to be true, is not perjury: Com. *v.* Brady, 5 Gray (Mass.) 78. In an indictment for subornation of perjury, it must be alleged that the accused knew that the witness would corruptly swear falsely: Stewart *v.* State, 22 Ohio St. 477; Com. *v.* Douglas, 5 Met. (Mass.) 241.}

[1] Jackson *v.* Humphrey, 1 Johns. 498. {Or that the notary before whom the oath was taken was at that time the resident of another State: Lambert *v.* People, 76 N. Y. 220.}

[2] R. *v.* Cohen, 1 Stark. 511.

[3] Paine's Case, Yelv. 111; Boling *v.* Luther, 2 Taylor 202; State *v.* Alexander, 4 Hawks 182; State *v.* Hayward, 1 N. & McC. 546; Com. *v.* White, 8 Pick. 453; State *v.* Furlong, 26 Me. 69; Muir *v.* State, 8 Blackf. 154; Lambden *v.* State, 5 Humph. 83.

[4] R. *v.* Melling, 5 Mod. 348, 350; R. *v.* Muscot, 10 id. 195; 2 McNally's Ev. 635; [Harp *v.* State, 59 Ark. 113.] In R. *v.* Crespigny, 1 Esp. 280, the mistake was in regard to the legal import of a deed. See acc. State *v.* Woolverton, 8 Blackf. 452.

[5] State *v.* Hathaway, 2 N. & McC. 118; Hinch *v.* State, 2 Mo. 158; [State *v.* Brown, 38 A. 731, N. H.]

[6] R. *v.* Hemp, 5 C. & P. 468.

[1] R. *v.* Dalby, 1 Peake 12; R. *v.* Hulme, 7 C. & P. 8.

an injunction of further proceedings at law,[2] — he has been rejected as incompetent. But the modern rule places the prosecutor in the same position as any other witness, rejecting him only where he has a *direct*, *certain*, *and immediate interest* in the record, or is otherwise disqualified, on some of the grounds stated in a preceding volume.[3] But where the defendant is a material witness against the prosecutor, in a cause still pending, the court will in their discretion suspend the trial of the indictment until after the trial of the civil action.

[2] R. *v.* Eden, 1 Esp. 97.

[3] See *ante*, Vol. I. §§ [328 *b*,] 387, 389, 390, 403, 404, 407, 411–413. And see State *v.* Bishop, 1 D. Chipm. (Vt.) 120; State *v.* Pray, 14 N. H. 464.

POLYGAMY.

§ 203. **Definition.** This offence consists in having *a plurality of wives at the same time.* It is often termed *bigamy;* which, in its proper signification, only means having had two wives in succession. It was originally considered as of ecclesiastical cognizance; but the benefit of clergy was taken away from it by the statute *De Bigamis;*[1] and afterwards it was expressly made a capital felony.[2]

§ 204. **Indictment.** The indictment states the *first* and *second marriages*, and alleges that at the time of the second marriage, the *former* husband or wife was *alive.* The proof of these three facts, therefore, will make out the case on the part of the prosecution.[1] In regard to the *first marriage*, it is sufficient to prove that a marriage in fact was celebrated according to the laws of the country in which it took place; and this, even though it were voidable, provided it were not absolutely void.[2] This may be shown by the evidence of persons present at the marriage, with proof of the official character of the celebrator; or, by documents legally admissible, such as a copy of the register, where registration is required by law, with proof of the identity of the person; or, by the deliberate admission of the prisoner himself.[3]

[1] 4 Edw. I. c. 5.

[2] 1 Jac. I. c. 11, § 1; 1 East P. C. 464.

[1] {In general, on the proof of marriage, see *ante*, Vol. I. §§ 107, [140 *c*, 339;] Vol. II. titles Adultery, Bastardy, Marriage. The bigamous contract of marriage constitutes the criminal offence, and therefore the indictment should be brought in the county where that contract is made: Beggs *v.* State, 55 Ala. 108; Walls *v.* State, 32 Ark. 565.}

[2] *Ante*, Vol. II. tit. Marriage, § 461. And see Bishop on Marriage and Divorce, 6th ed. c. 25, where the evidence of marriage is more fully treated. {The marriage contract cannot be formed unless both parties consent thereto. Therefore, if the circumstances tend to prove that such consent was not given by the parties, the marriage contract may be invalid. Thus, where the marriage license was taken out so irregularly that the parties must have known that the marriage was not authorized, and there was no evidence of cohabitation, nor was the marriage recognized in any way as valid, but there was positive evidence of non-assent, it was held that such proof of marriage would not support an indictment for bigamy: Kopke *v.* People, 43 Mich. 41.}

[3] See *ante*, Vol. I. §§ 339, 484, 493; Vol. II. § 461; Truman's Case, 1 East P. C. 470; State *v.* Ham, 11 Me. 391; Woolverton *v.* State, 16 Ohio 173; {Halbrook *v.*

§ 205. **Proof of Second Marriage.** In proof of the *second marriage*, the same kind of evidence is admissible as in proof of the first. But it must distinctly appear that it was a marriage in all respects legal, except that the first husband or wife was then alive;[1] that it was celebrated within the county, unless otherwise provided by statute; and that the person with whom the second marriage was had bore the name mentioned in the indictment.[2] Proof of a second marriage by reputation alone is not sufficient.[3] The description of the person, too, though unnecessarily stated in the indictment, must be strictly proved as alleged. Thus, where the person was styled a widow, but it appeared in evidence that she was in fact and by reputation a single woman, the variance was held fatal.[4]

§ 206. **Same Subject.** If the first marriage is clearly proved,

State, 34 Ark. 511; R. *v.* Mainwaring, 37 Eng. L. & Eq. 609; Miles *v.* U. S., 2 Utah 19; s. c. 103 U. S. 304; Williams *v.* State, 54 Ala. 131; Squire *v.* State, 46 Ind. 459; [State *v.* Melton, 120 N. C. 591; State *v.* Jenkins, 139 Mo. 535; State *v.* Gallagher, 38 A. 655, R. I.; Lowery *v.* People, 172 Ill. 466; Adkisson *v.* State, 34 Tex. Cr. App. 296.] This admission, though legal evidence, may have very slight weight. The weight is for the jury, who must look at all the circumstances of the case which may render the probability of the truth or falsehood of the admission, less or greater: U. S. *v.* Miles, *supra;* Com. *v.* Henning, 10 Phila. (Pa.) 209. But it was held in Gahagan *v.* People, 1 Park. Cr. R. 378, that the first marriage cannot be proved by the confessions of the defendant, though supported by proof of cohabitation and reputation. [And see under New York statute, People *v.* Edwards, 25 N. Y. S. 480.] And when the first marriage was contracted abroad, the prosecution must prove its validity by the foreign law: People *v.* Lambert, 5 Mich. 349. On the proof of foreign marriages, see *ante*, Vol. II., Bastardy and Marriage. Evidence that the person by whom a marriage ceremony was performed was reputed to be, and that he acted as, a magistrate or minister, is admissible, and is sufficient *prima facie* proof of his official or ministerial character. And where a marriage ceremony is performed by a person purporting to be a minister, and by whom a marriage certificate is given, and one of the parties to the ceremony speaks of it as a valid and real marriage, and refers to the certificate in support of his declaration, and he is subsequently indicted and tried for bigamy on account of such marriage ceremony, his declarations in reference to it are admissible, both as evidence of identity and of the marriage; and for the former purpose the marriage certificate itself would be admissible in connection with his declarations respecting it: State *v.* Abbey, 29 Vt. 60.} [Proof of marriage in Illinois is the same in bigamy as in other cases: Lowery *v.* People, 172 Ill. 466.]

[1] {But it was held in People *v.* Brown, 34 Mich. 339, that a marriage which would be bigamous was not rendered innocent by the fact that it was between a negro and white person, which was prohibited and made void by statute. As the contract is the criminal offence, it is not necessary to prove cohabitation after the completion of the second marriage contract: Gise *v.* Com., 81 Pa. St. 428.}

[2] Drake's Case, 1 Lewin C. C. 25.

[3] {Where an indictment for bigamy was brought against a Mormon living in Utah Territory, it was held that the second marriage might be proved by evidence that the woman whom he was alleged to have married was, at the time when the marriage was supposed to have taken place, in the so-called Endowment House, where, by the custom of the Mormons, marriages are solemnized, and that she then wore a peculiar dress, such as is the customary dress of Mormon brides: U. S. *v.* Miles, 103 U. S. 304. So the marriage may be proved by the conduct and declaration of the defendant: Com. *v.* Jackson, 11 Bush (Ky.) 679.}

[4] R. *v.* Deeley, 1 Moody C. C. 303; 4 C. & P. 579; *ante*, Vol. I. § 65.

and not controverted, then the person with whom the second marriage was had may be admitted as a witness to prove the second marriage, as well as other facts not tending to defeat the first or to legalize the second. Thus, it is conceived she would not be admitted to prove a fact showing that the first marriage was void, such as relationship within the degrees, or the like; nor that the first wife was dead at the time of the second marriage; nor ought she to be admitted at all, if the first marriage is still a point in controversy.[1]

§ 207. **Both Husbands or Wives must be living at the same Time.** There must also be proof that the first husband or wife was *living at the time of the second marriage.* And, for this purpose, it is said that the mere presumption of the continuance of life is not sufficient, without the aid of other circumstances, though seven years have not expired since the last intelligence was had in regard to the absent person.[1]

§ 208. **Defence.** The DEFENCE may be made by disproving either of the points above stated.[1] Thus, where a woman marries a second husband abroad, in the lifetime of the first; and afterwards the first died; and then she married a third in England, in the lifetime of the second, and for this third marriage she was indicted, — upon proof that the first husband was living when the second marriage was had, it was held a good defence to the indictment, the second marriage being a nullity, and the third therefore valid.[2] But the prior marriage must be shown to be absolutely void; for, if it were only voidable and not avoided previous to the second marriage, it is no defence.[3] The defence may also be made, by showing that the prisoner's

[1] See *ante*, Vol. I. § 339; 1 Hale P. C. 693; 1 East P. C. 469; 1 Russ. on Crimes, 218, 5th (Eng.) ed. vol. iii. pp. 315, 316; {U. S. *v.* Miles, 103 U. S. 304, is to the effect that if such wife testifies on the first trial of an indictment for bigamy, and then is kept away by the defendant from the second trial, evidence of what she testified at the former trial is admissible.}

[1] R. *v.* Twyning, 2 B. & Ald. 386.

[1] [Belief that the first spouse is dead is no defence in Massachusetts: Com. *v.* Hayden, 163 Mass. 453.]

[2] Lady Madison's Case, 1 Hale P. C. 693. {So where the husband was divorced from the wife subsequent to the second marriage but prior to the third, it was held that the third marriage did not render the parties liable to a prosecution for bigamy: Halbrook *v.* State, 34 Ark. 511.}

[3] 3 Inst. 88. {So where marriage was contracted by persons under the age of consent, this was held to be no defence to an indictment for bigamy, without proof of a subsequent avoidance of the marriage prior to the second marriage: Beggs *v.* State, 55 Ala. 108; Walls *v.* State, 32 Ark. 565.} [Belief that the first marriage was void is immaterial: State *v.* Sherwood, 68 Vt. 414.]

case comes within any of the *exceptions* found in the statutes which the several States have enacted on this subject: such as, absence of the former partner for more than seven years, unheard of;[4] previous divorce *a vinculo matrimonii;* or the like.[5]

[4] {It is not necessary that these defences should be negatived by the indictment. They should be offered in evidence by the defendant under the plea of not guilty: Barber *v.* State, 50 Md. 161; State *v.* Barrow, 31 La. Ann. 691. The Mormon practice of polygamy has never been countenanced in any degree by the courts of the United States. In U. S. *v.* Reynolds, 1 Utah Terr. 226, the defendant offered evidence that the doctrine of polygamous marriage was part of his religious creed, and that the polygamous marriage was in accordance with this doctrine, and the evidence was rejected. In a case in Massachusetts, the defence raised an interesting case of the conflict of the presumptions of life and innocence. The defendant offered evidence to prove that he was first married to a woman who was alive within a month of the former marriage alleged in the indictment; and asked that the ruling be given that, if the first wife was alive a month before said former marriage alleged in the indictment, the presumption of law, in the absence of evidence to the contrary, was that she was alive on that day, and that the jury would be warranted in so finding; and, therefore, that the first marriage alleged in the indictment was no marriage. The court instructed the jury that there was no presumption that she was alive on that day, but it must be proved as a fact; that, if there was any presumption, it was that the marriage was legal. On appeal, the instructions were held liable to mislead the jury; that the fact that a person is alive at a certain time does afford some presumption that he is alive a month later, as it does that he was alive an hour or a year later, and is evidence for the jury to consider. The court on appeal also said that the jury were to judge of the strength of the presumption of the innocence of the defendant; as well as of the continuance of life of his former wife, in view of all the circumstances affecting them; and that a ruling that the presumption of innocence destroyed the presumption of the continuance of life, so that the fact that the first wife was alive a month before the second marriage was not to be considered as evidence that she was living at the time of that marriage, was erroneous: Com. *v.* McGrath, 140 Mass. 298.}

[5] {Under the English statute, where a husband has been absent more than seven years, and the jury find that there is no evidence that the wife knew that the husband was alive at the time of her second marriage, but that she had the means of acquiring knowledge of that fact had she chosen to make use of them, it was held that a conviction could not be sustained: R. *v.* Briggs, 1 Dears. & Bell 98. And the *onus* of proving the absence of such knowledge rests on the prosecution: R. *v.* Curgerwen, 11 Jur. N. S. 984. A's wife obtains a divorce for his adultery, the statute forbidding him to marry again without the authority of the court. He married again in another State, in accordance with its laws, and returned and lived with his second wife in the State where the divorce was obtained. Held, not guilty of polygamy in the latter State: Com. *v.* Lane, 113 Mass. 458.}

RAPE.

§ 209. **Definition.** This offence is *defined* to be the unlawful *carnal knowledge* of a woman, by *force* and *against her will*.[1] These facts are the principal allegations in the indictment.

§ 210. **Carnal Knowledge.** In the proof of *carnal knowledge*, it was formerly held, though with considerable conflict of opinion, that there must be evidence both of penetration and of injection. But the doubts on this subject were put at rest in England by the statute of 9 Geo. IV. c. 31, which enacted that the former of the two facts was sufficient to constitute the offence. Statutes to the same effect have been passed in some of the United States.[1] But, as the essence of the crime consists in the violence done to the person of the sufferer, and to her sense of honor and virtue, these statutes are to be regarded merely as declaratory of the common law, as it has been held by the most eminent judges and jurists both in England and this country.[2]

§ 211. **Force; Non-consent.** The allegation of *force* and the *absence of previous consent* is proved by any competent evidence, showing that either the person of the woman was violated, and her resistance overcome by physical force, or that her will was

[1] 1 East P. C. 434. And see 2 Inst. 180, 181; 3 id. 60; 4 Bl. Comm. 210; 1 Russ. on Crimes, 675, 5th (Eng.) ed. 858. [An indictment for rape need not aver that the woman ravished was not the wife of the defendant, "because a man may be principal in the second degree in the commission of that crime on his wife; and as under our statutes he would be liable in such case to be presented in the same manner as the principal felon, he may be so charged in the indictment." Bigelow, C. J., Com. *v.* Fogerty, 8 Gray (Mass.) 489; [Cardenas *v.* State, 40 S. W. 980, Tex. Cr. App.]. But under an indictment for rape, in which there is no averment that the person of whom the defendant had carnal knowledge was not his wife, a conviction for fornication cannot be sustained: Com. *v.* Murphy, 2 Allen (Mass.) 163. In every written legal accusation of the crime of rape, it must be laid as a felony: Mears *v.* Com. 2 Grant's Cases (Pa.) 385.]

[1] See New York, Rev. Stat. vol. iii. 7th ed. p. 2569; Michigan, Comp. Laws, 1871, p. 2073; Iowa, Rev. Code of 1880, § 4558; Arkansas, Dig. of Stat. 1874, § 1301.

[2] 3 Inst. 59, 60; 1 Hale P. C. 628; 1 East P. C. 436, 437; R. *v.* Russen, 1 id. 438; R. *v.* Sheridan, ib.; 1 Russ. on Crimes, 678, 5th (Eng.) ed. 864; Com. *v.* Thomas, 1 Virg. Cas. 307; Pennsylvania *v.* Sullivan, Addison 143; State *v.* Leblanc, Const. Rep. 354. As to what constitutes penetration, see R. *v.* Lines, 1 C. & K. 393; R. *v.* Stanton, ib. 415; R. *v.* Hughes, 9 C. & P. 752; R. *v.* Jordan, ib. 118; R. *v.* McRue, 8 id. 641; [State *v.* Grubb, 55 Kan. 678; Barker *v.* State, 24 S. 69, Fla.]

overcome by the fear of death[1] or by duress.[2] In either case, the crime is complete, though she ceased all resistance before the act itself was finally consummated.[3] And if she was taken at first with her own consent, but was afterwards forced, against her will; or was first violated, and afterwards forgave the ravisher and consented to the act; or if she was his concubine, or a common strumpet, — still the particular offence in question being committed by force and against her will at the time of its commission, this crime is in legal estimation completed; these circumstances being only admissible in evidence, on the part of the defendant, to disprove the allegation of the want of consent.[4] So, if the prisoner rendered the woman intoxicated or stupefied with liquor, or chloroform, or other means, in order to have connection with her in that state, which purpose he accomplished, he may be convicted of this crime.[5] If the female was of tender age,

[1] [Doyle *v.* State, 39 Fla. 155.]

[2] [The resistance should be *totis viribus:* People *v.* Dohring, 59 N. Y. 374; Taylor *v.* State, 50 Ga. 79; State *v.* Burgdorf, 53 Mo. 65; People *v.* Brown, 47 Cal. 447; [O'Boyle *v.* State, 75 N. W. 989, Wis.]

The better rule is that it is not necessary that the woman should use all the physical force she has in resistance, but the resistance must be real, and must have been overcome by the force of the defendant: State *v.* Shields, 45 Conn. 256; Com. *v.* McDonald, 110 Mass. 405; [State *v.* Sudduth, 30 S. E. 408, S. C.; Mills *v.* U. S., 164 U. S. 644; Davis *v.* State, 63 Ark. 470; State *v.* Philpot, 97 Iowa 365.] In a recent case in New York the rule is well stated: "It is thus seen that the extent of the resistance required of an assaulted female is governed by the circumstances of the case, and the grounds which she has for apprehending the infliction of great bodily harm. When an assault is committed by the sudden and unexpected exercise of overpowering force upon a timid and inexperienced girl, under circumstances indicating the power and will of the aggressor to effect his object, and an intention to use any means necessary to accomplish it, it would seem to present a case for a jury to say whether the fear naturally inspired by such circumstances, had not taken away or impaired the ability of the assaulted party to make effectual resistance to the assault. It is quite impossible to lay down any general rule which shall define the exact line of conduct which should be pursued by an assaulted female under all circumstances, as the power and strength of the aggressor, and the physical and mental ability of the female to interpose resistance to the unlawful assault, and the situation of the parties, must vary in each case. What would be the proper measure of resistance in one case would be inapplicable to another situation accompanied by differing circumstances:" People *v.* Connor, 126 N. Y. 281.]

[3] [Unless she finally consented: Matthews *v.* State, 101 Ga. 547.]

[4] 1 Russ. on Crimes, 677, 5th (Eng.) ed. 860; 1 East P. C. 454, 445; Wright *v.* State, 4 Humph. 194.

[5] R. *v.* Champlin, 1 C. & K. 746; 1 Denison C. C. 89. In this case the prosecutrix was made insensible by liquor administered to her by the prisoner, for the purpose of exciting desire, and whilst she was in that condition he had connection with her. A majority of the judges held that he was guilty of rape. In the Addenda to 1 Denison C. C. 1, there is the following note of the reasons for this decision, supplied by Parke, B.: "Of the judges who were in favor of the conviction, several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility, and has no power over her will, whether such state is caused by the man or not, the accused knowing at that time that she is in that state; and Tindal, C. J., and Parke, B., remarked, that in a statute of Westminster 2, c. 34, the offence of rape is described to be ravishing a woman 'where she did not consent,' and not ravishing

the law conclusively presumes that she did not consent; and this age, being not precisely determined in the common law, was settled by the statute of 18 Eliz. c. 7, at ten years.[6] If the act were perpetrated upon a married woman, by fraudulently and successfully personating her husband, and coming to her bed in the night, it is not a rape, but an assault.[7]

against her will. But all the ten judges agreed, that in this case, where the prosecutrix was made insensible by the act of the prisoner, and that an unlawful act, and when also the prisoner must have known that the act was against her consent at the last moment that she was capable of exercising her will, because he had attempted to procure her consent and failed, the offence of rape was committed." The three dissenting judges appear to have thought that this could not be considered as sufficiently proved.

[6] 4 Bl. Comm. 212; 1 Hale P. C. 631; 1 East P. C. 436; Hays *v.* People, 1 Hill (N. Y.) 351. {If the injured person is over that age the question of consent is for the jury. Where a girl eleven years and three months old was the complainant, an instruction that the jury should determine the question whether she did or did not in fact consent, from her age, and appearance, and the fact, if they believed it, that she was too young to be presumed to have consented, was correct: Joiner *v.* State, 62 Ga. 560. Cf. Anschicks *v.* State, 6 Tex. App. 524. The authority of Hays *v.* People (referred to in note 1) was questioned in Smith *v.* State, 12 Ohio St. 466 (compare the cases on the question of consent in assault, *ante*, § 59, notes 7, 8, 9), and in O'Meary *v.* State, 17 Ohio St. 515, and Moore *v.* State, ib. 521, the presumption that a female under ten years of age cannot consent was held to be rebuttable.

In most States, however, the rule still holds that, on a charge of rape or carnal knowledge, the question of the consent of the female, if she is under ten years of age, is immaterial: Com. *v.* Sugland, 4 Gray (Mass.) 10; People *v.* McDonald, 9 Mich. 150; State *v.* Cross, 12 Iowa 66; R. *v.* Beale, L. R. 1 C. C. R. 10; [Proper *v.* State, 85 Wis. 615. A statement of the prosecutrix to the defendant that she is of the age of consent is no defence: Edens *v.* State, 43 S. W. 89, Tex. Cr. App.] The age of consent is fixed in some States at twelve years: Lawrence *v.* Com., 30 Gratt. (Va.) 845; State *v.* Tilman, 30 La. Ann. Pt. II. 1249; Greer *v.* State, 50 Ind. 267. [In Massachusetts, at sixteen years: Com. *v.* Murphy, 165 Mass. 66. In Kansas, at eighteen years: State *v.* Frazier, 54 Kan. 719. In Delaware, at seven years: State *v.* Smith, 9 Houst. 588.] In Pennsylvania there is a recent statute as follows: "That upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen years, if the jury shall find that such woman child was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of the felonious rape, and convicted of fornication only." A man who seeks to escape conviction for an offence of this nature, upon the ground that the female child he has abused is not of good repute, must show it; the law will not help him out with presumptions, and the Commonwealth need not show good repute until bad repute is shown by the accused: Com. *v.* Allen, 135 Pa. St. 492. In a case in Massachusetts, one was indicted for feloniously assaulting a female child under ten years of age, with intent to carnally know and abuse her. In that State there are two statutes, one giving a penalty for rape and continuing "whoever unlawfully and carnally knows and abuses a female child under the age of ten years shall be punished," etc., and the other that whoever assaults a female with intent to commit a rape shall be punished, etc. It appeared that the female child consented to the act, and the counsel for the defendant contended that as the indictment was for an assault, the consent was a defence, although it might not be in case of knowing and abusing the child under the statute. It was stated by the court that this defence was valid in many States and in England, but not in Massachusetts, for the reason that in that State such carnal knowledge of a female under ten years is rape, and the statute above quoted provides a special statutory punishment for any assault with intent to commit rape: Com. *v.* Roosnell, 143 Mass. 32.} [If the indictment alleges that the rape was committed by force, proof that the prosecutrix consented to the intercourse, though under the age of consent, constitutes a fatal variance: Jenkins *v.* State, 29 S. W. 1078, Tex. Cr. App.]

[7] R. *v.* Saunders, 8 C. & P. 265; R. *v.* Williams, ib. 286; R. *v.* Jackson, Russ. & Ry. C. C. 486; 1 Leading Crim. Cases, 234; R. *v.* Clark, 6 Cox C. C. 512; 1

§ 212. **Defence.** The *defence* against this charge generally consists in controverting the evidence of the fact or of the force adduced on the part of the prosecution. It is to be remembered, as has been justly observed by Lord Hale, that it is an accusation easily made, hard to be proved, and still harder to be defended, by one ever so innocent.[1] The party injured is legally competent as a witness; but her credibility must be left to the jury, upon the circumstances of the case which concur with her testimony: as, for example, whether she is a person of good fame; whether she made complaint of the injury as soon as was practicable, or without any inconsistent delay;[2] whether her person or garments bore token of the injury done to her; whether the place was remote from passengers, or secure from interruption; and whether the offender fled; or the like. On the other hand, if she be of ill fame, and stands unsupported by other evidence;[3] or if she

Leading Crim. Cases, 232; 29 Eng. Law & Eq. 542; {R. *v.* Barrows, L. R. 1 C. C. R. 156; Don Moran *v.* People, 25 Mich. 356; Lewis *v.* State, 30 Ala. 54; Wyatt *v.* State, 2 Swan (Tenn.) 394. [Otherwise in Texas, by statute: Franklin *v.* State, 34 Tex. Cr. App. 203.] But if the woman is asleep at the time, the act is without consent on her part, and a rape: R. *v.* Mayers, 12 Cox C. C. 311; R. *v.* Barrows, *supra*. [Even though she wakes and makes no resistance, believing the defendant to be her husband: Payne *v.* State, 43 S. W. 515, Tex. Cr. App.] There is some doubt on the authorities whether the non-consent of the female must be proved, if she is idiotic. In R. *v.* Fletcher, L. R. 1 C. C. R. 39; 10 Cox C. C. 248, it was said there must be some evidence of such non-consent. In R. *v.* Barratt, L. R. 2 C. C. R. 81, in which the circumstances were very similar to the case of R. *v.* Fletcher, Blackburn, J., says: "In every case, the question must be whether there is sufficient evidence to support the charge, and where mental capacity is involved, the question must be one of degree. In the present case, the degree of idiocy is very great; in R. *v.* Fletcher it was much slighter." He thus indicates that there may be a degree of idiocy which dispenses with proof of non-consent: [Caruth *v.* State, 25 S. W. 778, Tex. Cr. App.; State *v.* Enright, 90 Iowa 520. Ignorance of the mental incapacity of the woman is no defence: People *v.* Griffin, 117 Cal. 583.] When the female is unconscious at the time of the criminal act, it is presumed to be without her consent. This is true whether the unconsciousness was caused by the prisoner or not, or when produced by intoxication: R. *v.* Camplin, 1 Cox C. C. 220; 1 C. & K. 746; Com. *v.* Burke, 105 Mass. 376; State *v.* Danforth, 48 Iowa 43; R. *v.* Ryan, 2 Cox C. C. 115; R. *v.* Jones, 4 L. T. N. S. 154. If consent is gained by a fictitious marriage, this has been held no consent: Bloodworth *v.* State, 6 Baxt. (Tenn.) 614.} A medical practitioner had sexual connection with a young girl of the age of fourteen, who had for some time been receiving medical treatment from him. The jury found that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bona fide* belief that the defendant was (as he represented) treating her medically, with a view to her cure. It was held that he was guilty of an assault, and it seems that he might have been indicted for rape: R. *v.* Case, 1 Denison C. C. 580; 1 Eng. Law & Eq. 544; Temple Mew C. C. 318; 4 Cox C. C. 220; *ante*, § 59; {R. *v.* Flattery, L. R. 2 Q. B. Div. 410.}

[1] 1 Hale P. C. 635. [The court is not bound to give this instruction: Crump *v.* Com., 23 S. E. 760, Va.]

[2] {The effect of the delay in discrediting the witness is for the jury: Higgins *v.* People, 58 N. Y. 377; State *v.* Niles, 47 Vt. 82.}

[3] {In State *v.* Lattin, 29 Conn. 389, where the defendant had been convicted of the crime of carnally knowing and abusing a female child under the age of ten years, upon the uncorroborated testimony of the child herself, who was nine years of age, it

concealed the injury for any considerable time after she had opportunity to complain; or if the act were done in a place where other persons might have heard her cries, but she uttered none; or if she gave wrong descriptions of the place, or the place was such as to render the perpetration of the offence there improbable, — these circumstances, and the like, will proportionately diminish the credit to be given to her testimony by the jury.[4]

§ 213. **Complaint by Prosecutrix.** Though the prosecutrix may be asked *whether she made complaint of the injury*, and when and to whom, and the person to whom she complained is usually called to prove that fact; yet the particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination, the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple yes or no.[1] Indeed, the complaint constitutes no part of the *res gestæ:* it is only a fact corroborative of the testimony of the complainant; and, where she is not a witness in the case, it is wholly inadmissible.[2]

was held on the motion of the defendant for a new trial for a verdict against evidence, that it was not necessary to warrant the conviction, that the testimony of the child should have been confirmed by an examination of her person at the time or by medical testimony.]

[4] 1 Hale P. C. 633; 1 East P. C. 445; 1 Russ. on Crimes, 688, 689, 5th (Eng.) ed. 866.

[1] R. *v.* Walker, 2 M. & Rob. 212; R. *v.* Megson, 9 C. & P. 420; People *v.* McGee, 1 Denio 19; Phillips *v.* State, 9 Humph. 246; R. *v.* Clarke, 2 Stark. 241; 1 Russ. on Crimes, 689, 690, and n. by Greaves, 5th (Eng.) ed. 867.

[2] R. *v.* Guttridge, 9 C. & P. 471; R. *v.* Nicholas, 2 C. & K. 246; People *v.* McGee, 1 Denio 19. [Stephen (Digest of Evidence, art. 8) states the rule generally that in criminal cases the conduct of the person against whom the offence is said to have been committed, and in particular the fact that he made a complaint soon after the offence, to persons to whom he would naturally complain, are deemed to be relevant, but the terms of the complaint seem to be deemed irrelevant. He thus places the admissibility of such evidence on the ground that it forms part of the *res gestæ* of the crime itself. Prof. Greenleaf places the admissibility on the ground of its corroborating the witness. See State *v.* Niles, 47 Vt. 82. Mr. Stephen also, in his note v. to article 8, states that the practice of admitting particulars of the complaint is in accordance with common sense, and cites the language of Parke, B., in R. *v.* Walker, 2 M. & Rob. 212, where he says, "The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said. But for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross-examination." It is said that Baron Bramwell, of the English Court of the Exchequer, was in the habit of admitting the complaint itself. In this country the practice has been to admit only the fact that a complaint was made, unless the complaint was made so soon after the offence as to be part of the *res gestæ:* Oleson *v.* State, 11 Neb. 276; Maillet *v.* People, 42 Mich. 262; State *v.* Jones, 61 Mo. 232; State *v.* Peter, 14 La. Ann. 521; Pefferling

§ 214. **Character of Prosecutrix.**[1] The *character of the prosecutrix for chastity* may also be impeached; but this must be done by general evidence of her reputation[2] in that respect, and not by evidence of particular instances of unchastity.[3] Nor can she be interrogated as to a criminal connection with any other person,[4] except as to her previous intercourse with the prisoner himself; nor is such evidence of other instances admissible.[5]

v. State, 40 Tex. 486; Brogy *v.* Com., 10 Gratt. (Va.) 722. If evidence to impeach the complaint is put in by the defendant, it may be supported by proof that the prosecutrix's statements out of court corresponded with those in court: Thompson *v.* State, 38 Ind. 39.] [See Vol. I. §§ 162 *h*, 469 *c*.]

[1] [See Vol. I. §§ 14 *b*, 14 *g*, 14 *o*.]

[2] Among her neighbors: Conkey *v.* People, 1 Abb. Ct. of App. Dec. 418. See the case.

[3] R. *v.* Clarke, 2 Stark. 241; R. *v.* Barker, 3 C. & P. 589; R. *v.* Clay, 5 Cox C. C. 146. And see *ante*, Vol. I. § 54; State *v.* Jefferson, 6 Ired. 305; People *v.* Abbott, 19 Wend. 192; Camp *v.* State, 3 Kelley, 417; [O'Blenis *v.* State, 47 N. J. L. 279; Dorsey *v.* State, 1 Tex. App. 33; Rogers *v.* State, ib. 187. Though generally the character of the prosecutrix can be impeached only by attacking her general reputation as to chastity, yet, when the prosecutrix testifies that she was unconscious and does not know whether rape was committed or not, and a physician is called to show that, a short time after the alleged rape, he found upon examination that she had had sexual intercourse with some person, it is open to the defendant to prove that she had had such intercourse with divers persons: Shirwin *v.* People, 69 Ill. 55. So in case of an indictment for an assault by taking improper liberties with the prosecutrix, evidence of her bad character for chastity is admissible on the question of consent: Com. *v.* Kendall, 113 Mass. 210. The prosecutrix may also give evidence of previous attempts of the prisoner to rape her, since where a prisoner is tried for a particular crime, it is always competent to show, upon the question of his guilt, that he made an attempt at some prior time, not too distant, to commit the same offence. Upon the trial of a prisoner for murder it is competent to show that he had made previous threats or attempts to kill his victim: People *v.* Jones, 99 N. Y. 667. Upon the same principle it is always competent to show that one charged with rape had previously declarod his intention to commit the offence, or had previously made an unsuccessful attempt to do so, on the same woman. And the evidence is not rendered incompetent because it comes from the complainant herself. It is not as valuable or trustworthy, or important, as if it had come from other witnesses. It probably would not have a very important bearing with the jury, because, unless they believed her evidence as to the principal offence they would not believe her evidence as to the prior attempt: People *v.* O'Sullivan, 104 id. 483.]

[4] [State *v.* Turner, 1 Houst. C. C. (Del.) 76; Ritchie *v.* State, 58 Ind. 355; State *v.* Vadnais, 21 Minn. 382; McCombs *v.* State, 8 Ohio St. 643; Com. *v.* Regan, 105 Mass. 593; Pleasant *v.* State, 15 Ark. 624; State *v.* Jefferson, 6 Ired. (N. C.) L. 355; State *v.* White, 35 Mo. 500; State *v.* Knapp, 45 N. H. 148.]

[5] R. *v.* Hodgson, Russ. & Ry. C. C. 211; 1 Leading Crim. Cases, 228; R. *v.* Aspinwall, 2 Stark. Evid. 700. The soundness of this distinction was questioned by Williams, J., in R. *v.* Martin, 6 C. & P. 562. And, in New York and North Carolina, evidence of previous intercourse with other persons has been held admissible, as tending to disprove the allegation of force. See People *v.* Abbott, and State *v.* Jefferson, *supra;* R. *v.* Robins, 2 M. & Rob. 512. [This view has received some favor, and in several States it is now held that as bearing on the question of consent, the prosecutrix may be asked whether she had had sexual intercourse with another person than the defendant, or evidence that she has may be admitted: Titus *v.* State, 7 Baxt. (Tenn.) 132; Benstine *v.* State, 2 Lea (Tenn.) 169; People *v.* Jackson, 3 Park. Cr. Rep. 391; People *v.* Benson, 6 Cal. 221; State *v.* Reed, 39 Vt. 417; State *v.* Johnson, 2 Wms. (Vt.) 512. In England it has been held that she may be asked the question, but that her reply cannot be contradicted: R. *v.* Holmes, L. R. 1 C. C. R. 334. The prisoner may show that the prosecutrix was in the habit of receiving men into her house, for the purpose of promiscuous intercourse with them, as bearing upon the question of

§ 215. **Defence.** It may also be shown, in defence, that the prisoner was at the time *under the age of fourteen years;* prior to which age the law presumes that he was incapable of committing this offence; and this presumption is by the common law conclusive.[1] Under this age, therefore, it is held that he cannot be convicted of a felonious assault with intent to commit this crime.[2]

consent: Woods *v.* People, 55 N. Y. 515; State *v.* Reed, 39 Vt. 417; State *v.* Murray, 63 N. C. 31. The defendant's admission of similar conduct towards other women is not competent evidence in an indictment for assault with intent to commit rape upon a particular woman: People *v.* Bowen, 49 Cal. 654.} [See Vol. I. § 14 *q*.]

[1] 1 Hale P. C. 630; 4 Bl. Comm. 212; R. *v.* Eldershaw, 3 C. & P. 366; R. *v.* Groombridge, 7 id. 582; R. *v.* Phillips, 8 id. 736; R. *v.* Jordan, 9 id. 118; Com. *v.* Green, 2 Pick. 380; [R. *v.* Waite, 1892, 2 Q. B. 600.] But, in Ohio, this presumption has been held rebuttable by proof that the prisoner had arrived at puberty: Williams *v.* State, 14 Ohio 222; {Hiltabiddle *v.* State, 35 Ohio St. 52. Cf. People *v.* Randolph, 2 Park. Cr. Rep. 194.} And see Com. *v.* Lanigan, 2 Law Rep. 49, Thatcher, J. In California, it is enacted that "an infant under the age of fourteen years shall not be found guilty of any crime:" Rev. Stat. 1850, c. 99, § 4.

[2] 1 Russ. on Crimes, 676, 5th (Eng.) ed. 859; R. *v.* Eldershaw, 3 C. & P. 396; R. *v.* Groombridge, 7 id. 582; R. *v.* Phillips, 8 id. 736; State *v.* Handy, 4 Harringt. 556. But in Com. *v.* Green, 2 Pick. 380, it was held by the learned judges (Parker, C. J., dissenting), that a boy under the age of fourteen years might be lawfully convicted of an assault with intent to commit a rape; on the ground that, if near that age, he might be capable of that kind of force which constitutes an essential ingredient in the crime; and that females might be in as much danger from precocious boys as from men: [Davidson *v.* Com., 47 S. W. 213, Ky.] And see Williams *v.* State, *supra*. {Com. *v.* Green was disapproved in People *v.* Randolph, 2 Parker C. R. 194. See also State *v.* Sam, Winston (N. C.) Law 300.} *Ideo quære.* [That the burden is on the State to show the defendant's capacity to commit rape, see Gordon *v.* State, 93 Ga. 531.] If the crime is consummated by penetration alone, of which a boy under fourteen may be physically capable, and yet is in law conclusively presumed incapable, how can he be found guilty of an attempt to commit a crime, which, in contemplation of law, is impossible to be committed, or can have no existence? In England, this question is supposed to be put at rest by the Stat. 1 Vict. c. 85, § 11, which enacts that "on the trial of *any person, for any felony whatever, where the crime charged shall include assault*, the jury may acquit of the felony, and find the party guilty of an assault, if the evidence shall warrant such finding." See R. *v.* Brimilow, 9 C. & P. 366.

RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

§ 216. **Definition.** To constitute either of these offences, it is necessary that there be three or more persons tumultuously assembled of their own authority, with intent mutually to assist one another against all who shall oppose them in the doing either of an unlawful act of a private nature, or of a lawful act in a violent and tumultuous manner.[1] If the act is done, in whole or in part, it is a RIOT. If no act is done, but some advance towards it is made, such as proceeding towards the place, or the like, it is a ROUT. If they part without doing it or making any motion towards it, the offence is merely that of an UNLAWFUL ASSEMBLY.[2]

[1] [There must be a common purpose of doing the act: Aron *v.* Wausau, 74 N. W. 354, Wis.]

[2] 4 Bl. Comm. 146; 1 Hawk. P. C. c. 65, § 1; 1 Russ. on Crimes, 266, 272, 5th (Eng.) ed. 364; 3 Inst. 176; State *v.* Cole, 2 McCord 117; State *v.* Brooks, 1 Hill (S. C.) 361; Pennsylvania *v.* Craig, Addison 190; State *v.* Snow, 18 Me. 346; State *v.* Connolly, 3 Rich. 337; R. *v.* Birt, 5 C. & P. 154. In an indictment for that species of riots which consists in going about armed, etc., without committing any act, the words *in terrorem populi* are necessary, the terror to the public being of the essence of that offence; but in those riots in which an unlawful act is committed, these words are useless: R. *v.* Soley, 11 Mod. 116, per Ld. Holt; 10 Mass. 520; R. *v.* Hughes, 4 C. & P. 373. To disturb another in the enjoyment of a lawful right, if it be openly done by numbers unlawfully combined, is a riot: Com. *v.* Runnels, 10 Mass. 518; {Dupin *v.* Mut. Ins. Co., 5 La. Ann. 482; Sprail *v.* N. C. Mut. Ins. Co., 1 Jones (N. C.) 126. To assemble and proceed to another's house and beat him, acting in a violent and tumultuous manner, is a riot (Bolden *v.* State, 64 Ga. 361), or to go to his house and search the premises in a tumultuous manner (Sanders *v.* State, 60 id. 126). An indictment for riot was held to be supported by proof that three or more people assembled and in a violent and tumultuous manner, made loud noises with bells, horns, tin pans, guns, etc., to the terror of the citizens: State *v.* Brown, 69 Ind. 95.} In some of the United States, a riot is defined by statute. Thus, in Maine, it is enacted that, "When three or more persons together, and in a violent or tumultuous manner, commit an unlawful act, or together do a lawful act in an unlawful, violent, or tumultuous manner, to the terror or disturbance of others, they shall be deemed guilty of a riot:" Rev. Stats. c. 159, § 3. It is defined in the same words in the Code of Iowa, art. 2740. In Missouri, it is declared to be a riot, "if three or more persons shall assemble together with the intent, or, being assembled, shall agree mutually to assist one another, to do any unlawful act, with force or violence, against the person or property of another, or against the peace, or to the terror of the people, and shall accomplish the purpose intended, or do any unlawful act in furtherance of such purpose, in a violent or turbulent manner," etc. See Missouri, Rev. Stats. 1845, c. 47, art. 7, § 6. The Commissioners for revising the Penal Code of Massachusetts expressed their view of this offence, at common law, in these terms: "A riot is where three or more, being in unlawful assembly, join in doing or actually beginning to do an act, with tumult and violence not authorized by law, and striking terror, or tending to strike terror, into others." See their Report, Jan., 1844, c. 34, § 5.

§ 217. **Three Persons necessary.** In support of the *indictment for a riot*, it must be proved, that at least *three persons* were engaged in the unlawful act; and if the evidence extends only to one or two persons, all the defendants must be acquitted of this particular charge, though the act proved against one or two might amount to an assault, or some other offence.[1]

§ 218. **Unlawful Assembly.** There must also be evidence of an *unlawful assembling:* but it is not necessary to prove that when the parties first met they came together unlawfully;[1] for if, being lawfully together, a dispute arises, and thereupon they form into parties, with promises of mutual assistance, and then make an affray, the assemblage, originally lawful, will be converted into a riot. Nor is it necessary to show that every defendant was present at the original assemblage; for a person joining others already engaged in a riot, is equally guilty, as if he had joined them at the beginning.[2] So, if persons being lawfully assembled, should afterwards confederate to do an unlawful act, and proceed to execute it by doing an act of violence in a tumultuous manner, it is a riot.[3]

§ 219. **Terror and Disturbance.** If the indictment charges the actual perpetration of a deed of violence, such as an assault and battery, or the pulling down of a house, it is not necessary to allege or prove that it was done *to the terror and disturbance of the people;* but proof of all the other circumstances alleged will support the indictment without proving distinctly any terror. But where the offence consists in tumultuously disturbing the peace by show of arms, threatening speeches, turbulent gestures, or the like, without the perpetration of any deed of violence, it is necessary to allege and prove that such conduct was to the disturbance and terror of the good citizens of the State.[1] Yet there may be a

[1] R. *v.* Sudbury, 1 Ld. Raym. 484; R. *v.* Scott, 3 Burr. 1262; Pennsylvania *v.* Huston, Addison 334; State *v.* Allison, 3 Yerg. 428. {But if one of three indicted for a riot be separately tried, he may be convicted on proof of a riot in which he joined with any two others: Com. *v.* Berry, 5 Gray (Mass.) 93. If the indictment states that three certain people were the rioters, it is not supported by proof that any two of them committed the riotous acts with *other people:* State *v.* Kuhlman, 5 Mo. App. 587.} [Two persons are sufficient in Georgia: Stafford *v.* State, 93 Ga. 207.]

[1] [See Com. *v.* Martin, 7 Pa. Dist. R. 219.]

[2] 1 Hawk. P. C. c. 65, § 3; R. *v.* Royce, 4 Burr. 2073; Anon., 6 Mod. 43; State *v.* Brazil, Rice 258.

[3] State *v.* Snow, 18 Me. 346.

[1] 1 Hawk. P. C. c. 65, § 5; R. *v.* Soley, 11 Mod. 115; 2 Salk. 594, 595; Howard *v.* Bell, Hob. 91; Com. *v.* Runnells, 10 Mass. 518; Clifford *v.* Brandon, 2 Campb. 358, 369; State *v.* Brazil, Rice 258; State *v.* Brooks, 1 Hill (S. C.) 362; R. *v.* Hughes, 4 C. & P. 373. But see R. *v.* Cox, ib. 538. [It must also appear that the defendants knew

show of arms and a numerous assemblage, without a riot. Thus, if a man should assemble his friends or others, and arm them in defence of his house or person against a threatened unlawful and violent attack; or should employ a number of persons with spades or other proper implements, to assist him in peaceably removing a nuisance, and they do so, — it is neither a forcible entry nor a riot. Nor is it a riot when a sheriff or constable, or perhaps a private person, assembles a competent number of men forcibly to put down a rebellion, to resist enemies, or to suppress a riot.[2]

§ 220. **Purpose must be private.** It must also be shown that the object of the rioters was *of a private nature*, in contradistinction from those which concern the whole community; such as the redress of public grievances, or the obstruction of the courts of justice, or to resist the execution of a public statute everywhere and at all hazards, acts of this kind being treasonable. Thus, if the object of an insurrection or tumultuous assemblage be supposed to affect only the persons assembled, or be confined to particular persons or districts, — such as to destroy a particular enclosure, to remove a local nuisance, to release a particular prisoner, or the like, — it is not treason, but is a riot.[1] If the perpetration of an unlawful act of violence be charged as the riotous act, such as an assault and battery, it must be proved, or the parties must be acquitted; and if the offence is alleged to consist in a riotous assemblage and conduct, to the *terror of the citizens*, this part of the indictment will be supported by proof that one person only was terrified.[2]

§ 221. **Mode of Proof.** In proving the guilt of the defendants, as participators in the riot, *the regular and proper order of proceeding* is similar to that which is adopted in prosecutions for conspiracy; namely, first to prove the combination, and then to show what was done in pursuance of the unlawful design. But this, as we have heretofore seen, is not an imperative rule: it rests in the discretion of the judge to prescribe the order of proofs in each particular case; and if he deems it expedient,

that their acts were likely to lead to a breach of the peace: R. *v.* Clarkson, 66 L. T. N. S. 297.]

[2] 1 Hawk. P. C. c. 65, § 2; 1 Hale P. C. 487, 495, 496; 1 Russ. on Crimes, 266, 5th (Eng.) ed. 364.

[1] 1 Hawk. P. C. c. 65, § 6; 1 East P. C. 75; R. *v.* Birt, 5 C. & P. 154; Douglass *v.* State, 6 Yerg. 525.

[2] R. *v.* Langford, Car. & Marshm. 602; R. *v.* Phillips, 2 Moody C. C. 252, s. c. as R. *v.* Langford.

under the special circumstances, to permit the prosecutor first to prove the riotous acts, it will be only after the whole case, on the part of the government, has been openly stated, and the prosecutor has undertaken to connect the defendants with the acts done.[1] But it will be sufficient to fix the guilt of any defendant, if it be proved that he joined himself to the others after the riot began, or encouraged them by words, signs, or gestures, or by wearing their badge, or otherwise took part in their proceedings.[2]

§ 222. **Rout; Proof.** A *rout* is proved in the same manner as a riot, the proof only showing some advance made towards a riotous act, but stopping short of its actual perpetration. And an *unlawful assembly* is proved by similar evidence, without showing any motion made towards the execution of a riotous act; or, by evidence of the assemblage of great numbers of persons, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the people.[1] All who join such an assemblage, disregarding its probable effect, and the alarm and consternation likely to ensue; and all who give countenance and support to it, — are criminal parties.[2]

[1] See *supra*, tit. Conspiracy; *ante*, Vol. I. § 51 *a*; ib. § 111; Nicholson's Case, 1 Lewin C. C. 300; 1 East P. C. 96, § 37; Redford *v.* Birley, 3 Stark. 76.

[2] 1 Hale P. C. 462, 463; Clifford *v.* Brandon, 2 Campb. 358, 370; R. *v.* Royce, 4 Burr. 2073.

[1] 1 Hawk. P. C. c. 65, §§ 8, 9; 1 Russ. on Crimes, 272, 5th (Eng.) ed. 372; R. *v.* Birt, 5 C. & P. 154; R. *v.* Neale, 9 id. 431; R. *v.* Vincent, ib. 91, per Alderson, B.; R. *v.* Hunt, 3 B. & Ald. 566.

[2] Redford *v.* Birley, 3 Stark. 76, per Holroyd, J.

ROBBERY.

§ 223. **Definition.** This crime has been variously described in the books; but the most comprehensive and precise definition is that which was given by Lord Mansfield, who "was of opinion that the true nature and original definition of robbery was, *a felonious taking of property from the person of another by force.*" [1] The personal possession of the property by the party robbed, he proceeded to say, might be actual or constructive; as, if it be in his presence lying on the ground. And so of the force: it might be physical violence, directly applied; or constructive, by threats, or otherwise putting him in fear, and thereby overcoming his will. The indictment charges, — 1st, a *taking* of the goods; 2d, that they were taken with a *felonious intent;* 3d, *from the person* of the party robbed; 4th, by *force.*[2]

§ 224. **Property.** The goods must be proved to be the *property of the person* named as owner in the indictment.[1] If a servant, having collected money for his master, is robbed of it on his way

[1] Donnally's Case, 2 East P. C. 725. Robbery, by the common law, is larceny from the person, accompanied with violence, or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was by violence or by putting in fear, in addition to the averments that are necessary in indictments for other larcenies: Com. *v.* Clifford, 8 Cush. 216, per Metcalf, J. And see U. S. *v.* Jones, 3 Wash. 219; McDaniel *v.* State, 8 S. & M. 401.

[2] The following precedent is taken from Train & Heard's Precedents of Indictments, 461: —

Indictment for Robbery at Common Law.

"The jurors, etc., upon their oath present, that C. D., late of, etc., on the first day of June, in the year of our Lord ——, with force and arms, at B., in the county of S., in and upon one J. N., feloniously did make an assault, and the said J. N., in bodily fear and danger of his life, then and there feloniously did put, and one gold watch of the value of one hundred dollars, of the goods and chattels of the said J. N., from the person and against the will of the said J. N., then and there feloniously and violently did steal, take, and carry away; against the peace," etc.

The indictment must allege that the articles stolen were carried away by the robber, and that they are the property of the person robbed, or of some third person: Com. *v.* Clifford, 8 Cush. 215; R. *v.* Hall, 3 C. & P. 409; R. *v.* Rogan, Jebb C. C. 62.

[1] [Possession at the time of the theft by the one from whom the goods were stolen raises a presumption of ownership in the possessor: People *v.* Oldham, 111 Cal. 648; Goon Bow *v.* People, 160 Ill. 438; *ante*, Vol. I. § 34. The ownership of the goods must be alleged: Boles *v.* State, 58 Ark. 35. Altered by statute in some States: Clemons *v.* State, 92 Tenn. 282.]

home, it has been thought that it should still be deemed the money of the servant, until it has been delivered to the master; or otherwise the servant could not be guilty of the crime of embezzling it.[2] But the *value* is immaterial;[3] for the forcible taking of a mere memorandum, or a paper not equal in value to any existing coin, is held sufficient to constitute this crime.[4]

§ 225. **Taking.** In proof of the *taking*, it is necessary to show that *the goods were actually in the robber's possession*. This point has been illustrated by the case of a purse, which the robber in a struggle with the owner cut from his girdle, whereby the purse fell to the ground without coming into the custody of the robber; which Lord Coke held to be no taking; though, if he had picked up the purse, it would have been otherwise.[1] So, where the prisoner stopped the prosecutor, and commanded him to lay down a feather-bed which he was carrying, or he would shoot him, and the prosecutor did so; but the prisoner was apprehended before he could take it up so as to remove it from the place where it lay, — the judges were of opinion that the offence of robbery was not completed.[2] But where a diamond ear-ring was snatched by tearing it from a lady's ear, though it was not seen actually in the prisoner's hand, and was afterwards found among the curls in the lady's hair; yet as it was taken from her person by violence, and was in the prisoner's possession, separate from her person, though but for a moment, the judges held that the crime of robbery was completed.[3] It is not, however, sufficient that the property be snatched away, unless it be done with *some injury to the person*, as in the case just mentioned, where the ear was torn, or unless there be a *struggle for the possession and some violence used to obtain it*.[4]

§ 226. **Same Subject.** But there may be what is termed a *taking in law*, as well as a taking in fact; examples of which are given by Lord Hale. Thus, if thieves, finding but little about the man whom they attempt to rob, compel him by menace of death to swear to bring them a greater sum, and under in-

[2] R. *v.* Rudick, 8 C. & P. 237, per Alderson, B. [The indictment may allege the ownership in either: State *v.* Adams, 58 Kan. 365.]

[3] [State *v.* Perley, 86 Me. 427.]

[4] R. *v.* Bingley, 5 C. & P. 602; 2 East P. C. 707; R. *v.* Morris, 9 C. & P. 347; [Williams *v.* State, 34 Tex. Cr. App. 523.]

[1] 3 Inst. 69; 1 Hale P. C. 533.

[2] R. *v.* Farrel, 1 Leach C. C. (4th ed.) 322, n.

[3] R. *v.* Lapier, 1 Leach C. C. (4th ed.) 320; R. *v.* Simpson, 6 Cox C. C. 422.

[4] 1 Russ. on Crimes, pp. 871, 875, 876; 5th (Eng.) ed. vol. ii. p. 90.

fluence of this menace he brings it, this evidence will sustain an indictment for robbery, in the usual form of allegation.[1] And it is the same, if the money or goods were asked for as a loan, but still obtained by assault and putting the party in fear; or if, in fleeing from the thief, the party drops his hat or purse, which the thief takes up and carries away.[2]

§ 227. **Felonious Intent.** The taking must also be proved to have been with *a felonious intent;* the proof of which has already been considered, in treating of the crime of larceny.[1]

§ 228. **The Taking must be from the Person.** The goods must also be proved to have been *taken from the person* of the party robbed; and this possession by the party, as we have seen, may be either actual or constructive. This allegation in the indictment, therefore, may be proved by evidence that the goods were *in the presence* of the party robbed;[1] as, if the robber, having first assaulted the owner, takes away his horse standing near him; or, having put him in fear, drives away his cattle; or takes

[1] 1 Hale P. C. 532, 533; 2 East P. C. 714.

[2] 1 Hale P. C. 533.

[1] *Supra*, § 156; {State *v.* Hollyway, 41 Iowa 200; Chappell *v.* State, 52 Ala. 359; Brown *v.* State, 28 Ark. 126; People *v.* Woody, 48 Cal. 80. A creditor violently assaulted his debtor, and so forced him to give him a check in part payment, and then again assaulted him, in order to force him to give him money in payment of the debt. As there was no felonious intent, he cannot properly be convicted of robbery: R. *v.* Hemmings, 4 F. & F. 50; [Crawford *v.* State, 90 Ga. 701. So where the loser of money at an unlawful game compelled its return by force: Sikes *v.* Com., 34 S. W. 902, Ky. But see Blain *v.* State, 34 Tex. Cr. App. 448.] In a recent case in Pennsylvania, the defendant was indicted for the crime of highway robbery. The proof was that he took a chew of tobacco from a boy, by force. The jury convicted him of robbery. The trial court sentenced him to pay a fine of $100, and to undergo an imprisonment in the county jail for one year. The trial judge in his instructions to the jury as to what constituted the offence of robbery, said: "At common law, robbery is defined to be the taking of any property from the person of another by force." This definition was, on appeal, held inaccurate. The gravamen of the offence is the felonious intent. The jury may take into consideration the value of the property stolen, in considering the intent with which the act was committed. If it was not done with a felonious intent, it was not robbery; if it was intended as a practical joke, it was not robbery. And the jury may properly come to the conclusion that the taking of an article of no appreciable value, precludes the idea of a felonious intent: Com. *v.* White, 133 Pa. St. 188.} If the prisoner knowingly made or intended to make an *inadequate* compensation for the goods forcibly taken, this will not absolve him from the guilt of robbery; for the intent was still fraudulent and felonious: R. *v.* Simons, 2 East P. C. 712; R. *v.* Spencer, ib.; 1 Russ. on Crimes, p. 880; 5th (Eng.) ed. vol. ii. p. 94. But whether, if he made, or intended at the time to make, what he in good faith deemed a sufficient compensation and complete indemnity for the goods forcibly taken, the offence amounts to robbery, or is only a forced sale and a trespass, is a point upon which there is some diversity of opinion. The English Commissioners (Fourth Report, p. 69 *a*, 40, n.) were of opinion that the offence was robbery. Mr. East deemed it a question for the jury to find the intent, upon the consideration of all the circumstances: 2 East P. C. 661, 662. The Massachusetts Commissioners seem to have regarded it as not amounting to robbery. See Report on the Penal Code of Massachusetts, 1844, tit. Robbery, § 17.

[1] [Hill *v.* State, 42 Neb. 503.]

up his purse, which the owner, to save it from the robber, had thrown into the bush.[2] And it is sufficient, if it be proved that the taking by the robber was actually begun in the presence of the party robbed, though it were completed in his absence. Thus, where a wagoner was forcibly stopped in the highway by a man, under the fraudulent pretence that his goods were unlawfully carried for want of a permit, and, while they were gone to a magistrate to determine the matter, the man's confederates carried away the goods, — this was held sufficient proof of a taking to constitute robbery.[3] But where it was found by a special verdict that the thieves, meeting the party wronged, and desiring him to change half-a-crown, gently struck his hand, whereby his money fell to the ground; and that, he dismounting and offering to take up the money, they compelled him by menaces of instant death to desist; and it was also found, "that the said prisoners *then and there immediately* took up the money and rode off with it," — the court held this not to be sufficient proof of the crime of *robbery*, it not being found that they took up the money in the sight or presence of the owner.[4]

§ 229. **Force and Violence.** In regard to the *force* or *violence* with which the goods were taken, this may be actual or constructive: the principle being this, that the power of the owner to retain the possession of his goods was overcome by the robber; either by actual violence physically applied, or by putting him in such fear as to overpower his will.[1] If the robbery was by

[2] 2 East P. C. 707.

[3] Merriman *v.* Hundred of Chippenham, 2 East P. C. 709; 1 Russ. on Crimes, 876; 5th (Eng.) ed. vol. ii. p. 91.

[4] R. *v.* Frances, Com. 478. In expounding the above clause in the special verdict, the learned judges said: "It was not denied but that if a thief set upon a man, to rob him, and he throw away his money or his goods (being near him and in his presence), and was forced away by terror, and the thief took them, it would be robbery; and therefore here possibly it might have been well if the jury had found that, when Cox desisted, the prisoners at the same time, or without any intermediate space of time, or instantly, took it up. But the word *immediately* has great latitude, and is not of any determinate signification: it is in dictionaries explained by *cito, celeriter;* in writs returnable *immediate* it has a larger construction, — as soon as conveniently it can be done. In Mawgridge's Case it is twice mentioned, but with words added to ascertain it; as *without intermission, in a little space of time*, etc. In the statute 27 Eliz., it is directed that notice be given as soon as conveniently may be. In the pleadings that is usually expressed by *immediate;* so that *then and there immediately* doth not necessarily ascertain the time, but leaves it doubtful. Besides, it is proper to take notice, that in this verdict the words *then and there immediately* are not coupled in the same clause or sentence with the words preceding; but it is a distinct clause, and a separate finding:" ib. pp. 480, 481. And see s. c. 2 Stra. 1015. {Cf. People *v.* McGinty, 24 Hun (N. Y.) 62.}

[1] It is not necessary to allege that the party robbed was *put in fear;* nor is it necessary to prove that he was intimidated, if the robbery was by actual violence: Com. *v.*

actual violence, the proof of this fact will support this part of the indictment, though it should appear that the party did not know that his goods were taken; as, if he be violently pressed against a wall by the thief, who, in that mode, robs him of his watch, without his knowledge at the time.[2] So, if a thing be feloniously taken from the person of another with such violence as to occasion a substantial corporal injury: as, by tearing the ear, in plucking away an ear-ring,[3] or the hair, in snatching out an ornament from the head;[4] or if it be obtained by a violent struggle with the possessor, which causes a sensible concussion of his person, provided it be so attached to the person or clothes as to afford resistance;[5] as, if it be his sword, worn at his side.[6] But where it appeared that the article was taken without any sensible or material violence to the person, as, for example, snatching a hat from the head, or a cane or umbrella from the hand, of the wearer, rather by slight of hand and adroitness than by open violence, and without any struggle on his part, — it has been ruled to be not robbery, but mere larceny from the person.[7]

§ 230. **Fraud.** If it be proved that there was a felonious intent to obtain the goods, and that violence was used, but that this was done *under the guise of legal proceeding*, it will still

Humphries, 7 Mass. 242; Com. *v.* Clifford, 8 Cush. 215, 217; {State *v.* Burke, 73 N. C. 83; Chappell *v.* State, 52 Ala. 359;} [Pendy *v.* State, 34 Tex. Cr. App. 643; State *v.* Stinson, 124 Mo. 447.]

[2] Com. *v.* Snelling, 4 Binn. 379; {Mahoney *v.* People, 5 Thom. & C. (N. Y.) 329; Bloomer *v.* People, 1 Abb. (N. Y.) App. Dec. 146. If the prosecutor proves actual violence, no proof of fear is necessary: State *v.* Gorman, 55 N. H. 152; State *v.* Broderick, 59 Mo. 318.}

[3] R. *v.* Lapier, 1 Leach C. C. (4th ed.) 320; 2 East P. C. 557, 708.

[4] R. *v.* Moore, 1 Leach C. C. (4th ed.) 335.

[5] R. *v.* Mason, Russ. & Ry. C. C. 419.

[6] R. *v.* Davies, 2 East P. C. 709; {State *v.* McCune, 5 R. I. 60.}

[7] R. *v.* Steward, 2 East P. C. 702; R. *v.* Danby, ib.; R. *v.* Baker, ib.; 1 Leach C. C. (4th ed.) 290; R. *v.* Horner, 2 East P. C. 703; State *v.* Trexler, 2 Car. Law Repos. 90; R. *v.* Macauley, 1 Leach C. C. (4th ed.) 287; {Shinn *v.* State, 64 Ind. 13; Bonsall *v.* State, 35 id. 460; State *v.* John, 5 Jones (N. C.) 163;} [Routt *v.* State, 61 Ark. 594; Johnson *v.* State, 35 Tex. Cr. App. 140.] Thus, where A asked B what o'clock it was, and B took out his watch to tell him, holding his watch loosely in both hands, A caught hold of the ribbon and key attached to the watch, and snatched it from B and made off with it. This was held not to be robbery, but a larceny from the person: R. *v.* Walls, 2 C. & K. 214. {So, where one standing in a bar-room had his purse knocked out of his hand, and was then hustled out of the room and the door closed, and he was told that he had better go away, as he would never see his purse again, it was held that a charge that if the force was sufficient to deprive the owner of the purse, and the intent was felonious, the violence was sufficiently proved, was erroneous: People *v.* McGinty, 24 Hun (N. Y.) 62.} [Where the owner of the property is drunk, and does not resist the taking, there is no robbery: Hall *v.* People, 171 Ill. 540. Where the question of force is in doubt, the question of larceny must be submitted to the jury: People *v.* Church, 116 Cal. 300.]

support an indictment for robbery.[1] And if the violence be *used for another purpose*, as in the case of assault with intent to ravish, and money being offered to the criminal to induce him to desist, he takes the money, but persists in his original purpose, it is robbery.[2]

§ 231. **Putting in Fear.** Evidence that the money or goods were obtained from the owner by *putting him in fear*, will support the allegation that they were taken *by force*.[1] And the law, *in odium spoliatoris*, will presume fear, wherever there appears a just ground for it.[2] The fear may be of injury to the *person;* or, to the *property;* or, to the *reputation;* and the circumstances must be such as to indicate a felonious intention on the part of the prisoner. The fear, also, must be shown to have continued upon the party up to the time when he parted with his goods or money; but it is not necessary to prove any *words of menace*, if the conduct of the prisoner were sufficient without them; as, if he begged arms with a drawn sword; or, by similar intimidation, took another's goods under color of a purchase, for half their value, or the like.[3] It is only necessary to prove that the fact was attended with those circumstances of violence or terror, which, in common experience, are likely to induce a man unwillingly to part with his money for the safety of his person, property, or reputation.[4]

[1] See Merriman *v.* Hundred of Chippenham, 2 East P. C. 709; R. *v.* Gascoigne, ib.; 1 Russ. on Crimes, 876, 877; [Sweat *v.* State, 90 Ga. 315.]

[2] R. *v.* Blackham, 2 East P. C. 711; 1 Russ. on Crimes, 878, 5th (Eng.) ed. vol. ii. p. 91.

[1] {Clary *v.* State, 33 Ark. 561; Dill *v.* State, 6 Tex. App. 113; Shinn *v.* State, 64 Ind. 13; State *v.* Howerton, 58 Mo. 581.}

[2] Foster Cr. L. 128, 129.

[3] 2 East P. C. 711, 712.

[4] Foster Cr. L. 128. On this point Mr. East makes the following observations: "It remains further to be considered of what nature this fear may be. This is an inquiry the more difficult, because it is nowhere defined in any of the acknowledged treatises upon this subject. Lord Hale proposes to consider what shall be said to be a putting in fear; but he leaves this part of the question untouched: 1 Hale 534. Lord Coke and Hawkins do the same: 3 Inst. 68; 2 Hawk. Ch. 34. Mr. Justice Foster seems to lay the greatest stress upon the necessity of the property's being taken *against the will of the party;* and he lays the circumstance of fear out of the question; or that, at any rate, when the fact is attended with circumstances of violence or terror, the law *in odium spoliatoris* will presume fear, if it be necessary, where there appears to be so just a ground for it: Foster 123, 128. Mr. Justice Blackstone leans to the same opinion: 4 Bl. Comm. 242. But neither of them afford any precise idea of the nature of the fear or apprehension supposed to exist. Staundford defines robbery to be a felonious taking of anything from the person or in the presence of another *openly and against his will:* Staundf. lib. 1, c. 20; and Bracton also rests it upon the latter circumstance: Brac. lib. 3, fol. 150 *b*. I have the authority of the judges, as mentioned by Willes, J., in delivering their opinion in Donnally's Case, at the O. B. 1779, to justify me in not attempting to draw the exact line in this case, but thus much I

§ 232. **Threats of Injury to Person.** Menace of *danger to the person* may be proved not only by direct evidence of threats, but by evidence that the prisoner and his companions hung round the prosecutor's person so as to render all attempts at resistance hazardous, if not vain; and in that situation rifled him of his property; or by proof of any other circumstances showing just grounds of apprehension of bodily harm, to avoid which the party, *while under the influence of such apprehension,* gave up his money.[1] If, therefore, robbers, finding but little money on the person of their victim, enforce him, by menace of death, to swear to bring to them a greater sum, and *while the fear of that menace still continues upon him* he delivers the money, it is robbery.[2] It is also said, that menace of the *destruction of one's child* creates a sufficient fear to constitute robbery; but no direct adjudication is found upon this point, though it perfectly agrees with the principles of the law in other cases.[3]

§ 233. **Threats of Injury to Property.** The *fear of injury to one's property* may also be sufficient to constitute this offence. Thus, where money was given to a mob, under the influence of fear arising from threats,[1] or just apprehension[2] that they would destroy the party's house, it has been held to be robbery. So, where a mob compelled the possessor of corn to sell it for less than its value, under threats that if he refused they would take it by force, this also was held to be robbery.[3] And it is held, that

may venture to state, that on the one hand the fear is not confined to an apprehension of bodily injury, and, on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an actual taking by violence or assault upon the person:" 2 East P. C. 713. See also the remarks of Hotham, B., in Donnally's Case, ib. 718; R. *v.* Taplin, ib. 712.

[1] R. *v.* Hughes, 1 Lewin C. C. 301; 1 Russ. on Crimes, 879.

[2] 2 East P. C. 714; 1 Hale P. C. 532.

[3] R. *v.* Donnally, 2 East P. C. 715, 718, per Hotham, B.; 1 Leach C. C. (4th ed.) 193; R. *v.* Reane, 2 East P. C. 735, 736, per Eyre, C. J.; 1 Russ. on Crimes, 880, 892, 5th (Eng. ed.) vol. ii. p. 95. Bracton, in treating of the fear that will vitiate a pretended gift of goods, says: "Et non solum excusatur quis qui exceptionem habet, si sibi ipsi inferatur vis vel metus; sed etiam si suis, ut si filio vel filiæ, fratri vel sorori, vel aliis domesticis et propinquis," Bracton, lib. 2, De acquirendo rerum dominio, cap. 5, § 13, fol. 16 *b;* and he cites a case in which a grant of the manor of Middleton was held void, it being obtained by duress of imprisonment of the grantor's brother and to procure his release. But it has been held, that where a wife was compelled to give money, under threats of accusing her husband of an unnatural crime, it was not robbery: R. *v.* Edwards, 5 C. & P. 518.

[1] R. *v.* Brown, 2 East P. C. 731; R. *v.* Simons, ib.

[2] R. *v.* Astley, 2 East P. C. 729; R. *v.* Winkworth, 4 C. & P. 444.

[3] R. *v.* Spencer, 2 East P. C. 712, 713.

the prosecutor, in support of the charge, may give in evidence other similar conduct of the same prisoners, at other places on the same day, before and after the particular transaction in question.[4]

§ 234. **Threats of Injury to Reputation.** As to the fear of *injury to the reputation*, it has been repeatedly held, that to obtain money by threatening to accuse the party of an unnatural crime, whether the consequences apprehended by the victim were a criminal prosecution, the loss of his place, or the loss of his character and position in society, is robbery.[1] And it is immaterial whether he were really guilty of the unnatural crime or not; for, if guilty, it was the prisoner's duty to have prosecuted and not to have robbed him.[2] But where the money was given at a time appointed, not from fear of the loss of reputation, but for the purpose of prosecuting the offender, it has been held not to constitute robbery.[3]

§ 235. **Same Subject.** But it has also been held, that, in order to constitute robbery in cases of this sort, the money must be parted with *from an immediate apprehension of present danger, upon the charge being made;* and not where the party has had time to deliberate and opportunity to consult friends, and especially where he has had their advice not to give the money, and the presence of a friend when he gave it; for this would seem to give it the character rather of the composition of a prosecution than of a robbery.[1] And it may be added, that in all the cases in which the fear of injury to the reputation has been held sufficient to constitute the offence robbery, the charge threatened was that of unnatural practices. Whether any other threat, affecting the reputation, would suffice, is not known to have been decided, and may possibly admit of doubt.[2]

[4] R. *v.* Winkworth, 4 C. & P. 444, per Vaughan, B., and Parke and Alderson, JJ. See *supra*, § 15.

[1] R. *v.* Donnally, 2 East P. C. 715; 1 Leach C. C. (4th ed.) 193; R. *v.* Hickman, 2 East P. C. 728; R. *v.* Jones, ib. 714; R. *v.* Elmstead, 1 Russ. on Crimes, 894, 5th (Eng.) ed. vol. ii. p. 99, *et seq.;* R. *v.* Egerton, ib. 895; Russ. & Ry. 375; {People *v.* McDaniels, 1 Park. Cr. Rep. 198.} If the language of the charge is equivocal, it may be connected with what was afterwards said by the prisoner when he was taken into custody: R. *v.* Kain, 8 C. & P. 187.

[2] R. *v.* Gardner, 1 C. & P. 479.

[3] R. *v.* Fuller, 1 Russ. on Crimes, 896, 5th (Eng.) ed. vol. ii. p. 104; Russ. & Ry. C. C. 408.

[1] R. *v.* Jackson, 1 East P. C., Addenda, xxi. And see R. *v.* Cannon, Russ. & Ry. C. C. 146; 1 Russ. on Crimes, 894, 5th (Eng.) ed. vol. ii. p. 104; R. *v.* Reane, 2 East P. C. 734. The like distinction is recognized in the law of Scotland: Alison's Prin. Crim. L. pp. 231, 232.

[2] Threats of a criminal prosecution for passing counterfeit money have been held insufficient: Britt *v.* State, 7 Humph. 45.

§ 236. **Dying Declarations of the Person robbed.** On the trial of an indictment for *robbery*, the *dying declarations* of the person robbed are not admissible in evidence against the prisoner; such evidence, though sometimes formerly received, being now held admissible only upon the trial of a charge for the murder of the declarant.[1]

[1] See *ante*, Vol. I. § 156; R. *v.* Mead, 2 B. & C. 605; R. *v.* Lloyd, 4 C. & P. 233; Wilson *v.* Boerem, 15 Johns. 286.

TREASON.

§ 237. **Definition.** *Treason against the United States*, as defined in the Constitution, "shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." And it is added, that "No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."[1] By the Crimes Act, this offence may be committed "within the United States or elsewhere," and is expressly limited to persons owing allegiance to the United States.[2] In most of the several States, *treason against the State* is defined in the same words, or in language to the same effect; and the same amount of evidence is made necessary to a conviction:[3] but, in a few of the States, both the crime and the requisite proof are described with other qualifications. Thus, in New York, treason is declared to consist, 1. In levying war against the people of this State, within the State; 2. In a combination of two or more persons, by force, to usurp the government of the State or to overturn the same, evidenced by a forcible attempt, made within the State, to accomplish such purpose; and, 3. In adhering to the enemies of this State, while separately engaged in war with a foreign enemy, in the cases prescribed in the Constitution of the United States, and giving to such enemies aid and comfort, in this State or else-

[1] Const. U. S. art. 3, § 3. But treason is also a crime by the common law: Respublica *v.* Chapman, 1 Dall. 56; 1 Hale P. C. 76; 3 Inst. 4; 4 Bl. Comm. 75, 76.

[2] Stat. April 30, 1790, § 1.

[3] See Maine, Const. art. 1, § 12; Rev. Stat. 1871, c. 117, § 1; Massachusetts, Pub. Stat. 1882, c. 201, §§ 1, 4; New Hampshire, Gen. Laws, 1878, c. 283, § 1; Rhode Island, Pub. Stat. 1882, §§ 1, 3, pp. 661, 662; Connecticut, Const. art. 9, § 4; Delaware, Const. art. 5, § 3; Virginia, Code of 1873, c. 186, § 1; Alabama, Const. art. 6, § 2; Texas, Const. 1845, art. 7, § 2; California, 2 Hittell's Code, ¶ 13037, 14103; Michigan, Const. art. 1, § 16; Indiana, Const. art. 11, §§ 2, 3; Arkansas, Const. art. 7, § 2; Rev. Stat. 1837, c. 44, div. 2, § 1, p. 238; Missouri, Const. art. 13, § 15; Wisconsin, Const. art. 1, § 10; Iowa, Const. art. 1, § 16; Florida, Thompson's Dig. p. 490, c. 2; Louisiana, Const. art. 6, § 2; Mississippi, Const. art. 7, § 3. In Georgia (Penal Code, 1833, div. 3, § 2; Prince's Dig. p. 622; Cobb's Dig. vol. ii. p. 728, Code 1882, § 4313), the crime is defined in the same manner; but the proof is modified, as will be seen in its proper place.

where.[4] A similar division and description of the offence is found in the statute of Mississippi.[5] In Virginia, it is enacted, that "Treason shall consist only in levying war against the State, or adhering to its enemies, giving them aid and comfort, or establishing, without authority of the legislature, any government within its limits, separate from the existing government, or holding or executing, in such usurped government, any office, or professing allegiance or fidelity to it, or resisting the execution of the laws, under color of its authority." And the same amount of proof is required as in treason against the United Sattes.[6] In New Jersey, treason is limited to levying war against the State and adhering to its enemies, giving them aid and comfort, by advice or intelligence, by furnishing them money, provisions, or munitions of war, by treacherously surrendering any fortress, troops, citizen, or public vessel, or otherwise.[7] The statute of Pennsylvania on this subject, enacted during the Revolution, renders it treason in any person resident within the State, and under the protection of its laws, to take a commission under any public enemy; or to levy war against the State or its government; or to aid or assist any enemies at open war with the State or United States, by joining their armies, enlisting or procuring enlistments for that purpose, or furnishing them with arms or other articles for their aid or comfort, or carrying on a traitorous correspondence with them, or forming, or being concerned in forming, any combination to betray the State or country into their hands, or giving or sending intelligence to them for that purpose.[8] In South Carolina, it has been thought doubtful whether any law concerning treason, anterior to their Constitution of 1790, could be of force since that time;[9] and in several of the States the opinion has been entertained, to some extent, that treason, by levying war against a single State, was necessarily an offence against the United

[4] New York, Rev. Stat. vol. iii. p. 2470 (7th ed.).

[5] Mississippi, How. & Hutchins, Dig. 1840, p. 691; Penit. Code, tit. 2, § 2, Rev. Code, 1871, §§ 2688, 2689.

[6] Virginia, Code 1873, c. 186, § 1.

[7] New Jersey, Rev. Stat. 1846, tit. 8, c. 1, § 1, p. 257, Revision, p. 226, § 1.

[8] Pennsylvania, Stat. Feb. 11, 1776, 1 Brightley's Purdon's Dig. p. 314; Respublica *v.* Carlisle, 1 Dall. 35.

[9] See S. Car. Statutes at Large, vol. ii. pp. 717, 747, notes by Dr. Cooper, the authorized editor. He adds: "I know of no treason law in this State, as yet." But in a subsequent volume is found a statute making it treason for any one to be concerned with slaves in an insurrection, or to incite them to insurrection, or to give them aid and comfort therein: id. vol. v. p. 503; Stat. Dec. 19, 1805, No. 1860.

States, and therefore cognizable as such by none but the national tribunals.[10] But as war may be levied against a single State by an open and armed opposition to its laws, without any intention of subverting its government, the better opinion is that the State tribunals may well take cognizance of treasons of this description, and of any others directly affecting the particular State alone.[11]

§ 238. **Misprision of Treason.** *Misprision of treason* against the United States is when any person, having knowledge of the commission of any treason, shall conceal, and not, as soon as may be, disclose the same to the President of the United States, or some one of the judges thereof, or to the Governor of a particular State, or some one of the judges or justices thereof.[1] This offence is defined substantially in the same manner in the laws of several of the States; but these statutes are all merely recognitions of the doctrine of the common law, which is prevalent in the whole country.[2]

§ 239. **Allegiance.** In indictments for treason, it is material to allege that the party *owed allegiance and fidelity* to the State against which the treason was committed; and this allegation seems equally material in a charge of misprision of treason. It may be proved by evidence that the party was by birth a citizen of the State or of the United States, as the case may be; or that, though an alien, he was resident here, with his family and effects. And if he were gone abroad, leaving his family and effects here, his allegiance to the government is still due for the protection they receive.[1]

§ 240. **Overt Act.** In every indictment for this crime, *an overt act also must be alleged and proved;* for it is to the overt act charged that the prisoner must apply his defence. But it

[10] See Livingston's Penal Code for Louisiana, Introductory Report, p. 148; 4 Am. Law Mag. 318-350; 2 Wharton's Crim. Law, 8th ed. §§ 1814–1820; Walker's Introd. pp. 151, 458.

[11] Rawle on the Constitution, pp. 142, 143; Sergeant on Constit. Law, p. 382; 1 Kent, Comm. 442, n. (7th ed.); 2 Whart. Crim. Law, 8th ed. § 1815; Dorr's Trial, ib.; People *v.* Lynch, 11 Johns. 549.

[1] Crimes Act, April 30, 1790, § 2.

[2] 4 Bl. Comm. 119, 120; 1 Hale P. C. 372; Bracton, lib. 3, De Corona, cap. 3, fol. 118 *b*. In Florida, the act of endeavoring to join the enemies of the State, or persuading others to do so, or to aid and comfort them, is declared to be a misprision of treason, as well as knowing of the same, or knowing of any treason and concealing it: Thomps. Dig. p. 222.

[1] 2 Kent Comm. Lect. 25, pp. 1–15, 26; 1 East P. C. 52, 53; 1 Hale P. C. 59, 62, 92; Vattel, b. 2, §§ 101, 102; {Kent, Comm. 14th ed. Lect. 25, pp. 39–53, 63, 64.}

is not necessary, nor is it proper, in laying the overt acts, to state in detail the evidence intended to be given at the trial; it being sufficient if the charge is made with reasonable certainty, so that the prisoner may be apprised of the nature of the offence of which he is accused.[1] Therefore, if writings constitute the overt act, it is sufficient to state the substance of them;[2] or, if they were sent to the enemy for the purpose of giving intelligence, it will suffice simply to charge the prisoner with the overt act of giving and sending intelligence to the enemy.[3]

§ 241. **Proof by other Overt Acts.** Though the evidence of treason must be *confined to the overt act or acts laid in the indictment*, without proof of which no conviction can be had; yet, for the purpose of proving the *traitorous intention* with which those acts were committed, evidence of other overt acts of treason, not laid in the indictment, is admissible, if there be no prosecution for those acts then pending. And it seems sufficient if such collateral facts be proved by one witness only: for the law requiring two witnesses is limited in its terms to the specific overt act charged; leaving all other facts, such as alienage, intention, etc., to be proved as at common law.[1] But if the overt act charged is not proved by two witnesses, where this is required by law, so as to be submitted to the jury, all other testimony is irrelevant, and must be rejected.[2] Respecting the *intention* of the prisoner, or the *object* or *meaning* of the acts done, we may add, that *he* is not of necessity bound to prove this; but the entire offence must be made out by the government.[3]

§ 242. **Levying War.** Where the overt act of *levying war* is alleged to have been an *armed assemblage* against the government for that purpose, this allegation may be proved by evidence of such an assemblage for any warlike object in itself amounting

[1] Foster 194, 220; 4 Cranch 490; per Marshall, C. J., in Burr's Case, 2 Burr's Trial, 400. [See *ante*, Vol. I. § 256.]

[2] R. *v.* Francia, 6 St. Tr. 58, 73; R. *v.* Lord Preston, 4 id. 411; R. *v.* Watson, 2 Stark. 104, 116–118, 137, ed. 1823; 3 Eng. Com. L. 282.

[3] Respublica *v.* Carlisle, 1 Dall. 35.

[1] Layer's Case, 16 How. St. Tr. 215; 1 East P. C. 121–123; U. S. *v.* Mitchell, 2 Dall. 348. As to the proof of intention, see *supra*, § 14.

[2] U. S. *v.* Burr, 4 Cranch 493, 505; 2 Burr's Trial, pp. 428, 443.

[3] R. *v.* Frost, 9 C. & P. 129; *supra*, § 17. {It is competent to prove the intent with which an act of treason was done, by declarations of intention made previously by the prisoner: Resp. *v.* Malin, 1 Dall. (Pa.) 33. So, to explain facts which are *prima facie* innocent, evidence of the contemporaneous or previous circumstances which show that the acts were done with treasonable intent, and as part of the scheme of treason, is admissible: U. S. *v.* Hanway, 2 Wall. Jr. 139. Cf. the charge of Sprague, J., given in 23 Law Rep. 705, and of Smalley, J., ib. 597.}

to an actual or constructive levying of war; such as, to prevent the execution of a public law;[1] to compel the repeal of a law, or otherwise to alter the law; to pull down all buildings or enclosures of a particular description, or to expel all foreigners, or all the citizens or subjects of a particular country or nation.[2] But if the assemblage appears to have been for objects of a private or local nature, supposed to affect only the parties assembled, or confined to particular individuals or districts, such as to remove a particular building or enclosure; or to release a particular prisoner, or the like, — this evidence will not support this allegation.[3]

[1] Fries's Trial, p. 196; [The Homestead Case, 1 Pa. Dist. Rep. 785.]

[2] R. *v.* Ld. Geo. Gordon, 2 Doug. 590; Foster 211–215; 1 Hale P. C. 132, 153; 1 East P. C. 72–75.

[3] 1 East P. C. 75, 76; Foster 210; 1 Hale P. C. 131, 133, 149. The term "levying war," in the Constitution of the United States, has been expounded by Mr. Justice Curtis in the following terms: "The settled interpretation is, that the words 'levying war' include not only the act of making war, for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law, in pursuance of such combination. . . . The following elements, therefore, constitute this offence: 1. A combination, or conspiracy, by which different individuals are united in one common purpose. 2. This purpose being to prevent the execution of some public law of the United States, by force. 3. The actual use of force, by such combination, to prevent the execution of such law. It is not enough that the purpose of the combination is to oppose the execution of a law in some particular case, and in that only. If a person against whom process has issued from a court of the United States should assemble and arm his friends, forcibly to prevent an arrest, and, in pursuance of such design, resistance should be made by those thus assembled, they would be guilty of a very high crime; but it would not be treason, if their combination had reference solely to that case. But if process of arrest issues under a law of the United States, and individuals assemble forcibly to prevent an arrest under such process, pursuant to a design to prevent any person from being arrested under that law, and, pursuant to such intent, force is used by them for that purpose, they are guilty of treason. The law does not distinguish between a purpose to prevent the execution of one, or several, or all laws. Indeed, such a distinction would be found impracticable, if it were attempted. If this crime could not be committed by forcibly resisting one law, how many laws should be thus resisted to constitute it? Should it be two, or three, or what particular number short of all? And if all, how easy would it be for the most of treasons to escape punishment, simply by excepting out of the treasonable design some one law. So that a combination, formed to oppose the execution of a law by force, with the design of acting in any case which may occur and be within the reach of such combination, is a treasonable conspiracy, and constitutes one of the elements of this crime. Such a conspiracy may be formed before the individuals assemble to act, and they may come together to act pursuant to it; or it may be formed when they have assembled, and immediately before they act. The time is not essential. All that is necessary is, that, being assembled, they should act in forcible opposition to a law of the United States, pursuant to a common design to prevent the execution of that law, in any case within their reach. Actual force must be used. But what amounts to the use of force depends much upon the nature of the enterprise and the circumstances of the case. It is not necessary that there should be any military array, or weapons, nor that any personal injury should be inflicted on the officers of the law. If a hostile army should surround a body of troops of the United States, and the latter should lay down their arms and submit, it cannot be doubted that it would constitute an overt act of levying war, though no shot was fired or blow struck. The presence of numbers who manifest an intent to use

§ 243. **Same Subject.** In the proof of a charge of treason by levying war, it is not necessary to prove that the prisoner was actually present at the perpetration of the overt act charged; it being sufficient to prove that he was *constructively* present on that occasion. The law of *constructive presence* is now well settled. Whenever several persons conspire in a criminal enterprise, which is to be consummated by some principal act, or some decisive stroke, to the accomplishment of which certain other acts or circumstances are directly subordinate or ancillary, though these latter are to be performed at a distance from the principal scene of action, and consist merely in watching and warning of danger, or in having ready the means of instant escape, or the like, the law deems them all virtually present at the commission of the crime, and therefore all alike guilty as principals.[1] On this ground it is, that, if war is levied with an organized military force *vexillis explicatis*, all those who perform the various military parts of prosecuting the war, which must be assigned to different persons, may justly be said to levy war. All that is essential to implicate them is, to prove that they were leagued in the conspiracy, and performed a part in that which constituted the overt act, or was immediately ancillary thereto.[2] But if the personal co-operation of the prisoner in the general enterprise was to be afforded elsewhere, at a great distance, and the acts to be performed by him were distinct overt acts, he cannot be deemed constructively present at any acts except those to which the part he acted was *directly and immediately* ancillary.[3]

force, if found requisite to obtain their demands, may compel submission to that force which is present and ready to inflict injury, and which may thus be effectually used to oppose the execution of the law. But, unfortunately, it will not often be necessary to apply this principle, since actual violence, and even murder, are the natural and almost inseparable attendants of this great crime:" 4 Monthly Law Reporter, pp. 413, 414. Thus far the learned judge has stated the law of this species of treason, in precise accordance with the views of our greatest jurists. See U. S. *v.* Vigol, 2 Dall. 346; U. S. *v.* Mitchell, ib. 348, 355; *Ex parte* Bollman, 4 Cranch 75, 126; U. S. *v.* Burr, ib. 481–486; 2 Burr's Trial, 414–420; 3 Story on the Constitution, §§ 1790–1795; 3 Story, 615.

[1] See Com. *v.* Knapp, 9 Pick. 496; 10 id. 477; 1 Hale P. C. c. 34 per tot.; *supra*, tit. Accessory; 4 Cranch 492, 493.

[2] Burr's Case, 4 Cranch 471–476.

[3] Burr's Case, 4 Cranch 494. "It is manifest, that to hold a party to have been constructively present at an overt act of treason, which treason itself is already expressly defined by law, is a very different thing from creating a new species of treason, by judicial construction; yet these two have sometimes been confounded, and, in one instance, by a jurist of great eminence (see Tucker's Blackstone, vol. iv. Appendix B), whose reasoning, however, is sufficiently refuted by the observations of Marshall, C. J., in Burr's trial (4 Cranch 493–502). Professor Tucker puts the case of a person in

§ 244. **Aiding the Public Enemy.** The charge of treason by *adhering to the public enemies, giving them aid and comfort*, may be proved by evidence of any overt acts, stated in the indictment, done with that intent, and tending to that end: such as joining the enemy; liberating prisoners taken from him; holding a fortress against the State, in order to assist the enemy; furnishing him with provisions, intelligence, or munitions of war; destroying public stores in order to aid him; surrendering a fortress to him; or the like.[1] *Public enemies* are those who, not owing allegiance to the State, or to the United States, are in open and warlike hostility thereto; whether they act under authority from a foreign State, or merely as voluntary adventurers. And it is sufficient to prove that a state of hostility exists in fact, without proving any formal declaration of war.[2]

§ 245. **All Principals.** It is also to be noted, that "in treason, all the *participes criminis* are principals: there are *no accessories* to this crime. Every act, which, in the case of felony, would render a man an accessory, will, in the case of treason, make him a principal."[1]

Maryland, hearing of Fries's insurrection in Pennsylvania, and lending a horse or money to a person avowedly going to join the insurgents, in order to assist him in his journey; and asks if this would amount to levying war in Pennsylvania, where the lender never was? The answer is furnished by referring to the distinction taken by the court in Burr's Case. The indictment must state the specific overt act of treason. If what was done in Maryland was treasonable in itself, and is so charged, the trial must be had in Maryland, and the application of the doctrine of constructive presence is not required. But if the party was one of the conspirators, and his act constituted a part of the principal overt act of treason perpetrated in Pennsylvania, the State line, it is conceived, would interpose no objection to his being legally *particeps criminis;* any more than though, being in Maryland, he shot an officer dead who was on the Pennsylvania side of the line. If a citizen of Newport, in Rhode Island, stationing himself at Seekonk, in Massachusetts, while Dorr's troop of insurgents were storming the arsenal in Providence, had supplied them with arms and ammunition for that purpose, could he have escaped conviction as a traitor in the county of Providence, on the ground that he was never personally in that county? Yet here would be no constructive treason. The crime would be treason by levying war. The overt act would be storming the arsenal in Providence; in which the prisoner bore an essential, though a subordinate part. And if he bore such part, it surely can make no difference where he stood while he performed it:" 4 Monthly Law Rep. pp. 416, 417.

[1] Foster 22, 197, 217, 219, 220; 1 East P. C. 66, 78, 79; 1 Hale P. C. 146, 164; 3 Inst. 10, 11; U. S. *v.* Hodges, 2 Wheeler Cr. C. 477; R. *v.* Lord Preston, 12 How. St. Tr. 709; R. *v.* Vaughan, 13 id. 486; R. *v.* Gregg, 14 id. 1371; R. *v.* Hensey, 1 Burr. 642; R. *v.* Stone, 6 T. R. 527.

[2] 1 Hale P. C. 163, 164; Foster 219; 1 East P. C. 77, 78; 4 Bl. Comm. 82, 83.

[1] Fries's Trial, p. 198, per Chase, J. No exception was taken to this doctrine, in that case, though the prisoner was defended by the ablest counsel of that day, and the case was one of deep political interest. The same law is laid down by Ld. Hale, as "agreed of all hands:" 1 Hale, P. C. 233. Ld. Coke calls it "a sure rule in law:" 3 Inst. 138. And see Throgmorton's Case, 1 Dyer 98 *b*, pl. 56; Foster 213; *supra*, tit. Accessories, per tot.; 1 East P. C. 93, 94. The application of this doctrine, however, to cases under the Constitution of the United States, was questioned by Marshall, C. J., in Burr's Case, 4 Cranch 496-502.

§ 246. **Number of Witnesses.** In regard to the *number of witnesses* requisite to convict of treason, it is now universally settled, both in England and in this country, that there must be at least *two witnesses*. This rule was enacted in England in the reign of Edward VI.,[1] and has been adopted in all the States of the Union. In the interpretation of the early English statutes, it was held sufficient if one witness testified to one overt act, and another to another, of the *same treason;*[2] and this construction was afterwards adopted by act of Parliament.[3] The same construction is understood to be the rule of evidence in trials for treason against those several States of the Union which have not made a different provision. But the Constitution of the United States, as we have seen, provides that "No person shall be convicted of treason, unless on the testimony of two witnesses to *the same overt act*, or on confession in open court;" and this provision has been adopted by the constitutions and statutes of several of the individual States.[4] In these States, therefore, and in trials for treason against the general government in the courts of the United States, both the witnesses must speak not only to the same species of treason, but the same overt act charged in the indictment. But whether, where the overt act, constituting the treason, is to be proved by evidence of sev-

[1] Stat. 1 Ed. VI. c. 12; and 5 & 6 Ed. VI. c. 11. [See *ante*, Vol. I. § 255.]

[2] This construction was settled upon the trial of Ld. Stafford, who was indicted for compassing the death of the king. "And upon this occasion my Ld. Chancellor, in the Lords' House, was pleased to communicate a notion concerning the reason of two witnesses in treason, which he said was not very familiar, he believed; and it was this, — anciently, all or most of the judges were churchmen and ecclesiastical persons, and, by the canon law, now and then in use all over the Christian world, none can be condemned of heresy, but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and, anciently, heresy was treason; and from thence the Parliament thought fit to appoint that two witnesses ought to be for proof of high treason:" T. Raym. 408.

[3] Stat. 7 W. III. c. 3, § 2; which enacts, that no person shall be indicted, tried, or attainted of treason or misprision of treason, "but upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one and the other of them to another, overt act of the same treason;" or upon his confession, etc. The same rule, in regard to treason only, has been enacted in New York: Rev. Stat. vol. ii. p. 820, § 15.

[4] See *supra*, § 237. In Illinois, it is merely required that the party be "duly convicted of open deed, by two or more witnesses:" Rev. Stat. 1880, p. 396. In Florida, and in Connecticut, the testimony of "two witnesses *or that which is equivalent thereto*," is made necessary to *every* capital conviction: Thompson's Dig. p. 258, § 159. Cf. Dig. Laws, 1882, p. 519, § 30; Connecticut Rev. Stat. 1849, tit. 6, § 159. Cf. Const. art. 9, § 4. In Georgia, it is required that the party accused of treason be "legally convicted of open deed, by two or more witnesses *or other competent and credible testimony*," etc.: Penal Code, 1833, div. 3, § 2; Prince's Dig. p. 162; 2 Cobb's Dig. p. 782; Code 1882, § 4313. In Pennsylvania, the language of the law is, that he "be thereof legally convicted by the evidence of two sufficient witnesses, etc.: Stat. Feb. 11, 1777, 1 Brightley's Purdon's Dig. p. 314.

eral distinct facts, which, separately taken, may each appear innocent, but which in the aggregate are treasonable, it be necessary under the national Constitution that each of the two witnesses should be able to testify to all the facts of which the overt act of treason is composed, is a point not known to have been expressly decided.

§ 247. **Misprision.** The *proof of misprision of treason* is regulated by the rules of the common law, as in other cases of crime, in all those States where it has not been changed by statute.[1]

§ 248. **Confession of Treason insufficient Proof.** It may here be added, that though one witness may be sufficient to prove a *confession of treason*, where such confession is offered in evidence merely as *corroborative* of other testimony in the cause; yet, under the law of the United States, and of those States which have adopted a similar rule, the prisoner cannot be convicted upon the evidence of his confession alone, unless it is made in open court.[1]

[1] The only exception now known to the author is the provision in Maine, Rev. Stat. 1840, c. 153, § 4; which requires the same amount of evidence in proof of misprision of treason which is required by Stat. 7 W. III. c. 3, quoted *supra*, § 246, in cases of treason. In Pennsylvania, persons charged with treason or misprision of treason may be proceeded against for a misdemeanor, and convicted on the testimony of one witness alone: Stat. March 8, 1780; Dunlop's Dig. c. 69, p. 127.

[1] *Supra*, § 237; *ante*, Vol. I. §§ [217 *a*,] 255. And see 1 East P. C. 131–135; Respublica *v.* Roberts, 1 Dall. 39; Respublica *v.* McCarty, 2 id. 86; {U. S. *v.* Lee, 2 Cranch C. C. 104.}

EVIDENCE IN PROCEEDINGS IN EQUITY.

EVIDENCE IN PROCEEDINGS IN EQUITY.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 249. **Scope of this Topic.** In the first volume of this work, those general rules of Evidence have been considered, which are recognized in all the tribunals of the country, however various their modes of administering justice; including, of course, the general principles and rules of this branch of the law, as administered in courts of equity. Those principles and rules, therefore, will not here be repeated; it being proposed in this place merely to treat of matters in the Law of Evidence peculiar to proceedings in courts of equity, and in other courts which employ forms of proceedings substantially similar to those.

§ 250. **Difference between Legal and Equitable Rules.**[1] The rules of Evidence, as to the matter of fact, as Lord Hardwicke long since remarked, are generally the same in equity as at law. It is only in particular cases that they differ; and these are either the investigation of frauds or trusts, or cases growing out of the peculiar nature of the proceedings.[2] These proceedings, as on a former occasion has been observed,[3] are exceedingly diverse from those at common law, both in the forms of conducting the allegations of the parties and in the means by which evidence is obtained. For, though at law the defendant may, by a plea of the general issue, put the plaintiff upon the proof of every material fact he has alleged, and is not bound to make a specific answer to any; yet, in proceedings by bill in equity, the plaintiff may require

[1] [See *ante*, Vol. I. § 2 *a*.]

[2] Manning *v.* Lechmere, 1 Atk. 453; Glynn *v.* Bank of England, 2 Ves. 41; Man *v.* Ward, 2 Atk. 228. And see Dwight *v.* Pomeroy, 17 Mass. 303, 325; Reed *v.* Clarke, 4 Monr. 20; Baugh *v.* Ramsey, ib. 157.

[3] *Ante*, Vol. II. § 4.

the defendant to *answer particularly, and upon oath, to every material allegation, well pleaded, in the bill;* and the defendant also, by a cross-bill, may elicit from the plaintiff a similar answer, under the same sanction; each party being generally permitted to search the conscience of the other, for the discovery of any facts material to his side of the controversy. The object of this stringent course of proceeding is to furnish an admission of the case made by the bill, either in aid of proof, or to supply the want of it, and to avoid expense.[4] The plaintiff having thus appealed to the conscience of the defendant for the truth of what he has alleged, it results, as a reasonable and just consequence, that the answer of the defendant, under oath, so far as it is responsive to the bill, is evidence in the cause, in proof of the facts of which the bill seeks a disclosure; and being so, it is conclusive evidence in the defendant's own favor, unless, as will hereafter be seen, the plaintiff can overcome its force, either by the testimony of two opposing witnesses, or of one witness, corroborated by other facts and circumstances sufficient to give it a greater weight than the answer.[5] The obvious utility of this practice of examining the defendant himself has led to its adoption, to some extent, in several of the United States, in suits at common law, as will be subsequently shown.

§ 251. **Mode of taking Testimony.** Another material diversity between proceedings in equity and at common law, affecting the rules of evidence, is in *the manner of taking the testimony of witnesses*, — the latter requiring the examination to be open and *viva voce;* while in equity it is taken secretly, and in writing.[1] The reason of this diversity is said to be found in the difference of the objects sought to be attained, and in the result of the controversy. At common law, the jurors are not to decide on the general merits of the whole case, nor to elicit a conclusion of law from a series

[4] Wigram on Discovery, Introd. § 2.

[5] *Ante*, Vol. I. § 260; 2 Story, Eq. Jur. § 1528; Gresley on Evid. in Equity, p. 4; Pember *v.* Mathers, 1 Bro. Ch. 52, and cases in n. by Perkins; Evans *v.* Bicknell, 6 Ves. 183; {*post*, §§ 277–290; Tobey *v.* Leonards, 2 Wall. (U. S.) 423; Parker *v.* Phetteplace, 1 id. 689. See Lancaster *v.* Ward, 1 Overton (Tenn.) 430.}

[1] In the American practice, in those States whose modes of proceeding most nearly approach the old chancery forms, the interrogatories to witnesses are ordinarily filed in the clerk's office, and copies are served on the adverse party by a certain day, in order that he may prepare and file his cross-interrogatories; and the caption to the interrogatories usually states the names of the witnesses, if known. The parties, therefore, can generally form probable conjectures of the drift of the evidence to be taken, though its precise import may remain unknown until the publication of the depositions. See *post*, § 259, n; [*ante*, Vol. I. § 320.]

of facts laid before them; but are merely to find the truth of the particular issue of fact submitted to their decision. In order to do this, it is important that the witnesses should be examined and cross-examined publicly, in their presence,[2] that the entire mass of evidence should be commented on by advocates, and that it be summed up to them, with proper instructions, by the court. After this, the court renders the proper judgment upon the whole case, as it appears both in law and in fact upon the record. The evidence is not judicially recorded; for its results are found in the verdict; and there is no occasion to preserve it for the information of any appellate court, the common law not permitting any appeal, in the modern sense of the term, from a lower to a higher tribunal. But in equity, the determination of the particular issues of fact is not the principal object, though essential to its final attainment; but the object is, first, to obtain and preserve a sworn detail of facts, on which the court may, upon deliberation, adjudge the equities; and, secondly, to preserve it in an authentic record, for the use of a higher tribunal, should the cause be carried thither by appeal, — a proceeding, though unknown to the common law, yet of familiar use in courts of equity, admiralty, and ecclesiastical jurisdiction.[3]

§ 252. **Objections.** This mode of taking testimony in equity is *open to two objections:* first, that its protracted nature, by interrogatories filed from time to time,[1] enables the party to discover any defects in his proof, and furnishes the temptation to remedy them by false testimony; and, secondly, that its secrecy may not only afford facilities to perjury, but may lead to imperfect state-

[1] The student will hardly need to be reminded that the use of depositions in trials at common law is only authorized by statutes.

[3] Adams's Doctr. of Equity, pp. 365, 366.

[1] It was the ancient practice, when testimony was to be taken under a commission, to exhibit all the interrogatories and cross-interrogatories before the issuing of the commission; after which no others could be filed; the commissioners being sworn to examine the witnesses upon the interrogatories "*now* produced and left with you." But in the Orders in Chancery in 1845, Reg. 104, the word "*now*" was omitted from the oath; and even prior to that period, it was "the practice in country causes in England to *feed* the commissioners from time to time with interrogatories for the examination of witnesses, as they can be presented either for original or cross-examination, until the commissioners find that the supply of witnesses is exhausted:" Campbell *v.* Scougal, 19 Ves. 554. Whether new interrogatories can now be exhibited before a commissioner under the English rule, is doubted: 2 Dan. Ch. Pr. 1053, 1085, 5th Am. ed. vol. i. *916, *932. But the practice in the courts of the United States, and, as far as is known to the author, in the State courts also, is to permit parties to file new interrogatories to different witnesses, from time to time, and to take out new commissions, as often as they choose, within the period allowed for taking testimony: Keene *v.* Meade, 3 Peters 1, 10; 1 Hoffm. Ch. Pr. 476. [See *ante*, Vol. I. § 320.]

ments of the truth, especially where the party has so artfully framed his interrogatories as to elicit testimony only as to the part of the transaction most favorable to himself. The former of these objections is intended to be obviated not only by the entire secrecy with which the testimony is taken, no person being present except the examining officer and the witness, but also by the rule, that, until all the testimony is taken, and the depositions are opened and given out, or, as it is termed, until publication is passed, neither party is permitted to know what has been testified; and that, after publication, no witness can be examined without special leave of the court. The latter objection is more difficult of remedy, but it is in a great measure obviated by the rule, hereafter to be expounded, that, in order to give weight to evidence, the facts which it is intended to establish must previously have been alleged in the pleadings.[2]

§ 253. **Burden of Proof; Fiduciary Relations.** A further diversity between the course of courts of equity and courts of common law, will be found in the adjustment of the *burden of proof*, in their treatment of *fiduciary and confidential relations* between the parties. If, for example, an action at law is brought upon the bond of a client, given to his attorney, it will ordinarily be sufficient for the plaintiff to produce the bond and prove its execution; the bond being held, at law, conclusively to import a valuable and adequate consideration. But in a court of equity, in taking an account of the pecuniary transactions between an attorney and his client, the production of a bond, given by the latter to the former, will not be deemed sufficient *prima facie* evidence of a debt to that amount, but the burden of proof will still be on the attorney, to prove an actual payment of the entire consideration for which the bond was given.[1] The great principle by which courts of equity are governed in such cases, is this, that he who bargains in matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence.[2] This rule, in its principle, applies equally to parents, guardians, trustees, pastors, medical advisers, and all others, standing in confidential relations with those with whom they treat; the burden of proof being devolved in equity on such per-

[2] Adams's Doctr. of Eq. p. 367.

[1] Jones *v.* Thomas, 2 Y. & C. 498; Lewes *v.* Morgan, 3 Y. & J. 230. And see 1 Story, Eq. Jur. §§ 309–314.

[2] Gibson *v.* Jeyes, 6 Ves. 278, per Ld. Eldon.

sons, to establish affirmatively the perfect fairness, adequacy, and equity of their respective claims.[3]

§ 254. **Amount of Evidence.** Again, there is said to be a diversity in *the amount* or *quantity of evidence* which those courts respectively require, in order so to establish allegations of *fraud or trust* as to entitle the party to a verdict or a decree. In both courts the rule is well settled, that fraud is never to be presumed, but must always be established by proofs.[1] But courts of equity, it is said, will act upon circumstances, as indicating fraud, which courts of law would not deem satisfactory proofs; or, in other words, will grant relief upon the ground of fraud, established by presumptive evidence, which evidence courts of law would not always deem sufficient to justify a verdict.[2] Examples of this class are found where courts of equity will order the delivery up of *post obit* and marriage-brocage bonds, and composition bonds between a bankrupt and a preferred creditor, to induce him to sign the certificate; these being presumed fraudulent.[3]

[3] Ibid. And see 1 Story, Eq. Jur. §§ 311–314, and cases there cited; Hatch *v.* Hatch, 9 Ves. 292, 296, 297; 4 Desaus. 681; Huguenin *v.* Baseley, 14 Ves. 273; Thompson *v.* Heffernan, 4 Dru. & War. 285; Popham *v.* Brooke, 5 Russ. 8; Dent *v.* Bennett, 7 Sim. 539; Adams's Doctr. of Eq. pp. 184, 185.

[1] Such is the rule of the Roman civil law. *Dolum ex indiciis perspicuis probari convenit:* Cod. lib. 2, tit. 21, l. 6. Or, as the commentators expound it, *indiciis claris et manifestis:* Mascard. de Prob. vol. ii. Concl. 531; Menoch. De Præsumpt. lib. 4; Præsumpt. 12, n. 2. Mascardus, in commenting on the rule, *Dolus regulariter non præsumitur,* states a large number of exceptions to the rule; but in truth, they are only cases in which fraud is indirectly proved, being deduced as an inference of fact, from other facts proved in the case, as is ordinarily done by juries, in trials at law: Mascard. De Prob. vol. ii. Concl. 532. The *indicia* of fraud which he there enumerates deserve the attention of the student. [See Vol. I. §§ 34, 35, 43 *a*, 80.]

[2] 1 Story, Eq. Jur. §§ 190–193, and cases there cited.

[3] Chesterfield *v.* Janssen, 1 Atk. 301, 352; Fullagar *v.* Clark, 18 Ves. 481, 483. [The following note expresses the views of Judge Redfield as they were stated in his edition of this work: It is not safe to undertake to define what degree or kind of proof will justify a court of equity in granting relief against fraud. For the proof must satisfy the conscience of the Chancellor, or court. And no man would deem it prudent to attempt to define the extent of that indispensable qualification in a judge, or a court, — the requisite amount or quality of his sense of justice. And men's views in weighing evidence are as various as their forms or their features. All we can say is, that the proof must be sufficient to satisfy the mind of the triers, whether court or jury, of the existence of fraud. And to do this it must be sufficient to overcome the natural presumption of honesty and fair dealing. And that is undoubtedly one of considerable force. Hence we do not expect courts, and we do not advise juries, to find fraud except upon reasonably satisfactory evidence. And we are by no means certain, that juries are more reluctant to act, in such cases, from circumstances, than judges. We should incline to the contrary opinion. Hence, we could not subscribe fully to the opinion that courts of equity will find fraud upon any less proof, or any different proof, from what a jury will require. We think not. A jury is, in general, we believe, the better, the fairer, and more competent tribunal to investigate a question of fraud, depending upon circumstances. And besides, if we admit that there exists in courts of chancery a capacity, or right, or duty, or disposition, to find fraud, upon less proof, or different proof, from that which is required in courts of law, we at once establish a ground of preference between the two jurisdictions, which was never before claimed, and one of

§ 255. **These Rules govern the English Court of Chancery.** These diversities in the course of proceeding appear to have been the cause of all the modifications which the rules of evidence, as they exist at common law, have undergone in the Court of Chancery in England; the law of evidence, as administered in the courts of common law and of equity being in other respects generally the same.

§ 256. **And the Courts of Chancery in the United States.** In the national tribunals of the United States, where the jurisdiction, both at law and in equity, is vested in the same courts, the course of proceeding is nearly the same, in its main features, as it was in the year 1841, in the High Court of Chancery in England; many of whose Orders of that year were adopted in the Rules of Practice ordained by the Supreme Court of 1842;[1] with a general reference to the then existing English practice in chancery, as furnishing just analogies for the regulation of the practice in the courts of the United States, in all cases not otherwise provided for.[2] The same general course of practice is adopted in several of the individual States, which still retain a separate Court of Chancery, distinct from the courts of common law. Such is the case in the States of New Jersey, Delaware, Tennessee, South Carolina, Mississippi, and Alabama.[3] In these States, therefore, at least, as well as in the national tribunals, the rules of evidence,

a very invidious character in its practical operation. We trust, then, that no one will be drawn into the adoption of any such view upon the subject. We only desire to caution the inexperienced against setting out with any such view, since the general course of opinion and practice is now decidedly in the opposite direction. It is very common now, in courts of equity, to send issues of this character into a court of law, to be there tried by a jury. And in the English courts of equity they are sometimes tried by a jury summoned into the Court of Chancery : *post*, § 261.

The extent of responsibility for a false representation is thus defined in a recent case (Barry *v.* Croskey, 2 Johns. & H. 21) : Every man must be held responsible for the consequences of such an act, upon which any one acts, and so acting suffers loss or injury, provided it appears that the representation was made with the direct intent that it should be so acted upon, and in the manner which occasions the injury or loss, and where such injury or loss is the direct and immediate consequence of the representation so made: Collins *v.* Cave, 6 H. & N. 131. — REDFIELD.]

[1] Reg. Gen. Sup. Court, U. S. 1 How. pp. xli–lxx.

[2] Ib. p. lxix, Reg. xc. The course of chancery practice in England has recently undergone a total change by the statute of 15 & 16 Vict. c. 86, and the new orders thereupon made ; greatly simplifying and improving the proceedings. See note at the end of this chapter.

[3] The office of chancellor still exists in Maryland, but, by the constitution, as revised and adopted in 1851, it is to cease in two years from that time. See art. 4, § 23. In Mississippi, the constitution establishes a Superior Court of Chancery, but authorizes the legislature to give to the Circuit Courts of each county equity jurisdiction, in cases where the value in controversy does not exceed five hundred dollars : art. 4, § 16. [There have been many statutory changes, of course, since this was written.]

peculiar to proceedings in chancery, may be supposed to be generally recognized and observed; and all these rules it is proposed, for that reason, to state and explain; especially, as many or all of them may be applicable, to some extent, and in various degrees, in the practice of the other States.

§ 257. **Rules modified in Courts of Common Law having limited Equity Jurisdiction.** But in all the States, except those above named, the jurisdiction in equity is vested in the courts of common law; and in many of these, the course of proceeding, in several important particulars, has been so materially changed, that it is hardly possible to construct a treatise on Evidence in Equity equally applicable or useful in them all. Thus, in the States of New York, Indiana, Georgia, Louisiana, Texas, and California, there is no distinction in the forms of remedy or mode of trial, in civil cases of any description, whether cognizable in other States, in courts of equity or of common law;[1] but every suit is prosecuted and defended by one uniform mode of petition and answer, to which no oath is required.[2] It is obvious, therefore, that in these States that part of the law of evidence which relates to the effect of the defendant's answer as *evidence* in the cause has but little force, except so far as it may contain voluntary admissions of fact against himself.[3]

§ 258. **Proceeding by Bill and Answer.** In all the States not already named, the proceeding in equity is understood to be by bill and answer, according to the usual practice in chancery;

[1] [This is now the law in many other States.]

[2] The Judiciary Act of Congress (1789, c. 20, § 34, vol. i. p. 92) provides that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. This provision is held to include those statutes of the several States which prescribe rules of evidence in civil cases, in trials *at common law:* M'Niel *v.* Holbrook, 12 Pet. 84, 89. But it has been decided, that the adoption of State practice must not be understood as confounding the principles of law and equity; that the distinction between law and equity is established by the national Constitution; and that, therefore, though a party seeking to enforce a title or claim at law in the courts of the United States, may proceed according to the forms of practice adopted in the State where the remedy is pursued; yet, if the claim is an equitable one, he must proceed according to the rules which the Supreme Court of the United States has prescribed for the regulation of proceedings in equity; notwithstanding the State laws have abolished the distinction of forms of proceeding at law and in equity, and have established one uniform and peculiar mode of remedy for all cases: Bennett *v.* Butterworth, 11 How. (U. S.) 669. And see Livingston *v.* Story, 9 Pet. 632; Gaines *v.* Relf, 15 id. 9.

[3] In all cases, in the six States above mentioned, and in New Hampshire, and in cases in equity in New Jersey, Ohio, Wisconsin, Missouri, Mississippi, and Arkansas provision is made by law by which parties may, under certain regulations, examine each other as witnesses in the cause, thus superseding, to a great extent, the use of cross-bills. See *ante*, Vol. I. § 361, n.

though subject to some modifications. Thus, in Connecticut, though the complaint is by bill, the defence is either by demurrer or by a plea of general denial of the plaintiff's complaint, and this without oath, no oath being required of the defendant, except to his answer to a bill of discovery;[1] or, by a hearing of the bill, without plea, the defendant being permitted at the hearing to prove any matter of defence.

§ 259. **Evidence may be oral or written.** In many other States it is either expressly enacted, or implied from existing enactments, and therefore always permitted, that the trials of fact, in chancery cases, shall or may be by witnesses orally examined in court, or by depositions, taken in the same manner and for the same causes as at law.[1] By force of these provisions, therefore, and this course of practice, all that portion of the law of evidence in equity which relates to the mode of taking testimony, and requires it to be secret, and by depositions, is rendered obsolete in more than half the territory of the United States.

§ 260. **Trial by Jury in Equity.** Another and very material inroad upon the regular practice in chancery is made in those States in which it is the *right* of the party to have a *trial by jury* of all questions of fact, in cases in equity, as well as at law. In the Constitution of the United States, it is provided, that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."[1] This provision has been construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights; and the latter clause of the article has been held to be a substantial and independent clause.[2] This being the case, the question

[1] Dutton's Dig. pp. 521, 525, 526, 530; Broome *v.* Beers, 6 Conn. 208, 209.

[1] Such of course is the practice in those States where but one form of remedy is pursued in all civil cases. See, also, Missouri, Rev. Stat. 1845, c. 137, art. 3, §§ 10, 11; Georgia, Hotchk. Dig. pp. 583, 584; 1 Cobb's Dig. p. 276, Code 1875, § 4207; South Carolina, 4 Griff. Reg. 830, 870; Illinois, Rev. Stat. 1845, c. 40, § 11; Stat. of 1849, Feb. 12, § 1, Rev. Stat. 1880, 191, § 40; Florida, Thomp. Dig. p. 461; Ohio, Rev. Stat. 1841, c. 46, § 1; Michigan, Rev. Stat. 1846, c. 90, §§ 49–51, 57; Broome *v.* Beers, *supra;* Massachusetts, Stat. 1852, c. 312, § 85; {Mass. Pub. Stat. c. 169, § 66; Pingree *v.* Coffin, 12 Cush. 600.}

[1] Const. United States, Amendments, art. 7. [This right cannot be impaired by blending with a claim cognizable at law a demand for equitable relief: Scott *v.* Neely, 140 U. S. 106.]

[2] Parsons *v.* Bedford, 3 Peters 433. In this case, which was brought up from

may well arise whether the finding of the jury is not thereby rendered conclusive, in issues out of chancery.

Louisiana, where *all* civil proceedings are by petition and answer, Mr. Justice Story, in delivering the judgment of the court, expounded the article in question in the following terms: "At the time" (referring to the time of its adoption), "there were no States in the Union the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no States were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The Constitution had declared, in the third article, 'that the judicial power shall extend to all cases in *law and equity* arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority,' etc., and to all cases of *admiralty and maritime jurisdiction*. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary causes, to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By *common law*, they meant what the Constitution denominated in the third article 'law,' not merely suits which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. Probably there were few, if any, States in the Union in which some new legal remedies, differing from the old common-law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the Judiciary Act of 1789, c. 20 (which was contemporaneous with the proposal of this amendment); for in the ninth section it is provided, that 'the trial of issues of fact in the *District Courts* in all causes, except civil causes of *admiralty and maritime jurisdiction*, shall be by jury;' and in the twelfth section it is provided, that 'the trial of issues of fact in the *Circuit Courts* shall, in all suits, except those of *equity*, and of *admiralty* and *maritime jurisdiction*, be by jury;' and again, in the thirteenth section it is provided, that, 'the trial of issues of fact in the *Supreme Court in all actions at law* against citizens of the United States, shall be by jury.' But the other clause of the amendment is still more important; and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings. The Judiciary Act of 1798, c. 20, § 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.' And the appellate jurisdiction has also been amply given by the same act (§§ 22, 24) to this court to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury. Was it the intention of Congress, by the general language of the act of 1825, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by the jury? to enable it, after trial by jury, to do that in respect to the courts of the United States, sitting in Louisiana, which is denied to such courts sitting in all the other States in the Union? We think not. No general words purporting only to regulate the practice of a particular court, to conform its modes of proceeding to those prescribed by the State to its own courts, ought, in our judgment, to receive an interpretation which would create so important an alter-

§ 261. **Same Subject.** In pursuing this inquiry, it will be expedient to consider, for a moment, the object and effect of a trial by jury, in proceedings which are strictly according to the ancient course in chancery. The Chancellor has no power to summon a jury to attend him; but tries the whole matter in controversy alone.[1] By the theory of equity proceedings, the court addresses itself as the conscience of the defendant, and the evidence is adduced to confirm or to refute the answer he may give, upon his oath, or to sustain the allegations in the bill which he is unable to answer, and to enlighten the conscience of the Chancellor as to the decree which in equity he ought to render. He may, if he pleases, assume to himself the determination of every matter of fact suggested by the record: but if the facts are strongly controverted and the evidence is nearly balanced; or if one of the parties has a peculiar right to a public trial, upon the fullest investigation, as, if the will of his ancestor, or his own legitimacy and title as heir-at-law, is questioned; or the Chancellor feels a difficulty upon the facts, too great to be removed by the report of the Master or Commissioner, — in these, and other cases of the like character, it is the practice in general for the Chancellor to direct an issue to be tried at law, to relieve his own conscience, and to be satisfied, by the verdict of a jury, of the truth or falsehood of the facts in controversy.[2] The object

ation in the laws of the United States, securing the trial by jury. Especially ought it not to receive such an interpretation when there is a power given to the inferior court itself to prevent any discrepancy between the State laws and the laws of the United States; so that it would be left to its sole discretion to supersede, or to give conclusive effect in the appellate court to, the verdict of the jury! If, indeed, the construction contended for at the bar were to be given to the act of Congress, we entertain the most serious doubts whether it would not be unconstitutional. No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which would involve a violation, however unintentional, of the Constitution. The terms of the present act may well be satisfied by limiting its operation to modes of practice and proceeding in the court below, without changing the effect or conclusiveness of the verdict of the jury upon the facts litigated at the trial. Nor is there any inconvenience from this construction; for the party has still his remedy, by bill of exceptions, to bring the facts in review before the appellate court, so far as those facts bear upon any question of law arising at the trial; and, if there be any mistake of the facts, the court below is competent to redress it by granting a new trial." See 3 Peters 446, 449.

[1] 1 Spence on Eq. Jur. 337.

[2] 2 Daniell's Chan. Pract. 1265, 1286, and notes by Perkins, 5th (Am.) ed. vol. ii. *1083–*1085, 1 Hoffm. Ch. Pr. 502, 503; 3 Bl. Comm. 452, 453; Hall *v.* Doran, 6 Clarke (Iowa) 438. See Brewster *v.* Bours, 8 Cal. 501. [But where there is no conflict of evidence in regard to the material facts, it is the duty of the court to decide the question without referring it to the jury: Hildreth *v.* Schillenger, 10 N. J. Eq. 196; Dougan *v.* Blocher, 24 Pa. St. 28; see also Reed *v.* Cline, 9 Gratt. (Va.) 136; Smith *v.* Betty, 11 id. 752. As an issue can be directed only where the evidence creates a doubt, and not as a substitute for omitted evidence, the party claiming the issue must first prove his case by regular depositions: Adams's Eq. 376; Clayton *v.* Meadows,

of a trial at law thus being solely "for the purpose of informing the conscience of the court," it results that the verdict is not conclusive or binding on the court; but the Chancellor is still at liberty, if he pleases, to treat it as a mere nullity, and to decide against it, or to send it back to another jury.[3]

§ 262. **Same Subject.** It is obvious, however, that this power in the Chancellor to disregard the finding of the jury cannot exist in any of the United States where the trial of facts, in cases in equity, is secured to the parties by constitutional or statute law as a matter of right. The law, in granting such right, where it is seasonably asserted by the party, takes away from the Chancellor the authority to determine any question of fact material to the decision, and refers it exclusively to the jury; the judge retaining only the power to apply the law of equity to the facts found by the jury, in the same manner and to the same extent as at common law. It is only where no such right of the party is recognized by law, and where the resort to

2 Hare 29; Whitaker *v.* Newman, ib. 302; Hildreth *v.* Shillenger, 10 N. J. Eq. 196; Fisler *v.* Porch, ib. 243. In the English chancery practice it is allowable to try the facts in a case by a jury summoned into the Chancery Court, although it is said that this is not generally done, unless both parties desire it, or unless special reasons exist, such as saving expense or delay; still it would, with us, afford the preferable mode of coming at such trial, and save much of the embarrassment of formally drawing up the issue: Peters *v.* Rule, 5 Jur. N. S. 61. In Black *v.* Lamb, 1 Beasley (N. J.) 123, it is held that "the issue must be tried as a strict issue at law; and the rules of law in regard to evidence, its admissibility, and the weight of it, govern the proceedings, except so far as they have been otherwise regulated by the terms of the issue" out of the Court of Chancery. But an order made by the Court of Chancery, that certain evidence shall be read at the trial, is binding on the judge who conducts the trial, even if the evidence would be excluded by rules of law. See Yingling *v.* Hesson, 16 Md. 112; Ringwalt *v.* Ahl, 36 Pa. St. 336.] [Where the chancellor adopts the finding of a jury, the appellate court will not consider formal exceptions to rulings on the trial of issues before the jury: Wilson *v.* Riddle, 123 U. S. 608.]

[3] Gresley on Eq. Evid. pp. 498, 527, 528; Barnes *v.* Stuart, 1 Y. & C. 139, per Alderson, B. [It rests in the discretion of the Chancellor to award a feigned issue or not; and the verdict of the jury upon a feigned issue is not conclusive upon the Chancellor. He may have the case tried again and again, and make his decree contrary to such verdicts as are not agreeable to his sense of justice: U. S. *v.* Samperyac, 1 Hempst. C. C. 118; Lansing *v.* Russell, 13 Barb. (N. Y.) 510; [Idaho, etc. Co. *v.* Bradbury, 132 U. S. 509; Seisler *v.* Smith, 46 N. E. 993, Ind.; Stevens *v.* Shannahan, 160 Ill. 330; Caldwell *v.* Brown, 56 Kan. 566; Moore *v.* Copp, 119 Cal. 429; Hull *v.* Watts, 27 S. E. 829, Va. Or he may give binding instructions: Baldwin *v.* Taylor, 166 Pa. 507. In Rhode Island the verdict is conclusive if reconcilable with the evidence: Peckham *v.* Armstrong, 40 A. 419, R. I. See also *post*, § 266, n. 5.] And after a Court of Chancery has referred certain issues to a court of law for trial by jury, and the jury has decided some of them and been unable to agree upon others, the cause may then be decided by the Court of Chancery upon the whole record, including the report of the trial at law, provided such court finds itself able to dispose of the cause satisfactorily upon all the evidence before it: Adams *v.* Soule, 33 Vt. 538; Converse *v.* Hartley, 31 Conn. 380. That the evidence introduced on the trial of an issue sent to the jury was not returned with the verdict to the equity side of the court is no sufficient reason why the court should not enter a decree: Saylor's Appeal, 39 Pa. St. 497.]

a jury is left to the discretion of the judge, in aid of his own judgment, that he is at liberty to disregard the finding of the jury, or to determine the facts for himself.

§ 263. **Effect of Verdict.**[1] That the verdict of the jury may be conclusive, even in the national tribunals, may be inferred from the exposition which has been given by the Supreme Court to that provision of the Constitution by which the trial by jury is secured. Thus, in the case in Louisiana, above cited,[2] which was instituted in the District Court of the United States, according to the form of proceeding in the courts of that State, which is uniform in all cases, the cause was tried by a special jury in the ordinary manner, and was taken to the Supreme Court, by writ of error, founded on the refusal of the district judge to order that the evidence be taken down in writing, according to the course of practice in that State, which is required by law, to enable the appellate court to exercise the power of granting a new trial, and of reversing the judgment of the inferior court. But the exception was overruled, on the ground that the error complained of was in a matter of practice only, which could not regularly be assigned for error; and that by the Constitution,[3] "No fact, once tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law;" and that no power was given to the Supreme Court to reverse a judgment for any error in the verdict of the jury at the trial. It seems, therefore, that where the verdict of the jury, in the courts of the United States, cannot be set aside for some cause known in the rules for granting new trials at common law, it is conclusive upon the parties and upon the court; and this, whether the verdict were rendered upon a feigned issue sent out of chancery to the court of common law; or upon an issue framed upon a bill in equity in a court having jurisdiction both in equity and at common law; or in a civil suit at common law.

§ 264. **Trial by Jury in Equity.** In several of the *individual States*, the right of trial by jury is secured, either in their constitutions or statutes, in express terms. Thus in the constitution of Maine it is provided, that, "In all civil suits, and in all

[1] [See § 261, *ante*.]

[2] Parsons *v.* Bedford, *supra*, § 260. And see Story on the Constitution, vol. iii. pp. 626–648, §§ 1754–1766.

[3] Const. U. S. Amendments, art. 7.

controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practised.[1] A similar provision, in nearly the same words, is found in the constitutions of New Hampshire and Massachusetts;[2] and this has been construed to give the right to a trial of all material facts by the jury, even in cases in equity.[3] In the constitution of Vermont, it is declared, that,

[1] Maine, Const. art. 1, § 20. (Adopted in 1820.)

[2] New Hampshire, Const. (1792), part 1, art. 20; Massachusetts, Const. (1780), part 1, art. 15. In the constitution of Massachusetts there is an exception of "cases on the high seas, and such as relate to mariners' wages," should "the legislature hereafter find it necessary to alter it."

[3] Such is understood to be the opinion of the learned judges, in the case of the Charles River Bridge, 7 Pick. 344, 368, 369, though a formal adjudication of the point was waived, as unnecessary in that cause. The language was as follows: "The article relied on is in no ambiguous language; nothing could more explicitly declare the intention of the people, that, with the exceptions therein contained, the right to trial by jury should never be invaded. Now the case presented by this bill is a controversy concerning property, and it is also a suit between parties; so that, unless it is a case in which, at the time of the adoption of the Constitution, a different mode of trial could be said to have been practised, it is most clearly included in the article. But we wish not to decide this question now, believing it not to be necessary, and that further time might enable us to show that the case comes within the practice. We find that the colonial legislature, in 1685, vested in the County Courts as ample jurisdiction in matters of equity as exists in the Courts of Chancery in England. That statute continued in force until the grant of the provincial charter in 1691, by which the colonial statute was probably considered to be repealed. After the charter in 1692, the whole chancery power was vested in the governor and eight of the council, with a power to delegate it to a chancellor to be appointed by the governor. The next year the legislature, declaring that this mode administering the power was found in practice to be inconvenient, repealed the law, and transferred the power to three commissioners; and, in the succeeding year, this tribunal was superseded, and a High Court of Chancery was established. We have it from tradition, and I have seen it somewhere in history, that these several acts became null and void by reason of the negative of the king, which was exercised according to the charter, within three years after their enactment; they were, however, in force, according to the provisions of the charter until the veto of the king was made known to the constituted authorities here. Now, whether the framers of the Constitution, and the people, had reference to those former chancery tribunals, when they adopted the exception to the general provision in the fifteenth article, may admit of question; we are inclined to think, however, that the word 'heretofore,' in the exception, could hardly be applicable to a practice which had ceased to exist nearly a century before the Constitution was adopted. In regard to probate cases, and suits for redemption of mortgages, the practice of trying facts by the court instead of the jury had continued down to the adoption of the Constitution. But we say again, that we do not wish to decide this question now, any further than to declare, that a reasonable construction of the fifteenth article does not require that a suit in chancery shall be tried just as a suit at common law would be, and that there is no necessity that the whole case shall be put to the jury. The most that can be made of the article is, that all controverted facts deemed essential to the fair and full trial of the case shall be passed upon by the jury, if the parties, or either of them, require it. And whether the facts proposed to be so tried are essential or not, must of necessity be determined by the court. There may be many facts stated in a bill and denied in an answer, and also facts alleged in the answer, which are wholly immaterial to the merits of the case, and such facts the court may refuse to put to the jury; just as, in an action at common law, if a party offers to prove facts which are irrelevant, the court may reject the proof; and as immaterial issues, even after verdict, may be rejected as nugatory. The right of the party to go to the jury is preserved, if he is allowed that course in regard to all such facts as have a bearing upon the issue

"when an issue in fact, proper for the cognizance of a jury, is joined in a court of law, the parties have a right to a trial by jury, which ought to be held sacred."[4] Whether this provision has ever been adjudged to extend to proceedings in equity, subsequent to the creation of a Court of Chancery in that State, we are not informed. In the constitution of Virginia, the language is more general; it being declared, that, "in controversies respecting property, and suits between man and man, the ancient trial by jury of twelve men is preferable to any other, and ought to be held sacred.[5] In that of California, it is provided, that, "the right of trial by jury shall be secured to all, and remain inviolate for ever; but a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law."[6] By the constitution of New York, it is to remain inviolate for ever, "in all cases in which it has been heretofore used;" unless waived in civil cases by the parties.[7] But by the force of subsequent provisions of the Code of Procedure, abolishing the distinction between proceedings in equity and at law, it is conceived that the facts, in all cases, may be tried by jury, if demanded.[8] Undoubtedly they may be in Louisiana, where this right is granted generally, in all cases, if required by either party;[9] and probably, also, in those other States where the sole remedy is by petition and answer, no distinction existing between remedies in equity and at law; as in the case in California and Georgia, and in the other States before mentioned. In Delaware, it is required by the constitution that "trial by jury shall be as heretofore;" but it seems to be extended, by statute, to all cases.[10] In the States of Rhode Island, Connecti-

for trial." In New Hampshire, the question, whether the defendant, in a bill in equity, has a constitutional right to a trial by jury, of the material facts in issue, was a point directly in judgment, and was decided in the affirmative: Marston *v.* Brackett, 9 N. H. 336, 349. And see N. H. Rev. St. 1842, c. 171, § 8.

[4] Vermont, Const. (1793), c. 1, art. 12.

[5] Virginia, Const. (1796, 1851), Bill of Rights, § 11.

[6] California, Const. (1849), art. 1, § 3, St. 1850, c. 142, §§ 136, 160.

[7] New York, Const. (1846), art. 1, § 2.

[8] N. Y. Code of Procedure, §§ 62, 208, 221, 225, [252, 266, 270]; Lyon *v.* Ayres, 1 Code Rep. N. S. 257.

[9] Louisiana, Code of Practice, §§ 494, 495; Texas, Const. (1845), art. 4, §§ 16, 18, 19; ib. art. 1, § 12.

[10] Delaware, Const. (1831), art. 1, § 4. In the constitution of this State, in 1776, it was declared, "That trial, by jury, of facts, where they arise, is one of the greatest securities of the lives, liberties, and estates of the people:" Declaration of Rights, art. 13. And accordingly, in the Revised Statutes of 1852, c. 95, § 1, it is enacted, that "where matters of fact, proper to be tried by jury, shall arise in any cause depending in chancery, the Chancellor *shall* order such facts to trial by issues at the bar of the Superior Court."

cut, New Jersey, Florida, Mississippi, Tennessee, Kentucky, Ohio, Alabama, Missouri, Arkansas, Texas, and Iowa, the *constitutional* provision is simply, that "the right of trial by jury shall remain inviolate;" the words being in each constitution nearly the same, and without qualification.[11] The same provision exists in the constitution of Indiana, where it is expressly extended to all civil cases; in those of Maryland, Illinois, and Wisconsin, where it is applied only to "all cases at law," or to "civil proceedings in courts of law;" and in those of South Carolina and Georgia, where it is qualified by the addition of the words "as heretofore used in this State." It is qualified in a similar manner in the constitution of Pennsylvania.[12] In the constitution of Michigan, it is provided, that "the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties, in such manner as shall be prescribed by law," — a provision apparently copied from that in New York, with a studious omission of the words "in all cases in which it has been heretofore used."[13]

§ 265. **Same Subject.** In other States, as well as in some of those above mentioned, the right of trial by jury, in all civil cases, without exception, is further secured by statute. Thus, in the code of Iowa, it is enacted, that issues of fact shall be tried by the court, *unless* one of the parties require a jury.[1] And in North Carolina, it is made "the duty of the court to direct the trial of such issues as to the court may appear necessary, according to the rules and practice in chancery, in such cases."[2] In Georgia, the superior and inferior courts, which are courts of general jurisdiction in civil cases, both at law and in equity, have "full power and authority" to hear and determine all causes in their respective tribunals by jury;[3] and the course of such trials,

[11] Rhode Island, Const. (1842) art. 1, § 15; Connecticut, Const. (1818) art. 1, §21; New Jersey, Const. (1844) art. 1, § 7; Florida, Const. (1838) art. 1, § 6; Mississippi, Const. (1817, 1832) art. 1, § 28; Tennessee, Const. (1796, 1835) art. 1, § 6; Kentucky, Const. (1799) art. 13, § 8; Ohio, Const. (1802, 1851) art. 1, § 5; Alabama, Const. (1819) art. 1, § 28; Missouri, Const. (1821) art. 11, § 8; Arkansas, Const. (1836) art. 2, § 6; Texas, Const. (1845) art. 1, § 12; Iowa, Const. (1844) art. 2, § 9.

[12] Indiana, Const. (1816, 1851) art. 1, § 20; Maryland, Const. (1851) art. 10, § 4; Illinois, Const. (1818, 1847) art. 13, § 6; Wisconsin, Const. (1848) art. 1, § 5; South Carolina, Const. (1790) art. 9, § 6; Georgia, Const. (1798, 1839) art. 4, § 5; Pennsylvania, Const. (1838) art. 9, § 6.

[13] Michigan, Const. (1836, 1850) art. 6, § 27.

[1] Iowa, Code of 1851, § 1772.

[2] North Carolina, Rev. Stat. 1836, vol. i. c. 32, § 4.

[3] Hotchk. Dig. p. 529, § 149; 1 Cobb's Dig. p. 463.

in cases in equity, is provided for by the general rules in equity.[4]

§ 266. **Same Subject.** In view of these express declarations respecting the great value of the trial by jury, and of the sacredness of the right, and the care taken for its preservation, no one will deny that it is a mode of trial highly favored, and intimately connected with the general welfare. And therefore it may deserve to be considered, whether in those States where courts of equity are "authorized and empowered," or "permitted," to direct issues to the jury for the trial of material facts, it be not their duty so to do, and whether the parties may not demand it of right; unless, perhaps, in those cases where the statute expressly leaves it in the discretion of the court, — it being the well-known rule of law, that words of permission, in a statute, if tending to promote the public benefit, or involving the rights of third persons, are always held to be compulsory.[1] Such permission and authority to direct a trial by jury, "if there be an issue as to matter of fact, which shall render the intervention of a jury necessary," is found in the statute of Arkansas, and is copied, in nearly the same words, in that of Wisconsin.[2] In Alabama, the courts, sitting in chancery, "may direct an issue or fact to be tried whenever they judge it necessary."[3] In Virginia, "any court, wherein a chancery case is pending, may direct an issue to be tried in such court, or in any circuit, county, or corporation court."[4] The precise construction of these provisions, and whether they would justify the court in refusing to grant a trial of material facts by jury, when claimed by the parties, yet remains to be settled. Probably few judges, at the present day, in any State where the law is not perfectly clear against it, would venture to deny such an application, in a case *proper* for a jury, nor to disregard the verdict, if fairly rendered,

[4] Hotchk. Dig. pp. 953, 954, Reg. 1, 6.

[1] So held in R. *v.* Mayor, etc. of Hastings, 1 D. & R. 148, where the words were "*may have power* to have and hold a court of record," etc. So, where the church-wardens and overseers *shall have power and authority* to make a rate to reimburse the constable: R. *v.* Barlow, 2 Salk. 609. So, where the Chancellor *may* grant a commission of bankruptcy: Backwell's Case, 1 Va. 152. So, where the trustees of a public charity, under the will of the founder, *may* remove a pensioner, for certain causes: Att'y-Gen. *v.* Lock, 3 Atk. 164. And see Newburg Turnp. Co. *v.* Miller, 5 Johns. Ch. 113; R. *v.* Commissioners of Flockwold, 2 Chitty 251; Dwarris on Stat. 712; R. *v.* Derby, Skin. 370; 1 Kent Comm. 517; Simonton, *Ex parte*, 9 Port. 390; Malcolm *v.* Rogers, 5 Cowen 188; 1 Pet. 64.

[2] Arkansas, Rev. St. 1837, c. 23, § 64. Cf. Dig. of Stat. § 4642; Wisconsin, Rev. St. 1849, c. 84, § 31.

[3] Toulm. Dig. 487; English's Dig. c. 28, § 62.

[4] Virginia, Rev. Code, 1849, c. 177, § 4 and n.

upon a legal trial. And in proportion to the *duty* of directing an issue to the jury, is the obligation on the judge to be governed by their verdict.[5]

[5] [The decisions of the various States on this subject are very conflicting. In a general way, it may be said that the distinction given by Mr. Greenleaf in the text divides the cases into two classes, and that in those States where it is held the duty of the judge to direct an issue for the jury on application of a party, the verdict of the jury is binding on him as to those facts which it finds, and he can only administer the law on those facts; but that where the judge may in his discretion direct a jury trial, there he may also, *sua sponte*, disregard the findings of the jury. Probably the latter is the more general rule in the United States, notwithstanding the provisions in the State Constitutions and Statutes, referred to by Mr. Greenleaf.

A short review of the law and decisions in some of the various States on this point, is as follows: —

It is now settled in Maine by statute of 1873, c. 130, that either party may of right have an issue directed for a jury in all cases in equity: Call *v.* Perkins, 65 Me. 439.

But in Massachusetts the English Chancery practice prevails, and neither party has an absolute right to have an issue directed for a jury: Ward *v.* Hill, 4 Gray 593; Crittenden *v.* Field, 8 id. 621; Brooks *v.* Tarbell, 103 Mass. 496; Ross *v.* New England Ins. Co., 120 id. 113. But by a slightly anomalous turn of the decisions, if an issue is directed, it should comprise all the questions in the case which are proper for the jury to consider, and the verdict will settle the facts conclusively. Thus in Franklin *v.* Greene, 2 Allen 522, Chapman, J., says: "In this Commonwealth, the right of trial by jury is secured by the Constitution. In suits in equity the issues do not grow out of the pleadings as in suits at law, but are framed by the court; yet in framing the issues the court will have regard to the constitutional provision, and will allow the parties to submit to a jury all such material facts as are proper to be decided by them; and when a verdict is rendered, and not set aside for good cause shown, it will be regarded as settling the facts conclusively."

In New Hampshire, as is stated by Mr. Greenleaf, *ante*, § 264, note 3, it is decided that the defendant in a bill in equity has a constitutional right to a trial by jury, of the material facts in issue: Tappan *v.* Evans, 11 N. H. 334; Dodge *v.* Griswold, 12 id. 573.

In Minnesota it has been held that the verdict of a jury on matters submitted to it by a court of equity is binding on the court: Marvin *v.* Dutcher, 26 Minn. 391.

In Oregon it is said that the judge sitting in equity should not disregard the verdict of the jury, unless it is shown by some of the parties to be erroneous: Swegle *v.* Wells, 7 Oreg. 222.

In Georgia it is held that causes in equity are not within the provision of the State Constitution requiring all civil cases to be tried in the county in which the defendant resides: Jordan *v.* Jordan, 12 Ga. 77. Where titles to property are in dispute before a Court of Chancery, a jury alone is competent to determine the real truth of the fact: McDougald *v.* Dougherty, 11 id. 570; Mounce *v.* Byars, ib. 180; Brown *v.* Burke, 22 id. 574. But it is also held that if a case is referred to an auditor, and his report is not excepted to, and does not present any issue for a jury, the right of trial by jury, as preserved in the Constitution, is not infringed by the court pronouncing a decree without any jury trial: Cook *v.* Houston, County Comm'rs, 62 id. 223.

In North and South Carolina the verdict is not considered binding on the judge: Charlotte, etc. R. R. Co. *v.* Earle, 12 S. C. 53; Ivy *v.* Clawson, 14 id. 267; Gadsden *v.* Whaley, 9 id. 147; Humphreys *v.* Ward, 74 N. C. 784.

The same rule prevails in Pennsylvania (Baltimore *v.* Pittsburgh, etc. R. R. Co., 3 Pitts. (Pa.) 20); New Jersey (Holcomb's Executors *v.* New Hope D. B. Co., 1 Stockt. (N. J.) 457). In Virginia (Hord *v.* Colbert, 28 Gratt. (Va.) 49), it is held to be wholly discretionary with the judge whether he will direct an issue for a jury.

In most of the States of the Mississippi Valley, the old chancery rule prevails, that the judge may direct an issue or not, and may disregard it if he wishes; *e. g.* in Missouri, (Durkee *v.* Chambers, 57 Mo. 575); in Wisconsin (Stanley *v.* Risse, 49 Wis. 219; Waterman *v.* Dutton, 5 id. 413); in Illinois (Sibert *v.* McAvoy, 15 Ill. 106; Williams *v.* Bishop, ib. 553); Indiana (Lapreese *v.* Falls, 7 Ind. 692). And so in Maryland (Hoffman *v.* Smith, 1 Md. 475); in California (Wakefield *v.* Bouton, 55 Cal. 109; Bates *v.* Gage, 49 id. 127; Walker *v.* Sedgwick, 5 Cal. 192); in Colorado

§ 267. **Differences between English and American Proceedings.** Thus it appears, that the regular course of chancery proceedings, as heretofore used in England, is not strictly followed in any State of the Union. In some States, the proceedings in chancery are by bill and answer, the common-law remedy being by writ, as before; in others, there is but one, and that a brief form of remedy, pursued alike in all cases. In some, the parties may examine each other as witnesses; in others, this is not permitted. In some, the witnesses may be examined in court, *viva voce*, as at law; in others, the testimony is always taken in writing, either in open court, by the clerk or the judge, or in depositions, after the former method. In the latter case, however, there is this further diversity of practice, that, in some States, the parties may examine and cross-examine the witnesses, *ore tenus*, before the magistrate or commissioner; in others, they may only propound questions in writing, through the commissioner; in others, they may only be present during the examination, and take notes of the testimony, but without speaking; while in others, the parties are still excluded from the examination. In some of the States, also, it is required that all matters of fact, in all cases, shall be tried by the jury; in others, it is at the option of the parties; in others, it is apparently left in the discretion of the court; but with plain intimations that it ought not to be refused, unless for good cause. Other changes in the course of chancery proceedings might be mentioned; but these will suffice to show how difficult it is, if not impossible, to prepare a complete system of the law of evidence in equity, adapted alike to all the States in the Union. An approximation to this result is all that the author can hope to attain.

(Abbott *v.* Monti, 3 Col. 561); in Utah (Smith *v.* Richardson, 2 Utah 424), and in New Mexico (Huntington *v.* Moore, 1 N. Mex. 489).

In New York the distinction between trials at law and causes in equity having been abolished, renders the distinction of small value. As illustrating this point, however, it may be said that it was held in Wheelock *v.* Lee, 74 N. Y. 495, that where a plaintiff has drawn his complaint as for an equitable cause, and the case as proved is not one of equitable jurisdiction, but is a good action at law, the court cannot make a decree for the legal damages, but must allow the defendant an opportunity to claim a jury trial on the legal cause of action.] [See also *ante*, § 261, n. 3.]

NOTE.

[The English practice is now governed by the rules of 1883.]

CHAPTER II.

OF THE SOURCES, MEANS, AND INSTRUMENTS OF EVIDENCE.

§ 268. **Enumeration.** The SOURCES OF EVIDENCE in equity are principally four: namely, first, the intelligence of the court, or *the notice which it judicially takes* of certain things, and the *things which it presumes;* secondly, the *admissions of the parties*, contained in their *pleadings and agreements;* thirdly, *documents;* and, fourthly, *the testimony of witnesses.*

§ 269. 1. **Things judicially taken Notice of and presumed.** The first of these, namely, THINGS JUDICIALLY TAKEN NOTICE OF, has already been briefly treated in a preceding volume.[1] The principle on which such notice is taken, is the universal notoriety of the facts in question. These are sometimes distributed into two classes, composed of those things of which the court *suo motu* takes notice, and those of which it does not *suo motu* take notice, but expects its attention to be directed to them by the parties; in which latter class are enumerated those local and personal statutes, in which it is enacted, that they shall be judicially taken notice of without being specially pleaded; journals of the two houses of the legislature, public proclamations, public records, etc. But this distinction is of little or no practical importance; since, in the progress of every trial, the attention of the court is always called alike to all matters within its cognizance, which the parties or their counsel deem material to their respective interests, to whichsoever of those two classes they may seem to belong; and whenever a document or writing is required to aid the recollection of the court, it is generally provided beforehand for the occasion. It is, for example, wholly immaterial, in the final result, whether the facts of public and general history and their dates are recognized by the court *suapte sponte*, the books and chronicles or almanacs being used merely to aid the memory; or whether they will remain unnoticed until suggested by the parties and verified

[1] *Ante*, Vol. I. [§§ 3 *a*–6 *e*, 479.]

by the books; or whether the books themselves are adduced by the parties and admitted by the court as instruments of evidence, in the nature of public documents; the process and the result being in each case the same.[2] Neither is it possible to distinguish *a priori*, between those subjects of science which are *in fact* of such notoriety as entitles them to be judicially recognized, and those which are not; nor between those things which ought to be generally known, and those, the knowledge of which is not of general obligation; since each particular case must be decided by the judge as it occurs, and he can have no other standard than the measure of his own information or learning, — a standard subject to variations as numerous as the individuals by whom it is to be applied. This standard also must be liable to constant changes with the advancement and gradual diffusion of science; many things which formerly were occult, and to be proved by experts, as, for example, many facts in chemistry, and the like, being now, in the same places, matters of common learning in the public schools. The same may, in some degree, be said of every branch of physical science, of geographical knowledge, and of the religion and customs of foreign nations. A different application of the rule may also be requisite in different parts of the same country or government, as, for example, Maine and California, or England and Australia, or India.

§ 270. **Same Subject.** In regard to *the means or instruments to which resort is usually had by the court for the more accurate recollection of matters of general notoriety*, it may be observed, that the preamble of a public statute will ordinarily be sufficient for the knowledge of any general fact it recites,[1] any communication from the Secretary of State will suffice, as to the precise state of our relations with a foreign government;[2] the government Gazette, for the dates of public events, such as proclamations of war or peace, signature of treaties, terms of capitulations, and the like;[3] the diplomatic communications of our ministers abroad, for the relations of foreign governments to each other;[4] and, generally, public documents for the public facts they contain.[5]

§ 271. **Same Subject.** In taking notice of the *common and un-*

[2] *Ante*, Vol. I. § 497.
[1] Doct. & St. B. 2, c. 55; 1 Inst. 19 *b*; R. *v.* Sutton, 4 M. & S. 542.
[2] Taylor *v.* Barclay, 2 Sim. 220. And see *ante*, Vol. I. §§ 6, 490, 491.
[3] *Ante*, Vol. I. § 492.
[4] Thelluson *v.* Cosling, 4 Esp. 266.
[5] *Ante*, Vol. I. §§ 6, 490, 491.

written law or customs of the country, resort is had to the reported judgments of the courts, and to the great text-books, such as the writings of Bracton, Lord Coke, Lord Hale, Sir Michael Foster, Fitzherbert, and others. There is, however, a diversity in the degrees of credit given to books of reports and to the judgments themselves, arising from the character of the reporter and of the court.[1] The judgments of courts of appellate and ultimate jurisdiction are regarded as binding by those courts whose decisions they are authorized to revise and reverse. And judges, sitting at *Nisi Prius*, will not overrule or disregard the decisions *in banc* of their own courts. But the decisions of other courts of co-ordinate rank and authority, and the decisions of the courts of other States, are not generally regarded as of binding force, or as conclusive evidence of the common law; but are read and respected according to the estimation in which the tribunals are held.

§ 272. **Presumptions.** The subject of *presumptions* having been treated in a previous volume,[1] what is there stated needs no repetition here. Wherever the entire case is heard and decided by the judge or chancellor, without a jury, all inferences which jurors might draw, and all things which they may lawfully presume, will be drawn and presumed by the court.

§ 273. 2. **Admissions.**[1] In the *second place*, as to ADMISSIONS MADE BY THE PARTIES. These are either in the *bill*, or in the *answer*, or in some *special agreement*, made in the cause, for the purpose of dispensing with other proof. And statements in the bill may sometimes be used against the plaintiff, and at others, in his favor.

§ 274. **Original Bill.** An ORIGINAL BILL, praying relief, is so framed as to set forth the rights of the plaintiff; the manner in which he is injured; the person by whom it is done; the material circumstances of the time, place, manner, and other incidents; and the particular relief he seeks from the court.[1] It consists of several parts, the principal of which is termed the *premises*, or *stating part*, and contains a full and accurate narrative of the

[1] See, on the estimation of authorities, Ram on Legal Judgment, c. 18, per tot. {See also Mr. Wallace's work, "The Reporters Chronologically Arranged; with Occasional Remarks upon their Respective Merits" (3d ed. 1855). See also Bishop, First Book of the Law, § 560; Bouvier's Law Dictionary, "Reports."}

[1] *Ante*, Vol. I. c. [VI. § 14 *w*.]

[1] [See *ante*, Vol. I. §§ 171, 186.]

[1] Story, Eq. Pl. § 23.

facts and circumstances of the plaintiff's case, upon which the ultimate decree is founded. Ordinarily, the bill is drawn by the solicitor, upon the general instructions given by his client, and is signed by the solicitor only; and hence it has been regarded as the mere statement of counsel, frequently fictitious, and hypothetically constructed, in order to extract a more complete answer from the defendant. On this ground it has been laid down as a rule in England, that, "generally speaking, a bill in chancery cannot be received as evidence in a court of law, to prove any facts either alleged or denied in such bill;" though the rule is admitted to be subject to some exceptions.[2] But as this rule is avowedly founded on the assumption, that the statements in the bill are, in most cases at least, partially false, but permitted for the sake of eliciting truth, or are made upon misinformation, and to be afterwards corrected by amendment upon better knowledge, it is plain that the rule ought to be restricted to cases falling within the principle on which it is founded; namely, to allegations of facts not lying within the peculiar knowledge of the counsel. But in England, since the adoption of this rule, and in the United States for a longer period, the use of fictions in pleading has been pointedly reprobated, and much effort has been employed, both by courts and legislatures, to obtain a simple statement of the truth, in all legal proceedings; and the success which has crowned these endeavors has materially weakened the reason of the rule, so far as it regards facts in the knowledge of the party alone, and not of his counsel. But however this may be, it is to be observed, that in some of the United States bills are usually signed by the party, as well as by counsel; that some of the facts are ordinarily within the peculiar knowledge of the counsel, and not of the party; and that, in certain cases, either the bill itself is sworn to, or it is accompanied by an affidavit, stating the material facts. Such is the case in some bills of discovery, bills to obtain the benefit of

[2] See the answer of the judges, in the Banbury Peerage Case, 2 Selw. N. P. 744. Mr. Phillips, in the earlier editions of his work on Evidence, states the rule as well settled without qualification; but in the latest edition, after observing that the authorities are contradictory upon this subject, he only remarks that "it seems to be the more prevalent opinion" that a bill in chancery cannot be used at law as the admission of the plaintiff: 2 Phil. Ev. 28 (9th ed.). Mr. Justice Buller held it admissible in all cases where there had been proceedings upon the bill: Bull. N. P. 235. But in several American cases, it has been rejected, in trials at law, on the ground that many of the facts stated were merely the suggestions of counsel. See Owens *v.* Dawson, 1 Watts 149; Rees *v.* Lawless, 4 Litt. 218; Beldon *v.* Davies, 2 Hall (N. Y.) 444. If the bill has been sworn to, it is conceded to be admissible. See Rankin *v.* Maxwell, 2 A. K. Marsh. 488; Chipman *v.* Thompson, Walk. Ch. 405.

lost instruments, and some others. Now, in all these and the like cases, it is not easy to perceive why the statements in the bill, considerately made, of facts known to the persons making them, should not be received elsewhere, against the party, as evidence of his admissions of the facts so stated.[3] Where the statement

[3] [Wadsworth *v.* Duncan, 164 Ill. 360.] In Lord Trimlestown *v.* Kemmis, 9 Cl. & Fin. 749, 777, 779, 780, which was a writ of error on a judgment, in ejectment, the defendant put in evidence a deed of compromise between the widow of the plaintiff's ancestor and the lessor of the plaintiff, showing their dealings with the property in question; and then offered in evidence a bill in chancery, filed by the administrator of the same ancestor against the same lessor, as his agent, and the decree thereon, *to explain* one of the items of account, in the schedule referred in that deed of compromise; and for this purpose the bill was held admissible. The plaintiff also offered in evidence, by way of reply, a bill in chancery filed against one of his ancestors, respecting the same premises, and the answer of his ancestor, stating what he had heard his grandmother, who was a jointress in possession of part of the lands, say, in regard to her refusing to join her son in any alienation of the estate. This evidence was held rightly rejected, as being *hearsay;* though it was conceded that, had it been the declaration of a *party* in possession of the estate, and made *against* his own interest, it might have been received.

In the subsequent case of Boileau *v.* Rutlin, 2 Exch. 665 (1848), which was assumpsit for use and occupation, the defence was that the defendant had occupied under an agreement to purchase. Though he had given notice to the plaintiff to produce this agreement, he did not call for it, but in proof of it he put in a bill and other proceedings in a suit in chancery brought by the plaintiff against him, for not performing that agreement, and stating its terms. This was objected to, but was admitted by Ld. Denman, as some evidence of the contract, reserving the point. On a motion for a new trial for this cause, after a full consideration of the subject, the evidence was held inadmissible, upon grounds stated by Parke, B., as follows: —

"It is certain that a bill in chancery is no evidence against the party in whose name it is filed, unless his privity to it is shown. That was decided in Woollet *v.* Roberts (1 Ch. Ca. 64), though no such decision was wanted. The proceedings on such a bill, after answer, tend to diminish the presumption that it might have been filed by a stranger, and appear to have been held sufficient to establish the privity of the party in whose name it was filed: Snow *d.* Lord Crawley *v.* Phillips (1 Sid. 220). When that privity is established, there is no doubt that the bill is admissible to show the fact that such a suit was instituted, and what the subject of it was; but the question is, whether the statements in it are any evidence against the plaintiff of their truth, on the footing of an admission. Upon this point the authorities are conflicting. In the case referred to in Siderfin, it would seem that the bill, which was filed by the defendant to be relieved from a bond as simoniacal, was used against him to prove that he was simoniacally presented; but it does not very distinctly so appear. In Buller's Nisi Prius (p. 236), a bill in chancery is said to be 'evidence against the complainant, for the allegations of every man's bill shall be supposed to be true; and therefore it amounts to a confession and admission of the truth of any fact; and if the counsel have mingled in it any fact that is not true, the party may have his action.' And, after referring to the conflicting authority in Fitzgibbon, 196, the author of that treatise on the law of Nisi Prius lays it down as a clear proposition, that where the matter is stated by the bill as a fact on which the plaintiff founds his claim for relief, it will be admitted in evidence, and will amount to proof of a confession. These are the authorities in favor of the defendant. The recent case of Lord Trimlestown *v.* Kemmis (9 C. & F. 749), which was also mentioned, is not one in his favor, for the bill was there admitted to show what the subject of the suit was, and to explain a subsequent agreement for a settlement between the parties. On the other hand, in the above-mentioned case of Lord Ferrers *v.* Shirley (Fitz. 195), a bill preferred by the defendant, stating the existence of a deed at that time, was objected to as proof of that fact, on the ground that it was no more than the surmise of counsel for the better discovery of the title; and the court would not suffer it to be read. And Lord Kenyon, in Doe *d.* Bowerman *v.* Sybourn (7 T. R. 2), where the distinction was insisted upon between facts stated by way of inducement, and those whereon the plaintiff founds his claim for relief, rejected that

has been sworn to, it constitutes a clear exception to the rule; and in either case it is ordinarily not conclusive, but open to explanation.[4]

distinction, and pronounced his judgment, in which the court acquiesced, that a bill in chancery is never admitted further than to show that such a bill did exist, and that certain facts were in issue between the parties, in order to let in the answer or depositions. And it appears that in Taylor *v.* Cole (7 T. R. 3, n.) his Lordship held the same doctrine; with the exception, that a bill in chancery by an ancestor was evidence to prove a family pedigree stated therein, in the same manner as an inscription on a tombstone, or an entry in a Bible. This exception also was disallowed by the opinion of the judges in the Banbury Peerage Case (reported in 1 Selwyn's Nisi Prius, 756 (20th ed.), and correctly reported, for I have examined the books of the Committee of Privileges, 28th February, and 30th of May, 1809). The judges unanimously held, that a bill in equity was no proof of the facts therein alleged, or as a declaration respecting pedigree; that it made no distinction that the bill was filed for relief. And, in answer to the question whether any bill in chancery can ever be received as evidence in the court of law, to prove any facts either alleged or denied in such bill, the judges gave their opinion that, generally speaking, a bill in chancery cannot be received as evidence to prove any fact alleged or denied in such bill. But whether any possible case might be put which would form an exception to such general rule, the judges could not undertake to say. In the case of Medcalfe *v.* Medcalfe (1 Atk. 63), Lord Chancellor Hardwicke held, that the rule of evidence at law was, that a bill in chancery ought not to be received in evidence, for it is taken to be the suggestion of counsel only; but in the Court of Chancery it had been often allowed, and the bill was read. This distinction was afterwards repudiated in the case of Kilbee *v.* Sneyd (2 Molloy 208), by Lord Chancellor Hart. When the defendant's counsel offered to read part of the bill, as proof of certain facts on which he rested part of his defence, the Lord Chancellor said, the court never read a bill *as evidence* of the plaintiff's knowledge of a fact. 'It is mere pleader's matter; the statements of a bill are no more than the flourishes of the draughtsman;' and that no decree was ever founded on the allegations of a plaintiff's bill as evidence of facts; and he further said, that the statements of a bill are not evidence, and the registrar could not enter any part of it on his notes as read. In this state of the authorities directly bearing upon this question, there can be no doubt that the weight of them is against the reception of a bill in equity as an admission of the truth of any of the alleged facts. But it was argued that there are many more recent authorities indirectly bearing upon this question, which afford a strong analogy in favor of the reception of a bill in equity as evidence in the nature of a confession. These are the cases of Brickell *v.* Hulse (7 A. & E. 454) and Gardner *v.* Moult (10 id. 464). In the first of these, a party using an affidavit on a motion, in the second, by sending another to state a particular fact, was held to make the affidavit and statement, respectively, evidence against himself. These cases do not fall under the description of pleadings by parties; they are rather instances of admission by conduct, and are analogous to those in which the declarations of third persons are made evidence by the express reference of the party to them as being true. This is the explanation very rightly given in Mr. Taylor's recent Treatise on Evidence. In the first of the above-mentioned cases it may be presumed that the defendant prepared the affidavit, which he afterwards exhibited as true; at all events, that he exhibited it *for the purpose of proving a certain fact.* In the second, it must be taken that he sent the servant to prove *a particular act of bankruptcy;* for, if he sent him to be examined as a witness, and to give evidence generally as to any act to which the commissioner might examine him, there could be no reason for holding that his answers would be evidence against the party, any more than there would be for receiving the evidence of a witness examined by a party in an ordinary trial at law, as an implied admission by him, which, it is conceded, can never be done. (See Lord Denman's judgment in both the cases last cited.) The case of Cole *v.* Hadly (11 A. & E. 807) was also referred to as an authority. From the short report of that case, it is not clear on what ground the evidence was received. It would seem that it was received as the deposition of a witness on a prior inquiry, between the same parties, on the same question. It could not be on the ground that the statement was evidence

[4] See *ante,* Vol. I. §§ 212, 551.

§ 275. **Bill Evidence for Defendant.** In courts of equity, however, *the bill may be read as evidence for the defendant*, of any of the matters therein directly and positively averred.[1] For it is a part of that record upon the whole of which the decree is to be made; and whether the allegations be true or not, is immaterial, they being put forth as true, and of the nature of judicial admissions, for the purposes of that particular trial.[2] But it is only the amended bill that may thus be read, this alone being of record; unless the amendment has altered the effect of the answer, or rendered it obscure; in which case the original bill may be read

against the party, simply because the witness was produced by him, as the contrary was laid down in the two cases of Brickell *v.* Hulse and Gardner *v.* Moult, which were referred to. These authorities, therefore, afford no reason for doubting the propriety of the decisions above referred to as to bills in equity. It would seem that those, as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied to be proved, and ultimately submitted for judicial decision. The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated. Many cases were suggested in the argument before us, of the inconveniences and absurdities which would follow from their admission as evidence in other suits, of the truth of the facts stated. There is, however, we believe, no direct authority on this point. The *dictum* of Lord Chief Justice Tindal, in the Fishmonger's Company *v.* Robertson (5 M. & G. 192), which was referred to in argument, seems to be considered as amounting to a decision on this point; but it was unnecessary for the determination of that case. It is enough, however, to say, that, as to bills in equity, the weight of authority is clearly against their admissibility, for the only purpose for which they were material in the present case; and we are bound by that authority:" 2 Exch. 676–681.

From these and other authorities, it seems clear, that the bill, *if sworn to*, is evidence against the plaintiff as an admission of the truth of the facts therein stated. Its admissibility, however, does not depend on the oath, but on the fact that he is conusant of the statements in the bill, and solemnly propounds them as true. The oath is a proof of this knowledge and solemn assertion; but may not other evidence be equally satisfactory? If so, the question is reduced to the single point of the plaintiff's knowledge of what is contained in the bill; unless it be maintained that, notwithstanding the present state of forensic law, parties are still at liberty to allege as true, material propositions of fact which they know to be false. It is therefore conceived that, in the United States, and under the new rules of practice, the general question, as stated in Boileau *v.* Rutlin, may still be regarded as an open question. There was another ground on which the bill in chancery in Boileau *v.* Rutlin might well have been rejected; namely, that the admission it contained was a *confessio juris*, or, at most, a mixed proposition of law and fact, which is not to be proved by the mere admission of the party, when better evidence is within the power of the adverse party, by the production of the instrument itself. See *ante*, Vol. I. § 96.

[1] 2 Dan. Ch. Pr. 974, 976, 5th (Am.) ed. vol. i. *838, *840; Ives *v.* Medcalfe, 1 Atk. 63, 65. Such, also, was the opinion of Lord Chancellor Apsley, afterwards Earl Bathurst, the real author of the book so well known as Buller's Nisi Prius; as appears from the dedication of the first edition, and from Lord Mansfield's manner of quoting it, in 5 Burr. 2832. See Bull. N. P. 235; 2 Exch. Rep. 677, n.; *ante*, Vol. I. § 551.

[2] See *ante*, Vol. I. §§ 169, 186, 208; {Jones *v.* Thacker, 61 Ga. 329.}

by the defendant, for the purpose of explaining the answer.[3] It may also be read, upon the question as to costs, for the purpose of showing *quo animo* the bill was filed.[4] And the plaintiff's bill, filed in another suit, may sometimes be read against him, on proof of his actual privity to the contents and to the filing of it; especially where it is read in explanation or corroboration of other evidence in the cause.[5] But where the plaintiff has incorrectly stated circumstances with which he may well be presumed to have been unacquainted, and the defendant does not rely upon them in his answer, the plaintiff will not be held bound by the statement.[6]

§ 276. **For Plaintiff.** The *bill* alone may also sometimes be *read by the plaintiff, as evidence against the defendant*, of his admission of the truth of the matters therein alleged, and not noticed in his answer. The principle, governing this class of cases, is this, that the defendant, being solemnly required to admit or deny the truth of the allegations, has, by his silence, admitted it. "Qui tacet, cum loqui debet consentire videtur." But this applies only to facts either directly charged to be within the knowledge of the defendant, or which may fairly be presumed to be so;[1] for if the matters alleged are not of either of these descriptions, the better opinion is, that the defendant's omission to notice them in his answer is merely matter of exception on the part of the plaintiff, in order to obtain a distinct admission or denial, upon the particular point.[2] If he replies, instead of excepting, he must prove the allegations.[3]

[3] 2 Dan. Ch. Pr. 976, 5th (Am.) ed. vol. i. *839; Hales *v.* Pomfret, Dan. Exch. 141. And see McGowen *v.* Young, 2 Stewart 276.

[4] Ibid.; Fitzgerald *v.* O'Flaherty, 1 Moll. 347.

[5] 2 Dan. Ch. Pr. 977, 5th (Am.) ed. vol. i. *839; Woollet *v.* Roberts, 1 Ch. Cas. 64; Handeside *v.* Brown, 1 Dick. 236; Lord Trimlestown *v.* Kemmis, 9 Cl. & Fin. 749.

[6] Wright *v.* Miller, 1 Sandf. Ch. 103.

[1] 2 Dan. Ch. Pr. 977, n. by Perkins, 5th (Am.) ed. vol. i. *839; Thorington *v.* Carson, 1 Porter 257; Kirkman *v.* Vanlier, 7 Ala. 217; Ball *v.* Townsend, Litt. Sel. Ca. 325; Moseley *v.* Garrett, 1 J. J. Marsh. 212; Tobin *v.* Wilson, 3 id. 63; Pierson *v.* Meaux, 3 A. K. Marsh. 4. And see *ante*, Vol. I. § 171, n.

[2] Ibid. And see Tate *v.* Connor, 2 Dev. Ch. 224; Lunn *v.* Johnson, 3 Ired. Ch. 70; Cropper *v.* Burtons, 5 Leigh 426; Coleman *v.* Lyne, 4 Rand. 454; {Ingram *v.* Tompkins, 16 Mo. 399; Lyon *v.* Bolling, 14 Ala. 753; Hardy *v.* Heard, 15 Ark. 184; Ryan *v.* Melvin, 14 Ill. 68.}

[3] Cochran *v.* Couper, 1 Harringt. 200. {So in Wilson *v.* Kinney, 14 Ill. 27, and in Trenchard *v.* Warner, 18 id. 142.} In Young *v.* Grundy, 6 Cranch 51, it was said, in general terms, that if the answer neither admits nor denies the allegations in the bill, they must be proved at the hearing; the distinction taken in the text not being adverted to, as the case did not call for it. {Distinct and positive allegations in a bill taken *pro confesso* must be taken as true without proof, as in case of a judgment

If the defendant, being duly served with a *subpœna*, contumaciously neglects to appear and answer;[4] or moves to dismiss the bill, on the ground that the claim is barred by lapse of time; or answers evasively, — the allegations will be taken as admitted.[5] And where the plaintiff reads the defendant's answer in evidence against him, he may also read so much of the bill as is necessary to explain the answer.[6]

§ 277. **Answer as Evidence.** The ANSWER *of the defendant*, being a deliberate statement on oath, is *evidence against him* of all the matters it contains; and is extremely strong, though not so entirely conclusive as to preclude him from showing that it was made under an innocent mistake.[1] And it may be read, notwithstanding the plaintiff, by his replication, has denied the truth of the whole answer.[2]

§ 278. **Same Subject.** But it is only the answer of a person *sui juris* that can be treated as an admission of the facts, so far as to dispense with other proof of them; and therefore the

by *nil dicit* at common law. This doctrine applies with equal force to bills of review: U. S. *v.* Samperyac, 1 Hemp. 118.]

[4] *Ante*, Vol. I. § 18; Atwood *v.* Harison, 5 J. J. Marsh. 329; Higgins *v.* Conner, 3 Dana 1. In these cases, however, if there is no general order on the subject, it is usual to make a special order, that unless an answer is made within a certain time, the bill will be taken *pro confesso*. See Cory *v.* Gerteken, 2 Mad. 43; 1 Dan. Ch. Pr. 569–577 (Perkins's ed.) 5th (Am.) ed. 518–525; 1 Hoffm. Ch. Pr. c. 6, pp. 184–190. [As to what will constitute a due service of a *subpœna*, so that a bill may be taken *pro confesso*, see 1 Dan. Ch. Pr. 498–530 (Perkins's ed.) 3d (Am.) ed. 446–464.]

[5] Jones *v.* Person, 2 Hawks 269; Sallee *v.* Duncan, 7 Munroe 382; McCambell *v.* Gill, 4 J. J. Marsh. 87.

[6] M'Gowen *v.* Young, 2 Stew. 176.

[1] [Home Ins. Co. *v.* Myer, 93 Ill. 271; Yost *v.* Hudiburg, 2 Lea (Tenn.) 627. [See also Vol. I. §§ 178, 210.] If a defendant is absent from the country a commission will issue to take his answer: Stotesbury *v.* Vail, 13 N. J. Eq. 390; Lakens *v.* Fielden, 11 Paige (N. Y.) 644; and the answer should be sworn to according to the form of administering the oath which is customary in the country in which the answer is taken: Read *v.* Consequa, 4 Wash. C. Ct. 335.] [That the original answer is admissible after an amended answer has been filed, see Ludwig *v.* Blackshere, 102 Iowa 366; *contra*, Miles *v.* Woodward, 115 Cal. 308.]

[2] [The omission of the respondent to assert a fact material to his defence, and which is at the time within his knowledge, though it may not deprive him of the benefit of testimony taken to establish the fact, is a reason for requiring more stringent proof: Goodwin *v.* McGehee, 15 Ala. 232.

The answer of a corporation, under the corporate seal, and signed by its president, has the same force and effect as evidence as the answer of an individual not under oath would have in like cases: Maryland, etc. Co. *v.* Wingert, 8 Gill (Md.) 170; State Bank *v.* Edwards, 20 Ala. 512. Such answer cannot be used as evidence; but it puts in issue the allegation to which it responds, and imposes on the complainant the burden of proving such allegation: Baltimore, etc. R. R. *v.* Wheeling, 13 Gratt. (Va.) 40. See also Lovett *v.* Steam, etc. Assoc., 6 Paige (N. Y.) 54; McLard *v.* Linnville, 10 Humph. (Tenn.) 163; Carpenter *v.* Prov. Ins. Co., 4 How. (U. S.) 185. And where the defendant in a bill to redeem, in his answer expressly waives all objection to plaintiff redeeming upon the payment of such sum as shall be found due, he cannot afterwards insist that the mortgage had been foreclosed before the commencement of the suit: Strong *v.* Blanchard, 4 Allen (Mass.) 538.]

answer of an infant by his guardian cannot be read against the infant, for he cannot make an admission which ought to bind him; though it may be read against the guardian, for it is he alone that makes oath to it.[1] Nor can an infant's case be stated by the Court of Chancery, for the opinion of a court of law; because the admissions in such case would not be binding on the infant.[2] So the *joint answer of husband and wife*, though it may be read against both, if it relates merely to the *personal* property belonging to the wife, yet if it relates to the *inheritance*, of the wife, it cannot be read against her, though it still may be read against the husband.[3] But where the wife had represented herself and transacted as a *feme sole*, the other parties believing her to be such, and the husband had connived at the concealment of the marriage, her answer was allowed to be read against the husband.[4] And where a *feme covert*, being heir-at-law of a testator, lived separate and answered separate from her husband, pursuant to an order for that purpose, her admission of the will was held sufficient ground to establish it.[5]

[1] Eggleston *v.* Speke, 3 Mod. 258; s. c. Comb. 156; 2 Vent. 72; Wrottesley *v.* Bendish, 3 P. Wms. 237; Legard *v.* Sheffield, 2 Atk. 377; Hawkins *v.* Luscombe, 2 Swanst. 392; Stephenson *v.* Stephenson, 6 Paige 353; Kent *v.* Taneyhill, 6 G. & J. 1; Harris *v.* Harris, ib. 111; 1 Dan. Ch. Pr. 214; 2 Kent Comm. 245; {Watson *v.* Godwin, 4 Md. Ch. Decis. 25; Lenox *v.* Notrebe, 1 Hemp. 251; Eaton *v.* Tillinghast, 4 R. I. 276; Benson *v.* Wright, 4 Md. Ch. Decis. 278.} The infant's answer by his mother may be read against her: Beasley *v.* Magrath, 2 Sch. & Lefr. 34.

[2] Hawkins *v.* Luscombe, 2 Swanst. 392.

[3] Evans *v.* Cogan, 2 P. Wms. 450. And see Merest *v.* Hodgson, 9 Price 563; Elston *v.* Wood, 2 M. & K. 678; Ward *v.* Meath, 2 Chan. Cas. 172; 1 Eq. Cas. Abr. 65, pl. 4; 1 Dan. Ch. Pr. 5th (Am.) ed. 185, 186; Lewis *v.* Yale, 4 Fla. 418. The answer of a *feme* executrix shall not be read to charge the husband: 1 Eq. Cas. Abr. 227; Cole *v.* Gray, 2 Vern. 79.

[4] Rutter *v.* Baldwin, 1 Eq. Cas. Abr. 226. {And where a married woman claims as a respondent, in opposition to her husband, or lives separate from him, or disapproves of the defence which he wishes her to make, she may obtain an order of the court for liberty to answer and defend the suit separately; and in such case her answer may be read against her: Story, Eq. Pl. § 71; *Ex parte* Halsam 2 Atk. 50; Travers *v.* Bulkeley, 1 Ves. 383; Jackson *v.* Haworth, 1 Sim. & Stu. 161; Wybourn *v.* Blount, 1 Dick. 155; Com. Dig. Chancery, K, 2. See also Thorold *v.* Hay, 1 Dick. 410, and Carleton *v.* Dyer, 10 Ves. 442.}

[5] Codrington *v.* E. Shelburne, 2 Dick. 475. In several of the United States, it is enacted, that the answer of the defendant, discovering a concealment of the property of a judgment debtor, to defraud his creditors, shall not be read in evidence against such defendant in a criminal prosecution for the same fraud. See New York, Blatchford's Statutes, p. 307; Union Bank *v.* Barker, 3 Barb. Ch. 358; Illinois, Rev. Stat. 1845, c. 21, §§ 36, 37; Michigan, Rev. Stat. 1846, c. 90, §§ 27, 28; Wisconsin, Rev. Stat. 1849, c. 84, §§ 10, 11; Arkansas, Rev. Stat. 1837, c. 23, §§ 130, 132. In Vermont, the statute provides that "the *answer* of the defendant in chancery shall not be used as evidence to prove any fact therein stated, in any prosecution against such defendant for a crime or penalty:" Vt. Rev. Stat. 1839, c. 24, § 25. In New York, it is also enacted that "*no* pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading:" Amend. Code, § 157. In Iowa, "no (*verified*) pleading can be used in a criminal prosecution against the

§ 279. **Exceptions as to Infants.** There are also *some exceptions to the rule in regard to the answer of an infant.* For after he comes of age he may be permitted to file a new answer, upon his affidavit that he now can make a better defence than before; but he is bound to do this, as he is in respect to the confirmation or avoidance of other acts of his infancy, within a reasonable time after his coming of age, and without *laches;* if, therefore, he unreasonably delays to apply for leave to make a better defence, he will be taken to have confirmed his former answer, and it may then be read against him.[1] And if the infant's father, being an heir-at-law, and of age, has by his answer in the original suit admitted the due execution of the will of his ancestor, but died before the cause was brought to a hearing, the answer may be read against the infant, as an admission of the will, and sufficient to establish it.[2]

§ 280. **Answer of Idiots.** But though in general, the answer of an infant cannot be read against him, except as above stated, yet the rule is different in regard to idiots and persons of permanently weak intellects, and those who by reason of age or infirmity are reduced to a second infancy; their answer, which

party; nor can a party be compelled to state facts, which, if true, would subject him to a prosecution for *felony:*" Code of 1851, § 1748. In Virginia, "evidence shall not be given against the accused, of any statement made by him as a witness upon a legal examination:" Code of 1849, c. 199, § 22. But it is perfectly clear, as a general rule of law, that no party or witness can be compelled to discover or to state any matter which may expose him to a criminal charge or penalty: *ante*, Vol. I. § 193, n.; ib. § 451; Story, Eq. Pl. §§ 575–578, 591–598; Wigram on Discovery, pl. 130–133; Lichfield *v.* Bond, 6 Beav. 88; Adams *v.* Porter, 1 Cush. 170; 1 Dan. Ch. Pr. 626, 627, and notes by Perkins, 5th (Am.) ed. 562; Livingston *v.* Tompkins, 4 Johns. Ch. 432; Leggett *v.* Postley, 2 Paige 599. {Although a defendant in equity is not bound to criminate himself, or supply any link in the evidence by which a criminal prosecution may be sustained against himself, he may be compelled, in answer to a charge of fraud, to discover any act not amounting to a public offence or an indictable crime, although it may be one of great moral turpitude: Foss *v.* Haynes, 31 Me. 81.} [See also Vol. I. §§ 469 *d*, 469 *g*, 469 *i*, 469 *n*.] And it is now well settled, that if a witness, claiming the protection of the court, is obliged to answer in a matter tending to criminate himself; what he says must be considered to have been obtained by compulsion, and cannot afterwards be given in evidence against him: R. *v.* Garbett, 2 C. & K. 474, 495; *ante*, Vol. I. § 451. The same principle, it is conceived, will apply to matters which the defendant has been compelled to disclose in his answer in chancery. But where the defendant voluntarily answers, without obtaining the protection of the court by demurring or otherwise, the answer may be read in evidence against him in a criminal prosecution: R. *v.* Goldshede, 1 C. & K. 657. And see *ante*, Vol. I. §§ 193, 225, 226.

[1] Cecil *v.* Salisbury, 2 Vern. 224; Bennet *v.* Lee, 1 Dick. 89; 2 Atk. 487, 529; Stephenson *v.* Stephenson, 6 Paige 353; Mason *v.* Debow, 2 Hayw. 178.

[2] Lock *v.* Foote, 4 Sim. 132. {And where a respondent dies after answering a bill, leaving minor children who are made parties, the complainant may nevertheless use the answer, to the same extent as if the defendant were living: Robertson *v.* Parks, 3 Md. Ch. Decis. 65.}

is made by guardian, being admitted to be read against them, as the answer of one of full age, made in person. The reason of the difference is said to be this, that as the infant improves in reason and judgment, he is to have a day to show cause, after he comes of age; but the case of the others being hopeless, and becoming worse and worse, they can have no day.[1]

§ 281. **Answer as Evidence for Plaintiff.** In regard to the *reading of the answer in support of the plaintiff's case*, the *rule in equity* is somewhat different from the rule at law. For though, as we have heretofore seen,[1] when the answer of a defendant in chancery is read against him, in an action at law, the defendant is entitled to have the whole read; yet in courts of equity the rule is, that, "where a plaintiff chooses to read a passage from a defendant's answer, he reads all the circumstances stated in the passage: and if it contains a reference to any other passage, that other passage must be read also; but it is to be read only for the purpose of explaining, so far as explanation may be necessary, the passage previously read, in which reference to it is made. If, in the passage thus referred to, new facts and circumstances are introduced, in grammatical connection with that which must be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read."[2] Thus, where the passage read commenced with the words "before *such* demand was made," the plaintiff was ordered to read the passage immediately preceding, in which that demand was spoken of.[3] The defendant, also, may read any other passage in his answer, connected in meaning with that which the plaintiff has read.[4] The want of grammatical connection will not prevent another part from being read, if it is connected in meaning and is explanatory of the other; and, on the other hand, a merely grammatical connec-

[1] 1 Dan. Ch. Pr. 224, 225, 5th Am. ed. 178, 841; Leving *v.* Caverly, Prec. Ch. 229; and see 2 Johns. Ch. 235–237. {In Stanton *v.* Percival, 35 Eng. Law & Eq. 1, 5 H. L. Cas. 257, it is laid down that the answer of the committee of a lunatic could not be read so as to bind the lunatic. See also Micklethwaite *v.* Atkinson, 1 Coll. 173. But it was held, that, upon a bill of revivor against the personal representatives of the lunatic after her death, they being the committee who made the answer in the original suit, their original answer could be read against them.}

[1] *Ante*, Vol. I. §§ 201, 202.

[2] Bartlett *v.* Gillard, 3 Russ. 157, per Ld. Eldon. And see Nurse *v.* Bunn, 5 Sim. 225; Calcott *v.* Maher, 2 Moll. 316; Ormond *v.* Hutchinson, 13 Ves. 53. [A more liberal rule is laid down in Fehsenfeld *v.* Crockett, 41 A. 66, Md.; Clinch River Co. *v.* Harrison, 91 Va. 122.]

[3] Ibid.

[4] Rude *v.* Whitchurch, 3 Sim. 562; Skerrett *v.* Lynch, 2 Moll. 320.

tion, as, for example, by the particles *but* or *and*, will not entitle another part to be read, if it have no such explanatory relation.[5] It may here be added, that where the plaintiff in reading a passage from a defendant's answer, has been obliged to read an allegation which makes against his case, he will be permitted to read other evidence, disproving such allegation.[6]

§ 282. **Manner of Statement material.** The *manner of statement* in the answer is sometimes *material to its effect*, as an admission against the defendant, dispensing with other proof. For a mere statement that the defendant *has been informed* that a fact is as stated, without expressing his *belief* of it, will not be regarded as an admission of the fact. But if he answer that he *believes*, or *is informed and believes*, that the fact is so, this will be deemed a sufficient admission of the fact, unless this statement is coupled with some qualifying clause, tending to the contrary; the general rule in equity on this point being, that *what the defendant believes the court will believe.* But an exception to this rule has been admitted in regard to the belief of an heir-at-law of the due execution of a will by his ancestors; it being the course of the court to require either a direct admission, or proof in the usual manner.[1]

[5] Davis *v.* Spurling, 1 Russ. & My. 64; s. c. Tam. 199.

[6] 2 Dan. Ch. Pr. 979, 5th Am. ed. vol. i. 840; Price *v.* Lytton, 3 Russ. 206. {"The rule requiring the whole statement containing the admission to be taken together prevails to a considerable extent in equity, but with respect to answers and examinations in chancery, the equity rule is far less comprehensive than that which is recognized at common law, as if a party admits in his examination or answer that he received a sum of money, and adds in the same sentence that he immediately paid it away, or states that a person gave him a sum as a present, the charge and discharge will be so blended together that the one will not be admissible without the other; still, if he once admits the receipt of money as an independent fact, he cannot refer to other parts of his examination or answer, much less to affidavits sworn by him, or to schedules attached to his answer, for the purpose of showing that he has liquidated the amount so admitted to have been received, by separate and independent payments. So, if a plaintiff reads a passage in the answer as evidence of a particular fact, the defendant cannot read other parts, even though grammatically connected with such passage by conjunctive particles, unless they be really explanatory of its meaning, and if, in order to understand the sense of the passage on which the plaintiff relies, it is necessary to read on the part of the defendant other portions of the answer, still these portions will be evidence only so far as they are explanatory; and any new facts introduced therein, though so immediately connected with the parts admitted as to be incapable of subtraction, will be considered as not read. This rule seems to have been adopted in consequence of the subtle contrivances of equity draughtsmen; whose skill formerly consisted in so grammatically blending important points of the defendant's case with admissions that could not be withheld, as to render it necessary that both should be read in conjunction, and thus to prove their client's case by means of his own unsupported statements:" Taylor on Ev. vol. i. § 660; Ridgeway *v.* Darwin, 7 Ves. 404, per Ld. Eldon; Thompson *v.* Lambe, ib. 588, per Ld. Eldon; Robinson *v.* Scotney, 19 id. 584, per Sir Wm. Grant, M. R.; Davis *v.* Spurling, 1 Russ. & Myl., per Leach, M. R.; Bartlett *v.* Gillard, 3 Russ. 156, per Ld. Eldon; Freeman *v.* Tatham, 5 Hare 329.}

[1] 2 Dan. Ch. Pr. 980, 5th Am. ed. 840; Potter *v.* Potter, 1 Ves. 274. Whether

§ 283. **Answer of Co-defendants.** We have already seen, that, generally, *the answer of one defendant cannot be read against another*, there being no issue between them, and, therefore, no opportunity for cross-examination; but that this rule does not apply to cases where the defendant claims through him whose answer is proposed to be read; nor to cases where they are jointly interested in the transaction in question, as partners, or are otherwise identified in interest.[1] So where the defendant, in his own answer, refers to that of his co-defendant for further information.[2] And though it is laid down as a general rule, that *the answer of one defendant cannot be read by another defendant* as evidence in his own favor,[3] yet the universality of this rule has been controverted; and it has been held, that where the answer in question is unfavorable to the plaintiff, and is responsive to the bill, by furnishing a disclosure of the facts required, it may be read as evidence in favor of a co-defendant; especially where the latter defends under the title of the former.[4]

this exception applies to an administrator's belief that a debt is due from the intestate, *quære;* and see Hill *v.* Binney, 6 Ves. 738.

[1] *Ante*, Vol. I. §§ 178, 180, 182; 2 Dan. Ch. Pr. 981, 982, 5th Am. ed. 840, vol. i. 841; and cases in notes by Perkins. And see Crosse *v.* Bedingfield, 12 Sim. 35; {Gilmore *v.* Patterson, 36 Me. 544; Blakeney *v.* Ferguson, 14 Ark. 641; Clayton *v.* Thompson, 13 Ga. 206; Powles *v.* Dilley, 9 Gill (Md.) 222; Winn *v.* Albert, 2 Md. Ch. Decis. 169.}

[2] Ibid.; Chase *v.* Manhardt, 1 Bland 336; Anon., 1 P. Wms. 301; {Blakeney *v.* Ferguson, 14 Ark. 640. And where the right of the complainant to a decree against one defendant is only prevented from being complete by some questions between a second defendant and the former, he may read the answer of the second defendant for that purpose: Whiting *v.* Beebe, 12 id. 421.}

[3] 2 Dan. Ch. Pr. 981 (Perkins's ed.), 5th Am. ed. vol. i. 840 and notes; {Morris *v.* Nixon, 1 How. (U. S.) 119; Farley *v.* Bryant, 32 Me. 474; Gilmore *v.* Patterson, 36 id. 544; Cannon *v.* Norton, 14 Vt. 178.}

[4] Mills *v.* Gore, 20 Pick. 28. The decision in this case proceeded on the general ground, though the latter circumstance was also mentioned, as an independent reason. The language of the court was as follows: "An answer of one defendant is not evidence against a co-defendant, for the plaintiff may so frame his bill and interrogatories as to elicit evidence from one defendant to charge another, and to exclude such matters as might discharge him. To admit the answer of the one to be evidence against the other, under such circumstances, and when cross-interrogatories could not be admitted, would give to the plaintiff an undue advantage, against the manifest principles of impartial justice. But where the answer is unfavorable to the plaintiff, and consequently operates favorably for a co-defendant, the reason is not applicable. Where the plaintiffs call upon a defendant for a discovery, requiring him to answer under oath fully to all the matters charged in the bill, they cannot be allowed to say that his answer is not testimony. And so was the decision in Field *v.* Holland, 6 Cranch 8. In that case it was held that the answer of Cox, one of the defendants, was not evidence against the other defendant, Holland, but that, being responsive to the bill, it was evidence against the plaintiff. And, besides, in the present case, the respondent Quincy has a right to defend himself under the title of Gore. He is but a depositary of the papers, and became such at the request of both parties. He has no interest in the question, but is bound to deliver the papers to the party having

§ 284. **Answer Evidence for Defendant.** The *answer of the defendant* is not only evidence against him, but it may also, to a certain extent, and if sworn to, be read as *evidence in his favor*, sufficient, if not outweighed by opposing proof, to establish the facts it contains.[1] For it is to be observed, that the bill, though in part a mere pleading, is not wholly so; but where the older forms are still used, it is the examination of a witness by interrogatories. And in those States in which the interrogating part of the bill is now dispensed with, and the defendant is by the rules required to answer each material allegation in the bill as particularly as if specially interrogated thereto, the bill, it is conceived, partakes in all cases of the character both of a pleading and also of an examination of the defendant as a witness. The answer, too, so far as it sets up a new and distinct matter of defence, to defeat the equity of the plaintiff, is a mere pleading in the nature of a confession and avoidance at law; but when it only denies the facts on which the plaintiff's equity is founded, it is not only a pleading, but it is a pleading coupled with evidence. In all other respects, and so far as it is responsive to the bill, it is evidence; and the plaintiff, having thought fit to make the defendant a witness, is bound by what he discloses, unless it is satisfactorily disproved. Nor is the answer in such case to be discredited, nor any presumption indulged against it, on account of its being the answer of an interested party.[2]

the title. The question of title is between the plaintiffs and the defendant Gore, and Gore's answer, being evidence for him in support of his title, is consequently evidence for the other defendant. So that in whatever point of view the objection may be considered, we think it quite clear that the answer in question, so far as it is responsive to the bill, is evidence to be weighed and considered; and that it is to be taken to be true, unless it is contradicted by more than one witness, or by one witness supported by corroborating circumstances, according to the general rule of equity. The answer in all respects, in relation to the question as to the delivery of the deed and note, is directly responsive to the allegations in the bill, and it expressly denies that the deed and note were ever delivered to the plaintiff Mills, as charged in the bill :" 20 Pick. 34, 35; {Salmon *v.* Smith, 58 Miss. 399. Where a defendant is merely nominal and may not be willing to give as full an answer as the case of the party really in interest demands, a commission to take the answer of the party really in interest will be issued: Wilkins *v.* Jordan, 3 Wash. C. C. 226.}

[1] Clason *v.* Morris, 10 Johns. 524, 542; Union Bank *v.* Geary, 5 Pet. 99; Daniel *v.* Mitchell, 1 Story 172, 188; Adams, Doctr. of Equity, 21, 363; Wharton's notes. In Indiana, it is enacted, that "pleadings, sworn to by either party, in any case, shall not on the trial be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party than those not sworn to:" Rev. Stat. 1852, vol. ii. part 2, c. 1, § 785, p. 205. See also *post*, § 289; [*ante*, Vol. I. §§ 351, 551.]

[2] Clason *v.* Morris, 10 Johns. 542; Field *v.* Holland, 6 Cranch 24; Woodcock *v.* Bennet, 1 Cowen 743, 744, n.; Stafford *v.* Bryan, 1 Paige 242; Forsyth *v.* Clark, 3 Wend. 643.

§ 285. **Responsiveness.** The *test of the responsive character of the answer* is by ascertaining whether the questions answered would be proper to propound to a witness in a trial at law; whether they would be relevant to the complaint, and such as the witness would be bound to answer; and whether the answers would be competent testimony against the interrogating party.[1] Thus, the answer is held competent evidence for the defendant, of all those facts, a statement of which is necessary in order to make a full answer to the bill.[2] So, if an account is required by the bill, and is given in the answer, or is rendered to the master, and explained in answers to interrogatories put before him, the answers are responsive, and are competent evidence for the defendant.[3] So, if the bill sets forth only a part of the complainant's case, omitting the residue, and the omitted part is stated in the answer, thereby showing a different case from that made by the bill, and not merely by way of confession and avoidance, it is evidence in the cause.[4] And hence, where a bill, for the specific performance of a contract in writing, called on the defendant to answer as to the making of the contract, the execution of the instrument, how it was disposed of, and when, where, and how the defendant obtained possession of it, and under what pretences; it was held, that the allegations in the answer, setting up an agreement to rescind the contract, were responsive to the bill, and were evidence for the defendant.[5]

[1] Dunham *v.* Gates, 1 Hoffm. Ch. 185.

[2] Allen *v.* Mower, 17 Vt. 61.

[3] Powell *v.* Powell, 7 Ala. 582; Chaffin *v.* Chaffin, 2 Dev. & Bat. Ch. 255.

[4] Schwarz *v.* Wendell, Walk. Ch. 267.

[5] Woodcock *v.* Bennet, 1 Cowen 711. {Where the bill set out the making of a contract, alleged its loss, and treated it as a contract in force, it was held that this did not permit that an averment of its cancellation by the respondents, in their answer, should be considered as evidence: Sheldon *v.* Sheldon, 3 Wis. 699. So where a bill, brought to procure settlement of a partnership account, did not allege any settlement, but the answer set forth a full accounting and settlement, it was held that this was not responsive to the bill, and could not be considered as evidence, but that, coming in by way of defence, it must be regarded in the nature of a plea: Spaulding *v.* Holmes, 25 Vt. 491. Nor can the answer, though responsive and uncontradicted, be taken to establish anything in bar of the relief prayed for, which parol testimony would not be admitted to prove, for it is as evidence only that it is received: Winn *v.* Albert, 2 Md. Ch. Decis. 169. And when the complainant filed his bill to reform a deed given by him, alleging that by the deed one hundred feet were conveyed on a certain street, whereas it should have conveyed thirty feet only, and the respondent in his answer admitted that there was a mistake in the deed, but "affirmed" that the deed should have conveyed thirty-two feet, it was held, that it would seem that the respondent must establish this allegation by independent evidence: Busby *v.* Littlefield, 33 N. H. 76. See also Parkes *v.* Gorton, 3 R. I. 27.

But where the answer of the respondent admitted the indebtedness originally as charged in the bill, but alleged payment, such answer being responsive to the allegations and interrogatories of the bill, it is at least *prima facie* evidence for the party

§ 286. **Answer to be under Oath, unless waived.** Regularly, in proceedings in chancery, the defendant's answer is *under oath, unless the plaintiff chooses to dispense with it;* in which case he moves the court for an order to that effect; which, if the defendant is under no incapacity, such as infancy, or the like, is ordinarily granted.[1] If the parties agree, the order is granted of course; and if the plaintiff files a replication to an answer not sworn to, this is evidence of a waiver of the oath.[2] *Where*

making it, if it is not absolute proof of the facts stated, so as to require the usual countervailing proof in cases necessary to outweigh an answer in chancery : King *v.* Payan, 18 Ark. 583. See also Hinkle *v.* Wanzer, 17 How. (U. S.) 353.]

[1] Cooper, Eq. Pl. 325; Story, Eq. Pl. § 874; 2 Dan. Ch. Pr. 846, 5th Am. ed. vol. i. 734–744 and notes.

[2] Fulton Bank *v.* Beach, 6 Wend. 36; s. c. 2 Paige 307. By the present Code of Practice in New York, if the plaintiff makes oath to his complaint, the defendant is bound to put in his answer under oath; but the verification to the answer may be omitted, when an admission of the truth of the allegations might subject the party to prosecution for felony : Amended Code, § 157; Hill *v.* Muller, 8 N. Y. Leg. Obs. 90; Swift *v.* Hosmer, 6 id. 317; s. c. 1 Code Rep. 26; Alfred *v.* Watkins, 1 Code Rep. N. S. 343. If the defendant verifies his answer by oath, all the subsequent pleadings must be verified in like manner, whether the complaint is verified or not : Lin *v.* Jaquays, 2 Code Rep. 29; Levi *v.* Jakeways, ib. 69; Code, *ubi supra.* [In Massachusetts, by the fifth rule of chancery practice, "when a bill shall be filed other than for discovery only, the complainant may waive the necessity of the answer being made on the oath of the defendant; and in such case the answer may be made without oath, and shall have no other or greater force as evidence than the bill. No exception for insufficiency can be taken to such answer." In Bingham *v.* Yeomans, 10 Cush. 58, it was decided that this waiver must be made by the complainant in his bill before answer, and that he cannot do it afterwards. The whole case was thus stated by Shaw, C. J. : "This is a bill in equity against a mortgagee, to redeem a mortgage, and praying for an account. The bill is in the usual form, not waiving the respondent's oath; to which a sworn answer was duly made. When the case came before the judge at *Nisi Prius*, the complainant moved to waive the requirement of a sworn answer, and that the respondent's answer might be stricken out. The motion was overruled, and the question reserved for the whole court.

"If the complainant in equity would waive an answer on oath, as he may do under the fifth rule of chancery practice, he must do it by his bill and before answer. In that case the respondent may make his answer with reference solely to his own grounds of defence, and without regard to the interrogating part of the bill; and to such answer there can be no exception taken. Or, the complainant might require an answer on oath, as he does if not waived, and compel a full discovery, under a severe penalty; but, having done so, the respondent is by law entitled to the benefit of his answer as evidence, so far as responsive. If it were otherwise, the effect would be, that, after a sworn answer filed, the complainant might speculate on the relative advantage or disadvantage, on the one hand, of benefit to himself of the discoveries, and, on the other, of benefit to the defendant of his answer, as evidence, and admit or reject it accordingly, at his own election. This would be an unfair advantage, and inequitable; and the court are of opinion that the motion of the complainant to strike out the oath from the respondent's answer was rightly overruled." In Chace *v.* Holmes, 2 Gray 431, it was held that the complainant who had not waived the oath of the respondent in his bill could not do so after a demurrer had been filed by the respondent and then withdrawn.

In Gerrish *v.* Towne, 3 id. 91, the complainant in his bill waived the oath of the respondent to his answer. The respondent, notwithstanding this express waiver, answered under oath. The complainant, without moving the court for the cancellation of the oath, filed a general replication. It was held, that though a general replication waives all insufficiencies and defects in the answer, yet that it does not at all affect the question of its competency as proof of the facts and statements it con-

the answer is not sworn to, its effect and value, as evidence in the cause, is a point on which, in this country, some difference of opinion has been expressed. The rule in England, as held by Lord Eldon, was that the defendant's answer without oath gave the same authority to the court to look at the circumstances, denied or admitted in the answer so put in, for the purpose of administering civil justice between the parties, as if it was put in upon the attestation of an oath.[3] In a case in the Supreme

tains ; and that such is the necessary effect of the rule itself, the provision being that when the complainant waives the answer on oath, "the answer *may* be made without oath, and *shall* have no other or greater force as evidence than the bill."

In Maryland, under the act of 1852, c. 133, if the bill does not require the answer on oath, the answer of the respondent on oath is not evidence against the complainant: Winchester *v.* Baltimore, etc. R. R., 4 Md. 231. In Indiana, if the complainant waive the respondent's oath to his answer, pursuant to the statute, the effect of the denial in the answer is to require the allegations in the bill to be sustained by a preponderance of evidence: Moore *v.* McClintock, 6 Ind. 209. In such case, two witnesses are not required to prove the matter put in issue by the denial in the answer, but the evidence of one witness is entitled to the same weight as it would have in establishing the affirmative of an issue in law : Peck *v.* Hunter, 7 id. 295 ; Larsh *v.* Brown, 3 id. 234, In Iowa, a defendant in equity may answer under oath, although the bill expressly waives it, and such answer will be received in evidence: Armstrong *v.* Scott, 3 G. Gr. (Iowa) 433.

The views of Judge Redfield on the question of the admissibility of an unsworn answer as evidence were expressed by him in his edition of this work, as follows : —

"It seems to be settled in the practice of some of the American States, that although the statute allow the plaintiff, in a bill in equity, to dispense with the oath of the defendant in his answer, and that in such cases the answer will be sufficient in all ordinary cases, without oath ; yet it will be requisite, in order to sustain a motion to dissolve an injunction, that the answer should be sworn to : Mahaney *v.* Lazier, 16 Md. 69. There can be no question upon principle, it would seem, that the answer of the defendant not upon oath, although responsive to the bill, is to be treated merely in the nature of a plea of denial, by way of special traverse. And it would be of the same effect precisely, if it were a mere general issue. We somewhat marvel that any judge or text-writer could ever have entertained any serious doubt in regard to this. It must arise from the general practice of courts of equity not to decree relief upon a bill which was flatly denied by the respondent upon oath, and only sustained by the oath of one witness. It consequently becomes almost matter of course to allow that extent of force to the answer, *per se*, not reflecting always whether it is to the answer as testimony or as a pleading. But a moment's consideration must convince all that this effect results from the answer as counter evidence only. It is upon the same ground that no weight is to be attached to the answer of a defendant as executor, or in an official capacity, or as agent of a corporation, or in any form where not purporting to be made upon personal knowledge. This view is strongly confirmed by the opinions of Lord Eldon (Curling *v.* Townshend, 19 Ves. 628, 629), Thompson, J. (Union Bank of Georgetown *v.* Geary, 5 Peters 99, 110–112), and Chancellor Walworth (Smith *v.* Clark, 4 Paige 368)."

It has been held that the facts alleged in the answer may be regarded by the court in deciding on the merits of the case, although the answer was not sworn to, where the facts regarded were admissions against the defendant: Miller *v.* Payne, 4 Bradw. 112. In Hall *v.* Clagett, 48 Md. 223, an answer not under oath was held not evidence against the complainant, and to the same effect is Gerrish *v.* Towne, 3 Gray (Mass.) 82.] [The same rule holds good when the oath is waived, though the answer is sworn to : Bickerdike *v.* Allen, 157 Ill. 95. The answer in such a case can be used only as an affidavit at the hearing as an application for an injunction : U. S. *v.* Workingmen's Council, 54 F. 994.]

[3] Curling *v.* Townshend, 19 Ves. 628. This was an application by the defendant for leave to file a supplemental answer; in other words, to deprive the plaintiff of the

Court of the United Sates, which was an injunction bill, filed upon the oath of the complainant, to which an answer, by a corporation, was put in without oath, the question was as to the amount of evidence necessary to outweigh the answer. The court said, that the weight of such answer was very much lessened, if not entirely destroyed, as matter of evidence, when not under oath; and, indeed, that they were inclined to adopt it as a general rule, that an answer not under oath, is to be considered merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegations. But the cause was not decided on this ground, there being sufficient circumstances in the case, corroborating the testimony of the opposing witness, to outweigh the answer, even if it had been sworn to.[4] And Mr. Chancellor Walworth, in a case before him, is reported to have held, that an answer, not sworn to, was not of any weight as evidence in the cause.[5] But Mr. Justice Story, speaking of such an answer, was of opinion, that it is by no means clear that it is not evidence in favor of the defendant as to all facts, which are not fully disproved by the other evidence and circumstances in the case, nor clear that it ought not to prevail, where the other evidence is either defective, obscure, doubtful, or unsatisfactory. And it may well be suggested, he adds, whether the plaintiff has a right to dispense with the oath, and yet to make the answer evidence in his own favor as to all the facts which it admits, and exclude it in evidence as to all the facts which it denies.[6]

benefit to which he was entitled from the answer which was already on the record, but was without oath : 2 Dan. Ch. Pr. 848, 5th Am. ed. vol. i. 738.

[4] Union Bank of Georgetown *v.* Geary, 5 Pet. 99, 112. See *ante*, § 277, n.

[5] Bartlett *v.* Gale, 4 Paige 503. And see, accordingly, Willis *v.* Henderson, 4 Scam. 13. In some of the United States it is enacted, that when the plaintiff waives his right to a sworn answer, the answer shall have no more weight as evidence than the bill. See Michigan Rev. Stat. 1846, c. 90, § 31 ; Illinois, Rev. Stat. 1845, c. 21, § 21. See also Massachusetts, Reg. Gen. in Chan., 24 Pick. 411, Reg. 5. If the defendant is entitled, by the rules of law, to have his answer considered in evidence, though not sworn to, the question has sometimes been raised, whether the court can, by any rule of practice, exclude it.

[6] Story, Eq. Pl. § 875 *a*. Subsequently to the publication of the work here cited, the same point was adverted to by Mr. Justice Wayne, in delivering the opinion of the court in Patterson *v.* Gaines, 6 How. S. C. 588 ; in which he cited and reaffirmed the observations of the learned judge in 5 Pet. 112, above quoted, and also that of Mr. Chancellor Walworth, in Bartlett *v.* Gale, *supra*. But here, too, the point was not raised in argument, nor was it judicially before the court, the testimony of the opposing witness being, as the judge remarked, so strongly corroborated by other proofs, that the answer would be disproved, if it had been sworn to. The attention of the court does not seem to have been drawn to the doubt suggested by Mr. Justice

§ 287. **Exceptions to Rule that Defendant's Answer is Evidence in his Favor.** The *general rule* that the defendant's answer, responsive to the bill, is evidence in his favor, is *subject to several limitations and exceptions.* For though, *in form*, it is *responsive* to an interrogatory in the bill, yet, if it involves also, affirmatively, the assertion of a right, in opposition to the plaintiff's demand, it is but mere pleading, and is therefore not sufficient to establish the right so asserted.[1] The answer, also, must not be evasive; it must be direct and positive, or so expressed as to amount to a direct and positive denial or affirmation of the facts distinctly alleged and charged or denied in the bill, in order to have weight as evidence in his own favor, in regard to those facts.[2] And this is especially true as to facts charged in the bill as being the acts of the defendant, or within his personal knowledge.[3] If, however, they are such, that it is probable he cannot recollect them so as to answer more positively, a denial of them, according to his knowledge, recollection, and belief, will be sufficient.[4] And no particular form of words is necessary; it being sufficient if the substance is so.[5] But if the defendant professes a want of knowledge of the facts alleged in the bill, the answer is not evidence against those allegations, even though he also expressly denies them.[6] So, if the fact

Story. In Babcock *v.* Smith, 22 Pick. 61, 66, the question whether the depositions of co-defendants were admissible for each other where the plaintiff had waived the oath to their answers, was raised, but not decided.

[1] Payne *v.* Coles, 1 Munf. 373; Clarke *v.* White, 12 Pet. 178, 190; {Hart *v.* Carpenter, 36 Mich. 402; O'Brian *v.* Fry, 82 Ill. 274; Miles *v.* Miles, 32 N. H. 147; Busby *v.* Littlefield, 33 id. 76; Spaulding *v.* Holmes, 25 Vt. 491; Ives *v.* Hazard, 4 R. I. 14; Fisler *v.* Porch, 2 Stockt. (N. J.) 243; Dease *v.* Moody, 31 Miss. 617; Roberts *v.* Totten, 13 Ark. 609; Pugh *v.* Pugh, 9 Ind. 132; Hunt *v.* Thorn, 2 Mich. 213; Smith *v.* Potter, 3 Wis. 432. So, where the defendant sets up laches on the part of the complainant, his allegations are not responsive to the bill and are not evidence: Gass *v.* Arnold, 6 Baxt. (Tenn.) 329.

If a bill alleges matters which constitute the defence of the respondent, this allegation does not render that part of the answer which relates to that defence, evidence for the respondent; for only that part of the answer which is responsive to the material allegations of the bill is evidence for the respondent: Brown *v.* Kahnweiler, 28 N. J. Eq. 311.}

[2] 2 Dan. Ch. Pr. 830, 831, 984, and notes by Perkins, 5th Am. ed. vol. i. 719–730; Wilkins *v.* Woodfin, 5 Munf. 183; Sallee *v.* Duncan, 7 Monr. 382; Hutchison *v.* Sinclair, ib. 291. And see McGuffie *v.* Planters' Bank, 1 Freem. Ch. 383; Amos *v.* Heatherby, 7 Dana 45; {Stouffer *v.* Machen, 16 Ill. 553; Dinsmoor *v.* Hazelton, 2 Foster (N. H.) 535.}

[3] Hall *v.* Wood, 1 Paige 404; Sloan *v.* Little, 3 id. 103; Knickerbacker *v.* Harris, 1 id. 209, 212.

[4] Ibid.

[5] Utica Ins. Co. *v.* Lynch, 3 Paige 210.

[6] Drury *v.* Connor, 6 H. & J. 288; Bailey *v.* Stiles, 2 Green Ch. 245; McGuffie *v.* Planters' Bank, 1 Freem. Ch. 383; Town *v.* Needham, 3 Paige 546; Dunham *v.*

asserted by the defendant is such, that it is not and cannot be within his own knowledge, but is in truth only an expression of his strong conviction of its existence, or is what he deems an infallible deduction from facts which were known to him; the nature of his testimony cannot be changed by the positiveness of his assertion, and therefore the answer does not fall within the rule we are considering.[7] The answer of an infant, also, by his guardian *ad litem*, though it be responsive to the bill, and sworn to by the guardian, is not evidence in his favor; for it is regarded as a mere pleading, and not as an examination for the purpose of discovery.[8]

§ 288. **Allegations in Answer not denied, admitted.** But in order that the answer may be evidence for the defendant, it is *not always necessary that it should be responsive to the bill;* for where no replication has been put in, and the cause is heard upon the bill, answer, and exhibits, the answer is considered true throughout, in all its allegations, and whether responsive or not; upon the plain and obvious principle that the plaintiff, by not filing a replication and thereby putting the facts in issue, has deprived the defendant of the opportunity to prove them.[1]

Gates, 1 Hoffm. Ch. 185; Whittington *v.* Roberts, 4 Monr. 173; State *v.* Holloway, 8 Blackf. 45; {Loomis *v.* Fay, 24 Vt. 240; Wooley *v.* Chamberlain, ib. 270.}

[7] Clark *v.* Van Riemsdyk, 9 Cranch 160, 161; Pennington *v.* Gittings, 2 G. & J. 208. And see Copeland *v.* Crane, 9 Pick. 73; Garrow *v.* Carpenter. 1 Port. 359; Waters *v.* Creagh, 4 Stew. & Port. 410; Lawrence *v.* Lawrence, 4 Bibb 357; Harlan *v.* Wingate, 2 J. J. Marsh. 138; Hunt *v.* Rousmanier, 3 Mason 294; Fryrear *v.* Lawrence, 5 Gilm. 325; Dugan *v.* Gittings, 3 Gill 138; Newman *v.* James, 12 Ala. 29. [See also Shackelford *v.* Brown, 72 Miss. 380.] {Where an answer, although responsive to the bill, denies circumstances to be fraudulent as alleged, yet contains statements from which no reasonable doubt can be entertained of fraud, the circumstances of the answer will destroy the effect of its denial: Wheat *v.* Moss, 16 Ark. 243.}

[8] Bulkley *v.* Van Wyck, 5 Paige 536; Chaffin *v.* Kimball, 23 Ill. 36. And see Stephenson *v.* Stephenson, 6 Paige 353; *ante*, § 278 and notes.

[1] 2 Dan. Ch. Pr. 1188, 1189 (5th Am. ed.), vol. i. *829, ib. 984, and n. by Perkins; Dale *v.* McEvers, 2 Cowen 118, 126. And see Barker *v.* Wyld, 1 Vern. 139; Kennedy *v.* Baylor, 1 Wash. 162; Peirce *v.* West, 1 Pet. C. C. 351; Slason *v.* Wright, 14 Vt. 208; Leeds *v.* Marine Ins. Co., 2 Wheat. 380; {Randolph's Appeal, 66 Pa. St. 178; Gates *v.* Adams, 24 Vt. 70; Warren *v.* Twilley, 10 Md. 39; Lampley *v.* Weed, 27 Ala. 621; Gwin *v.* Selby, 5 Ohio St. 97; Perkins *v.* Nichols, 11 Allen (Mass.) 544; Tainter *v.* Clark, 5 id. 66; [Barton *v.* International Alliance, 85 Md. 14; Huyck *v.* Bailey, 100 Mich. 223; U. S. *v.* Trans-Missouri Freight Ass'n, 19 U. S. App. 36; Lake Erie, etc. R. *v.* Indianapolis N. B., 65 F. 690;] and if the answer denies material allegations in the plaintiff's bill, these allegations are considered disproved by the answer, for the plaintiff, by taking a hearing upon the bill and answer, has in reality agreed to take the defendant's statement of the case as true. The bill, therefore, must be dismissed, as the plaintiff's case fails in some of its material allegations: U. S. *v.* Scott, 3 Woods C. C. 334.} In Arkansas, it is enacted that "when any complainant shall seek a discovery respecting the matters charged in the bill, the disclosures made in the answer shall not be conclusive; but if a replication be filed, it may be contradicted or disproved, as other testimony, according to the practice of courts of chancery:" Rev. Stat. 1837, c. 23, § 49. So is the law in Missouri, Rev. Stat. 1845,

And if, after a replication is filed, the cause is set down for a hearing on the bill and answer, by the plaintiff, or by consent, the answer is still taken as true, notwithstanding the replication.[2] And where the defendant states only that he believes, and hopes to be able to prove, the facts alleged in the answer, the same rule prevails, and the facts so stated are taken for truth.[3] If, where the cause is heard upon bill and answer, it appears that the plaintiff is entitled to a decree, he must take it upon the qualifications stated in the answer.[4]

§ 289. **Effect of Answer.** Subject to the preceding qualifications and exceptions, the known *rule in equity*, as before intimated,[1] is "that an answer, which is responsive to the allegations and charges made in the bill, and contains clear and positive denials thereof, must prevail; unless it is overcome by the testimony of two witnesses to the substantial facts, or at least, by one witness, and other attendant circumstances which supply the want of another witness, and thus destroy the statements of the answer, or demonstrate its incredibility or insufficiency as evidence."[2] From the manner in which this rule is stated both

c. 137, § 30. And in Illinois, Rev. Stat. 1845, c. 21, § 33. In Ohio, it is enacted that, at a hearing on bill and answer, the answer may be contradicted by matter of record referred to in the answer, but not otherwise: Rev. Stat. 1841, c. 87, § 31. So also is the statute law in New Jersey, Rev. Stat. 1846, tit. 33, c. 1, § 38. And in Missouri, Rev. Stat. 1845, c. 137, § 29. And in Illinois, Rev. Stat. 1845, c. 21, § 32.

[2] Moore *v.* Hylton, 1 Dev. Ch. 429; Carman *v.* Watson, 1 How. (Miss.) 333; Reece *v.* Darby, 4 Scam. 159; {White *v.* Crew, 16 Ga. 416; Coulson *v.* Coulson, 5 Wis. 79. But it was held in Van Dyke *v.* Van Dyke, 26 N. J. Eq. 180, that, in such a case, any allegations in the answer which set up a defence in the way of confession and avoidance were not evidence in favor of the defendant, but must be proved by him by evidence *aliunde*. So in Taunton *v.* Taylor, 116 Mass. 254, where the cause was set down for hearing on the bill, answer, and an agreed statement of facts, after a general replication had been filed, it was held that the allegations in the answer must be supported by the statement of facts in order to be taken as true.}

[3] Brinckerhoff *v.* Brown, 7 Johns Ch. 217, 223.

[4] Doolittle *v.* Gookin, 10 Vt. 265.

[1] *Supra*, § 277. And see *ante*, Vol. I. § 260; Vandegrift *v.* Herbert, 18 N. J. Eq. 166; Thomas *v.* Noose, 114 Pa. St. 45.

[2] Daniel *v.* Mitchell, 1 Story 172, 188, per Story, J.; Lenox *v.* Prout, 3 Wheat. 520; [Morrison *v.* Durr, 122 U. S. 518; Southern Development Co. *v.* Silva, 125 id. 247; Latta *v.* Kilbourn, 150 id. 524; Coldiron *v.* Asheville Shoe Co., 93 Va. 364. See also Vol. I. § 260;] 2 Dan. Ch. Pr. 983, and cases in Mr. Perkins's note (5th Am. ed.), vol. i. § 843; 2 Story, Eq. Jur. § 1528. In Iowa, every pleading required to be made under oath, if sworn to by the party himself, is considered as evidence in the cause, of equal weight with that of a disinterested witness: Rev. Code, 1851, § 1745; and every affirmative allegation duly pleaded in the petition, if not responded to in the answer, is taken as true: ib. § 1742. But an answer, though responsive to the bill, and denying its charges, and not outweighed by two opposing witnesses, or by one witness and other equivalent testimony, is not conclusive upon a jury: Hunter *v.* Wallace, 1 Overton 239. In Indiana, it is enacted that pleadings, sworn to by either party, in any case, shall not, on the trial, be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party, than those now sworn

here and elsewhere, it might at first view appear as though the testimony of *a witness* were indispensable, and that documentary evidence, however weighty, would not alone suffice to counterpoise the answer. But it is not so. The rule, when stated as above, applies particularly to the case of an answer, opposed

to: Rev. Stat. 1852, part 2, c. 1, § 75. In Mississippi, the rule, requiring more than one witness to overthrow an ancestor in chancery, is abolished in all cases where the bill is sworn to by the complainant; and it is enacted, that the answer shall in no case receive greater weight and credit, upon the hearing, than, in view of the interest of the party making it, and the circumstances of the case, it may be fairly entitled to: Stat. Feb. 15, 1838, § 6; Ald. & Van Hoes. Dig. p. 847. In Arkansas, the answer to a bill of discovery is not conclusive; but on filing a replication, the plaintiff may contradict or disprove it, as in other cases, according to the course of practice in chancery: Rev. Stat. 1837, c. 23, § 49. In Michigan, in bills other than for discovery, the plaintiff may waive the defendant's oath as to the answer; in which case the answer may be made without oath, and shall have no other or greater force as evidence, than the bill: Rev. Stat. 1846, c. 90, § 31. In Alabama the law is the same: Code of Alabama (1852), § 2877. It is also the same in Illinois: Rev. Stat. 1845, c. 21, § 21. In Carpenter *v.* Prov. Wash. Ins. Co., 4 How. (U. S.) 185, the rule stated in the text was reviewed and commented on by Woodbury, J. "Where an answer," he observed, "is responsive to a bill, and like this denies a fact unequivocally and under oath, it must, in most cases, be proved not only by the testimony of one witness, so as to neutralize that denial and oath, but by some additional evidence, in order to turn the scales for the plaintiff: Daniel *v.* Mitchell, 1 Story 188; Higbie *v.* Hopkins, 1 Wash. C. C. 230; Union Bank of Georgetown *v.* Geary, 5 Peters 99. The additional evidence must be a second witness, or very *strong circumstances:* 1 Wash. C. C. 230; Hughes *v.* Blake, 1 Mason C. C. 515; 3 Gill & Johns. 425; 1 Paige 239; 3 Wend. 532; 2 Johns. Ch. 92. Clark's Ex'rs *v.* Van Riemsdyk, 9 Cranch 153, says, 'with pregnant circumstances:' Neal *v.* Hagthrop, 3 Bland's Ch. 567; 2 Gill & Johns. 288. But a part of the cases on this subject introduce some qualifications or limitations to the general rule, which are urged as diminishing the quantity of evidence necessary here. Thus, in 9 Cranch 160 the grounds of the rule are explained; and it is thought proper there, that something should be detracted from the weight given to an answer, if from the nature of things the respondent could not know the truth of the matter sworn to. So if the answer do not deny the allegation, but only express ignorance of the fact, it has been adjudged that one positive witness to it may suffice: 1 J. J. Marshall 178. So, if the answer be evasive or equivocal: 4 id. 213; 1 Dana 174; 4 Bibb 358. Or if it do not in some way deny what is alleged: Knickerbacker *v.* Harris, 1 Paige 212. But if the answer, as here, explicitly denies the material allegation, and the respondent, though not personally conusant to all the particulars, swears to his disbelief in the allegations, and assigns reasons for it, the complainant has, in several instances, been required to sustain his allegation by more than the testimony of one witness (3 Mason's C. C. 294). In Coale *v.* Chase, 1 Bland 136, such an answer and oath by an administrator was held to be sufficient to dissolve an injunction for matters alleged against this testator. So it is sufficient for that purpose if a corporation deny the allegation under seal, though without oath (Haight *v.* Morris Aqueduct, 4 Wash. C. C. 601); and an administrator denying it under oath founded on his disbelief from information communicated to him, will throw the burden of proof on the plaintiff beyond the testimony of one witness, though not so much beyond as if he swore to matters within his personal knowledge: 3 Bland's Ch. 567, n.; 1 Gill & Johns. 270; Pennington *v.* Gittings, 2 id. 208. But what seems to go further than is necessary for this case, it has been adjudged, in Salmon *v.* Clagett, 3 Bland 141, 165, that the answer of a corporation, if called for by a bill, and it is responsive to the call, though made by a 'corporation aggregate, under its seal, without oath,' is competent evidence, and 'cannot be overturned by the testimony of one witness alone.' We do not go to this extent, but see no reason why such an answer, by a corporation, under its seal, and sworn to by the proper officer, with some means of knowledge on the subject, should not generally impose an obligation on the complainant to prove the fact by more than one witness (5 Peters 111; 4 Wash. C. C. 601)." See 4 How. (U. S.) 217–219.

only by the testimony of one witness; in which case the court will neither make a decree, nor send it to a trial at law.[3] But if there is sufficient evidence in the cause to outweigh the force of the answer, the plaintiff may have a decree in his favor. This sufficient evidence may consist of one witness, with additional and corroborative circumstances; and these circumstances may sometimes be found in the answer itself;[4] or it may consist of circumstances alone, which, in the absence of a positive witness, may be sufficient to outweigh the answer even of a defendant who answers on his own knowledge.[5] Thus, on the one

[3] Pember *v.* Mathers, 1 Bro. Ch. 52.

[4] Pierson *v.* Catlin, 3 Vt. 272; Maury *v.* Lewis, 10 Yerg. 115. And see Freeman *v.* Fairlie, 3 Mer. 42. For cases illustrative of the nature and amount of the corroborative testimony required, in addition to one witness, to outweigh the answer, see Only *v.* Walker, 3 Atk. 407; Morphett *v.* Jones, 1 Swanst. 172; Biddulph *v.* St. John, 2 Sch. & Lefr. 532; Lindsday *v.* Lynch, ib. 1; Pilling *v.* Armitage, 12 Ves. 78.

[5] Long *v.* White, 5 J. J. Marsh. 228; Gould *v.* Williamson, 8 Shepl. 273; Clark *v.* Riemsdyk, 9 Cranch 153. In this case, the doctrine on this subject was expounded by Marshall, C. J., in the following terms: "The general rule, that either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill is admitted. The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. But certainly there may be evidence arising from circumstances stronger than the testimony of any single witness. The weight of an answer must also, from the nature of evidence, depend, in some degree, on the fact stated. If a defendant asserts a fact which is not and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. When he intended to utter only a strong conviction of the existence of a particular fact, or what he deemed an infallible deduction from facts which were known to him, he may assert that belief or that deduction in terms which convey the idea of his knowing the fact itself. Thus, when the executors say that John Innes Clark never gave Benjamin Monro authority to take up money or to draw bills; when they assert that Riemsdyk, who was at Batavia, did not take this bill on the credit of the owners of The Patterson, but on the sole credit of Benjamin Monro, they assert facts which cannot be within their own knowledge. In the first instance they speak from belief; in the last, they swear to a deduction which they make from the admitted fact that Monro could show no written authority. These traits in the character of testimony must be perceived by the court, and must be allowed their due weight, whether the evidence be given in the form of an answer or a deposition. The respondents could found their assertions only on belief; they ought so to have expressed themselves; and their having, perhaps incautiously, used terms indicating a knowledge of what, in the nature of things, they could not know, cannot give to their answer more effect than it would have been entitled to, had they been more circumspect in their language:" 9 Cranch 160, 161. See also Watts *v.* Hyde, 12 Jur. 661.

The rule requiring the testimony of two witnesses, or its full equivalent, was borrowed from the rule of the Roman civil law, — *Responsio unius non omnino audiatur.* But the strictness with which the rules of that law were formerly observed in courts of equity has very much abated in modern times, and the rule in question is now placed on the principle above stated by Marshall, C. J. It hence appears that these courts no longer recognize the binding force of the civil law, even in proceedings which, in general, are according to the course of that law; but govern themselves by the principles

hand, it has been held, that if the answer be positive, denying the charge in the bill, it ought not to be overthrown by evidence *less* positive, *though* it proceed from the mouth of two witnesses;[6] and that if the answer be improbable, yet, if it is not clearly false, it will be conclusive in favor of the defendant, in the absence of any opposing proof.[7] On the other hand, it has been held, that the force of the answer to a bill of *discovery* may be impeached by evidence showing directly that *the defendant* is not to be believed.[8] So, if the fact is denied upon belief only, unless the grounds of belief are also disclosed, and are deemed sufficient;[9] or, if the fact is denied equivocally, indistinctly, or evasively, in the answer;[10] or, if the denial is mixed up with a recital of circumstances inconsistent with the truth of the denial;[11] or, if the answer is made by a corporation, under its seal, and without oath;[12] the testimony of one witness may be sufficient against it. But a positive answer, responsive to the bill, is not outweighed by the proof of facts which may be reconciled with the truths of the statements or denials in the answer;[13] nor by the proof of the mere admissions of the defendant, contradictory to the answer, unless they appear to have been deliberately and considerately made.[14] Very little reliance, it is said, ought to be placed upon loose conversations or admissions of the party, to overbalance his solemn denial, on oath, in his answer.[15]

§ 290. **Same Subject.** The *effect* thus given to the answer is *limited* to those parts of it which are *strictly responsive to the bill;* it being only where the plaintiff has directly appealed to the con-

and rules of the common law, in all cases to which these principles and rules can apply; agreeably to the maxim, *æquitas sequitur legem.*

[6] Auditor *v.* Johnson, 1 Hen. & Munf. 536.

[7] Jackson *v.* Hart, 11 Wend. 343.

[8] Miller *v.* Tolleson, 1 Harp. Ch. 145. And see Dunham *v.* Gates, 1 Hoffm. Ch. 185.

[9] Hughes *v.* Garner, 2 Y. & C. 328; Copeland *v.* Crane, 9 Pick. 73, 78; Hunt *v.* Rousmanier, 3 Mason 294; {Cunningham *v.* Ferry, 74 Ill. 426.}

[10] Phillips *v.* Richardson, 4 J. J. Marsh. 212. And see Brown *v.* Brown, 10 Yerg. 84; Farnam *v.* Brooks, 9 Pick. 212; Martin *v.* Greene, 10 Mo. 652.

[11] Barraque *v.* Siter, 9 Ark. 545. {So if the answer to a bill alleging fraud contains admissions of facts which establish fraud, the rule as to the necessity of two opposing witnesses does not apply: Hoboken Savings Bank *v.* Beckman, 33 N. J. Eq. 53; Wheat *v.* Moss, 16 Ark. 243.}

[12] Van Wyck *v.* Norvell, 2 Humph. 192; Lovett *v.* Steam Saw Mill Co., 6 Paige 54; *sed quære*, and see 4 How. (U. S.) 218, 219, *semb. contra.*

[13] Branch Bank *v.* Marshall, 4 Ala. 60.

[14] Hope *v.* Evans, 1 Sm. & M. 195; Petty *v.* Taylor, 5 Dana 598. It has been held, that the testimony of two witnesses to two distinct conversations is not sufficient: Love *v.* Braxton, 5 Call 537.

[15] Flagg *v.* Mann, 2 Sumn. 486, 553, 554, per Story, J.; Hine *v.* Dodd, 2 Atk. 275.

science of the defendant, and demanded of him the disclosure of a particular matter of fact, that he is bound to receive the reply for truth, until he can disprove it. If, therefore, the defendant, in addition to his answer to the matter concerning which he is interrogated by the plaintiff, sets up other facts by way of defence, his *answer is not evidence for him in proof of such new matter*, but it must be proved *aliunde*, as an independent allegation.[1] We have already seen,[2] that the rule of the common law on this subject is different from the rule in equity; it being required in courts of law, when the declaration or conversation of a party is to be proved against him, the whole of what was said at the same time and in relation to the same subject should be taken together. But this

[1] 1 Dan. Ch. Pr. 983, 984, and notes by Perkins, 5th Am. ed. *844, 845; 2 Story, Eq. Jur. § 1529; 2 Story, Eq. Pl. § 849 *a*; Hart *v.* Ten Eyck, 2 Johns. Ch. 62. In this case, the rule was thus stated and explained by the learned Chancellor Kent: "It appears to me, that there is a clear distinction, as to proof, between the *answer* of the defendant, and his examination as a *witness*. At any rate, the question how far the matter set up in the answer can avail the defendant, without proof, is decidedly and rationally settled. The rule is fully explained in a case before Lord Ch. Cowper, in 1707, reported in Gilbert's Law of Evidence, p. 45. It was the case of a bill by creditors against an executor, for an account of the personal estate. The executor stated in his answer that the testator left £1,100 in his hands, and that, afterwards, on a settlement with the testator, he gave his bond for £1,000, and the other £100 was given him by the testator as a gift for his care and trouble. There was no other evidence in the case of the £1,100 having been deposited with the executor. The answer was put in issue, and it was urged that the defendant having charged himself, and no testimony appearing, he ought to find credit where he swore in his own discharge. But it was resolved by the court, that when an answer was put in issue, *what was confessed and admitted by it need not be proved;* but that the defendant must make out, *by proof*, what was insisted on by way of avoidance. There was, however, this distinction to be observed, that where the defendant admitted a fact, and insisted on a *distinct* fact by way of avoidance, he must prove it, for he may have admitted the fact under an apprehension that it could be proved, and the admission ought not to profit him, so far as to pass for truth, whatever he says in avoidance. But if the admission and avoidance had consisted of one *single fact*, as if he had said the *testator had given him* £100, the whole must be allowed, unless disproved. This case is cited by Peake (Ev. 36, *in notis*), to show a distinction on this subject between the rule at law and equity, and that in chancery one part of an answer may be read against the party without reading the other; and that the plaintiff may select a particular admission, and put the defendant to prove other facts. He preferred, as he said, the rule at law, that if part of an answer is read, it makes the whole answer evidence, and even Lord Hardwicke, in one of the cases I have cited, thought the rule of law was to be preferred, provided the courts of law would not require equal credit to be given to every part of the answer. On the above doctrine, in the case of Gilbert, I have to remark, in the first place, that it is undoubtedly the long and well-settled rule in chancery, whatever may be thought of its propriety. Lord H. says, in the case of Talbot *v.* Rutledge, that if a man admits, by his answer, that he received several sums of money at particular times, and states that he paid away those sums at other times in discharge, he must prove his discharge, otherwise it would be to allow a man to swear for himself, and to be his own witness. But, in the next place, I am satisfied that the rule is perfectly just, and that a contrary doctrine would be pernicious, and render it absolutely dangerous to employ the jurisdiction of this court, inasmuch as it would enable the defendant to defeat the plaintiff's just demands, by the testimony of his own oath, setting up a discharge or matter in avoidance:" 2 Johns. Ch. 88–90. See also Wasson *v.* Gould, 3 Blackf. 18; Parkes *v.* Gorton, 3 R. I. 27.

[2] *Ante*, Vol. I. § 201; *supra*, § 281.

difference in the rules arises from the difference in principle between the two cases. For in courts of law the evidence is introduced collaterally, as evidence, and not as a pleading; and therefore it is reasonable that the whole should be weighed together; and the rule in chancery is the same, when an answer or other declaration of the party is introduced collaterally, and merely by way of evidence. So, when the bill is for *discovery* only, and the answer is read for that purpose, the rule still is to read the whole. But when, upon the hearing of a bill for *relief*, passages are read from the answer, which is put in issue by a replication, they are read not as *evidence* in the technical sense, but merely as a *pleading* to show what the defendant has *admitted*, and which therefore needs not to be proved; and hence the plaintiff is not required to read more than the admissions.[3]

§ 291. **Bills for Discovery and Relief distinguished.** The distinction between a bill for discovery and a bill for relief, in the application of the rule above stated, is more strikingly apparent when a bill for *discovery*, after a discovery is obtained, is *by amendment converted into a bill for relief*. The defendant, in such case, being permitted to put in a new answer, the former is considered as belonging to a former suit, and therefore is permitted to be read as an answer to a bill of discovery, as evidence; and not as part of the defence or admission, upon which the bill proceeds.[1]

§ 291 *a*. **Supplemental Bill.** In the case of a *supplemental bill*, which is merely a continuation of the original suit, all the testimony which was properly taken in the original suit may be used in both suits, notwithstanding it was not entitled in the supplemental suit. If publication has passed in the original cause, no new evidence is admissible, in the supplemental cause, of matters previously in issue.[1] But where a bill was brought by the son and heir of a grantor, for the purpose of setting aside his conveyance to the defendant, on the ground of fraud, and a supplemental bill

[3] 2 Johns. Ch. 90–94; 2 Poth. Obl. by Evans, 137, 138 (Am. ed.); Ormond *v.* Hutchinson, 13 Ves. 51, *arg.* approved by Ld. Ch. Erskine, ib. 53; Thompson *v.* Lambe, 7 id. 587; Boardman *v.* Jackson, 2 Ball & Beat. 382; Beckwith *v.* Butler, 1 Wash. 224; Bush *v.* Livingston, 2 Caines Cas. 66; Green *v.* Hart, 1 Johns. 580, 590. If a judgment or decree in another cause is properly stated in the bill and admitted in the answer, the record of it is not requisite to be filed as an exhibit, but will be deemed sufficiently proved by the admission in the answer: Lyman *v.* Little, 15 Vt. 576.

[1] Butterworth *v.* Bailey, 15 Ves. 358, 363. And see Lousada *v.* Templer, 2 Russ. 561; 1 Story, Eq. Jur. §§ 64 *k*, 70–73.

[1] 3 Dan. Ch. Pr. 1683, 1684, 5th Am. ed. vol. ii. 1535, 1536.

being filed, to bring in the administratrix of the grantor as a necessary party defendant, the cause was set down by the plaintiff for hearing, without replication to the answer to the supplemental bill; and the administratrix produced the letters of administration, in proof of her representative character; it was objected by the original defendant, that this evidence was inadmissible, and that, as his answer in the supplemental suit averred his original answer to be true, the cause could now be adjudicated only upon the facts stated in that answer. But it was held by the Vice-Chancellor, that the court was entitled to look into the letters of administration, for the purpose of ascertaining the representative character of the administratrix, and that, notwithstanding the present posture of the suit, the evidence taken in the original cause was still before the court.[2] The point whether documentary evidence is admissible, when the answer is not replied to, was raised and argued, but was not decided. The cases on this point are conflicting; but the weight of authority seems to be in favor of admitting the proof of documents, the existence or genuineness of which is not denied.[3]

§ 292. **Admissions by Agreement.** We are next to consider *admissions made by express* AGREEMENT OF THE PARTIES, in order to dispense with other proof. These ordinarily ought to be in writing, and signed by each party or his solicitor; the signature of the latter being deemed sufficient, as the court will presume that he was duly authorized for that purpose.[1] But it is not indispensably necessary that the agreement be written; in some cases, as, for example, the waiver of proof by subscribing witnesses, a parol agreement, either of the party, or of the attorney, has been held sufficient.[2] It must, however, be a distinct agreement to admit the instrument at the trial, dispensing with the ordinary proof of its execution; for what the attorney said in the course of conversation is not evidence in the cause.[3] The authority of the

[2] Wilkinson *v.* Fowkes, 9 Hare 193, 592; 15 Eng. Law & Eq. 163.

[3] 2 Dan. Ch. Pr. 975, 1025, 5th Am. ed. vol. i. 829, 875, 876; Rowland *v.* Sturgis, 2 Hare 520; Chalk *v.* Raine, 7 id. 393; Jones *v.* Griffith, 14 Sim. 262; Neville *v.* Fitzgerald, 2 Dr. & War. 530. See *infra*, § 309.

[1] Gainsford *v.* Grammar, 2 Campb. 9; 2 Dan. Ch. Pr. 988, 5th Am. ed. vol. i. 848; Gresley on Eq. Ev. 48; Young *v.* Wright, 1 Campb. 139. In some courts, the rules require that these agreements should always be in writing, or be reduced to the form of an order by consent. See Suydam *v.* Dequindre, Walk. Ch. (Mich.) 23; Brooks *v.* Mead, ib. 389.

[2] Laing *v.* Kaine, 2 B. & P. 85; Marshall *v.* Cliff, 4 Campb. 133.

[3] Ibid.; Young *v.* Wright, *supra; ante*, Vol. I. § 186.

attorney to act as such will be sufficiently proved if his name appears of record.[4]

§ 293. **Not extended by Implication.** Admissions of this sort, however, are *not to be extended by implication*, beyond what is expressed in the agreement. Thus, in an action of covenant, where the defendant's attorney signed an admission in these words, "I admit the due execution of the articles of agreement dated the 23d day of February, 1782, mentioned in the declaration in this cause," it was held that this only dispensed with the attendance of the subscribing witness, and did not preclude the defendant from showing a variance between the instrument produced in evidence and that described in the declaration; though, had the language been "*as* mentioned in the declaration," its effect might have been different.[1] So, where it was admitted that a certain exhibit was a notice, and that a certain other exhibit was a true copy of the lease referred to in the notice; it was held, that the admission of the notice was not evidence of the lease, and that the admission as to the copy of the lease only substituted the copy for the original, but did not place the copy in a better situation than the original would have been if it were produced but not proved.[2]

§ 294. **Not received if against Law or Public Policy.** Lastly, it is to be observed, that while the courts will generally encourage the practice of admissions tending to the saving of time and expense, and to promote the ends of justice, they will *not sanction any agreement for an admission, by which any of the known principles of law are evaded.* Thus, where a *husband* was willing that his *wife* should be examined as a witness, in an action against him for malicious prosecution, Lord Hardwicke refused to permit it, because it was against the policy of the law.[1] Admissions by *infants*,[2] and admissions evasive of the stamp-laws,[3] have been disallowed, on the same general principle.

§ 295. 3. **Documents.** In respect to *documents*, the *first* point to be considered is their PRODUCTION;[1] which, on motion, is ordered

[4] See note 3, *ante*.

[1] Goldie *v.* Shuttleworth, 1 Campb. 70.

[2] Mounsey *v.* Burnham, 1 Hare 15. And see Fitzgerald *v.* O'Flaherty, 1 Moll. 350.

[1] 2 Dan. Ch. Pr. 988, 5th Am. ed. vol. i. 849; Barker *v.* Dixie, Rep. temp. Hardw. 265. And see Owen *v.* Thomas, 3 My. & K. 357. Such seems to be the sound rule of law, though it has in one or two instances been broken in upon. See *ante*, Vol. I. § 340.

[2] See *supra*, §§ 279, 280; Wilkinson *v.* Beal, 4 Mad. 408; Townsend *v.* Ives, 1 Wils. 216; Holden *v.* Hearn, 1 Beav. 445; Morrison *v.* Arnold, 19 Ves. 671.

[3] Owen *v.* Thomas, 3 My. & K. 353–357; 2 Dan. Ch. Pr. 989.

[1] [See Vol. I. §§ 309, 559–563.]

by the court, either for their safe custody and preservation, *pendente lite*, or for discovery and use for the purposes of the suit.[2] Where the production is sought by the bill, and the discovery is not resisted, the documents are described either in the answer or in schedules annexed to it, to which reference is made. If the documents are not sufficiently described in the answer, or the possession of them by the defendant is not admitted with sufficient directness, the answer will be open to exceptions;[3] for the possession must be shown by the defendant's admission in the answer, and cannot be established by affidavit, unless, perhaps, where the plaintiff's right to the production is in question, and the documents are neither admitted nor denied in the answer; in which case the plaintiff has been admitted to verify them by affidavit.[4]

§ 296. **Documents within Defendant's Control.** If the documents are not in the defendant's actual custody, but are *in his power*,[1] as, if they are in the hands of his solicitor;[2] or of his agent, whether at home or in a foreign country;[3] or if they are about to come to his possession by arrival from abroad,[4] — the court will order him to produce them, if no cause appear to the contrary; and will allow a reasonable time for that purpose, according to the circumstances.[5] If they are in the joint posses-

[2] See, on this subject, 3 Dan. Ch. Pr. c. 41, 5th Am. ed. vol. ii. c. 42; Wigram on Discovery, pl. 284 *et seq.*; Story, Eq. Pl. §§ 858–860 *a*. {But the plaintiff, in addition to a discovery of that which constitutes his own title, may seek a discovery for the purpose of repelling what he anticipates will be the case set up by the defendant. But this does not extend to a discovery of the *evidence* in support of the defendants (Attorney-General *v.* Corporation of London, 2 Mac. & Gord. 247); and a party obtaining an order for the production of documents, is entitled to have them inspected by his solicitors and agents, as well as by himself. But neither he nor they are entitled to make public the information they obtain by means of such inspection; if necessary an injunction will be granted to prevent it: Williams *v.* Prince of Wales Life, etc. Co., 23 Beav. 338.}

[3] Ibid.; Atkyns *v.* Wryght, 14 Ves. 211, 213; 3 Dan. Ch. Pr. 2045; {Robbins *v.* Davis, 1 Blatchf. C. C. 238.}

[4] Barnett *v.* Noble, 1 Jac. & W. 227; Addis *v.* Campbell, 1 Beav. 261; Lopez *v.* Deacon, 6 id. 254. And see Watson *v.* Renwick, 4 Johns. Ch. 381, where the history and reasons of the rule are stated. See also Storey *v.* Lennox, 1 My. & C. 534; {Reynell *v.* Sprye, 8 Eng. Law & Eq. 35; 1 De G. M. & G. 660. As to orders of inspection by courts of common law, see *ante*, Vol. I. § 559.}

[1] Taylor *v.* Rundell, 1 Cr. & Phil. 104; 3 Dan. Ch. Pr. 2041, 2042, 5th Am. ed. vol. ii. *1825, 1826, 1827.

[2] Ibid.

[3] Ibid.; Eager *v.* Wiswall, 2 Paige 369, 371; Freeman *v.* Fairlie, 3 Mer. 44; Murray *v.* Walter, 1 Cr. & Phil. 125; Morrice *v.* Swaby, 2 Beav. 500; {Robbins *v.* Davis, 1 Blatchf. C. C. 238.}

[4] Farquharson *v.* Balfour, Turn. & Russ. 190, 206.

[5] Ibid.; Eager *v.* Wiswall, 2 Paige 371; Taylor *v.* Rundell, 1 Phil. C. C. 225; 11 Sim. 391.

sion of the defendant and others, not parties to the suit, but equally entitled, with him, to their custody, this will excuse the defendant from producing them, but he will still be required to inspect them and answer as to their contents;[6] and if they are in the hands of a common agent of the defendant and others, the plaintiff may have an order on such agent to permit him to inspect them; on the ground that the court has a right to give the plaintiff all the access to the documents which the defendant would be entitled to claim.[7] Where the documents are in the hands of the defendant's agent or solicitor, who wrongfully retains them, so that they cannot be controlled, he may be compelled, by being made a party to the cause.[8]

§ 297. **Plaintiff must designate.** To entitle the plaintiff to a production of documents, a merely general reference to them in the answer is not sufficient; they must be *described with reasonable certainty*, either in the answer or in the schedule annexed to it, so as to be considered, by the reference, as incorporated in the answer, and to enable the court to make an order for their production, and afterwards to determine whether its order has been precisely and duly obeyed.[1]

§ 298. **Must have an Interest in.** It is further necessary that the plaintiff, in order to be entitled to the production of documents,

[6] 3 Dan. Ch. Pr. 2042, 2043, 5th Am. ed. vol. ii. 1826, 1827; Taylor *v.* Rundell, 1 Cr. & Phil. 110; Murray *v.* Walter, ib. 114; {Edmonds *v.* Foley (Lord), 30 Beav. 282; s. c. 8 Jur. N. S. 552.}

[7] Walburn *v.* Ingilby, 1 My. & K. 61.

[8] Ibid.; Fenwick *v.* Reed, 1 Mer. 125.

[1] Atkyns *v.* Wryght, 14 Ves. 211; Watson *v.* Renwick, 4 Johns. Ch. 381. {When the documents are very voluminous, as, for instance, when they consist of a series of letters extending over a number of years, the proper method of setting them out is not by a short reference to each one, as by the date, name of writer and of the person to whom it is addressed, but to refer to them as contained in a bundle each document in the bundle being identified by a letter, or some other method of identification: Walker *v.* Poole, L. R. 21 Ch. D. 835.

Where a case is made out, raising a reasonable suspicion that a defendant who has made an affidavit as to documents, has in his possession other documents relating to the matters in question and not disclosed by the first affidavit, the court may order him to make a further affidavit, although the first is sufficient in point of form: Noel *v.* Noel, 1 De G. J. & Sm. 468. And where a defendant against whom a decree for an account was made, had before decree made full discovery by answer as to documents in his possession, it was held, nevertheless, that the plaintiff after decree was entitled to call for an affidavit as to his possession of any other documents than those mentioned in his answer relating to the matter in question: Hanslip *v.* Kitton, 1 De G. J. & Sm. 440. The power of the court to compel either of the parties to a suit to produce books and papers in their possession relating to matters in issue between them, is to be exercised with caution, and the party calling for its exercise must, with a reasonable degree of certainty, designate the books and papers required, and the facts expected to be proved by them: Williams *v.* Williams, 1 Md. Ch. Decis. 199; Robbins *v.* Davis, 1 Blatchf. C. C. 238; Jackling *v.* Edmonds, 3 E. D. Smith 539.}

should either have a *right to the documents* themselves, or *a sufficient interest in inspecting them.*[1] And this right must appear in his bill, and cannot, regularly, be established by collateral proof. Thus, where, after an answer, admitting the possession of certain documents relating to the matters of some of them in the bill, the plaintiff amended the bill by striking out a part of the matters to which the documents related, and then moved for a production of them upon the answer; it was refused, because his right to it was no longer apparent upon the bill.[2] If the defendant admits that they are *relevant* to the plaintiff's case, this will throw on the defendant the burden of excusing himself from producing them.[3] But the plaintiff's right to the production must relate to the purposes of the suit; and to the relief prayed for; if the object be collateral to the suit; as, if a copy of a certain book be demanded, for the purposes of his trade, this is not such an interest as will entitle him to the production.[4] So, if the production of a document be sought only for the ulterior purposes of enabling the plaintiff to carry into execution the decree which he may obtain in the cause, and not for the purposes of proving his right to a decree, an inspection will not be granted before the hearing.[5] The sufficiency of the plaintiff's interest in the docu-

[1] {"Whatever advances the plaintiff's case may be inquired into, though it may at the same time bring out matter which the defendant relies upon for his defence; but you shall not inquire into what is exclusively matter of defence; that which is common to both plaintiff and defendant may be inquired into by either." Per Ld. Campbell, Whatley *v.* Crowter, 5 El. & B. 709; Bolton *v.* Corp. of Liverpool, 1 My. & K. 88.}

[2] Haverfield *v.* Pyman, 2 Phil. C. C. 202. {For the purpose of an application for the production of documents, it must be assumed that the plaintiff's case, as alleged in the bill, is true, in order to test whether he is entitled to production of documents upon that assumption; because if the court must wait until the fate of the litigation is known, that would be equivalent to refusing production: Gresley *v.* Mousley, 2 Kay & J. 288.}

[3] Smith *v.* D. of Beaufort, 1 Hare 519; Tyler *v.* Drayton, 2 Sim. & Stu. 310; 3 Dan. Ch. Pr. 2046–2048, 5th Amer. ed. vol. ii. 1828. {The court accepts the oath of a defendant whether documents are relevant; but the plaintiff has a right to judge for himself whether they will assist his case, and is entitled to the production of all relevant documents, except such as the court can clearly see have no bearing on the issue: Mansell *v.* Feeney, 2 Johns. & H. 320.}

[4] 3 Dan. Ch. Pr. 2049, 5th Amer. ed. vol. ii. 1829; Lingen *v.* Simpson, 6 Madd. 290.

[5] Ibid.; Wigram on Discovery, pl. 295. The observations of this learned Vice-Chancellor on this point deserve particular attention, and are as follows: "Supposing the answer to contain the requisite admission of possession by the defendant, and a sufficient description of the documents, the plaintiff must next show *from the answer* that he has a right to see them. This is commonly expressed by saying that the plaintiff must show that he has *an interest* in the documents, the production of which he seeks. There can be no objection to this mode of expressing the rule, provided the sense in which the word *interest* is used be accurately defined. But the want of such definition has introduced some confusion in the cases under consideration. The word

ments, of which a discovery and production are required, depends on their *materiality* to his case; for the right of the plaintiff is limited, in the well-considered language of Vice-Chancellor Wigram, to "a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit."[6] But an exception to this limitation is admitted, where the defendant, in stating *his own title*, states a document shortly or partially, and for the sake of greater caution refers to the document, in order to show that its effect has been accurately stated; in which case, though the document be not in itself material to the plaintiff's title, the court will order its production *as part of the answer*.[7]

interest must here be understood with reference to the subject-matter to which it is applied. Now the *purpose* for which discovery is given is (simply and exclusively) to aid the plaintiff on the trial of an issue between himself and the defendant. A discovery beyond or uncalled for by this particular purpose, is not within the reason of the rule which entitles a plaintiff to discovery. The word *interest*, therefore, must in these cases be understood to mean an interest in the production of a document for the purpose of the trial about to take place. According to this definition of the word *interest*, — if the object of the suit or action be the recovery of an *estate*, — the plaintiff, in a bill in aid of proceedings to recover that estate, will, *prima facie*, be entitled, *before* the hearing of the cause, to the production of every document, *the contents* of which will be evidence at that hearing of his right to the estate. But the same reason will not *necessarily* extend to entitle the plaintiff, *before* the hearing of the cause, to a production of the title-deeds appertaining to the estate in question. He may, indeed, and (if his bill be properly framed) he will be entitled to have these title-deeds *described* in the answer, and also to a discovery whether they are in the defendant's possession; because, without proof of such matters (and whatever the plaintiff must prove the defendant must *prima facie* answer), a perfect decree could not be made in the plaintiff's favor. The same observations will apply to a case in which the object of the suit is to recover the possession of documents. The plaintiff is entitled to know *what* the documents are, and *who holds them*. But there is no reason why the plaintiff should, in cases of the description here noticed, inspect the documents *before* the hearing of the cause. Unless the meaning of the word *interest* be limited in the way pointed out, it is obvious that the effect of a simple claim (perhaps without a shadow of interest) would be to open every muniment room in the kingdom, and every merchant's accounts, and every man's private papers, to the inspection of the merely curious."

[6] {Ingilby *v.* Shafto, 33 Beav. 31; Wigram on Discovery, pl. 26, p. 15. As to the nature of the *materiality*, see ib. pl. 224 *et seq.*; Robbins *v.* Davis, 1 Blatchf. C. C. 238.}

[7] Hardman *v.* Ellames, 2 My. & K. 732; Adams *v.* Fisher, 3 My. & C. 548; Eager *v.* Wiswall, 2 Paige 371. The soundness of the exception stated in the text has been strongly questioned by Vice-Chancellor Wigram (on Discovery, pl. 385–424, 2d ed.), to which the student is referred; the further consideration of the point being foreign to the plan of this work. See also Story, Eq. Pl. § 859; 3 Dan. Ch. Pr. 2056–2060 (5th Amer. ed. vol. ii. 1832); Latimer *v.* Neate, 11 Bligh 149; Phillips *v.* Evans, 2 Y. & C. 647. It may, however, be here added, that the English rule, that the plaintiff, in a bill of discovery, shall only have a discovery of what is necessary to his own title, and shall not pry into the title of the defendant, is deemed inconsistent with the course of remedial justice as administered in Massachusetts, which permits a full inquiry as to all and any facts that may impeach the right of property in the party of whom the inquiry is made: Adams *v.* Porter, 1 Cush. 170. The like principle, it is conceived, will apply in the jurisprudence of Maine, and such other States as pursue similar forms of remedy. {The valuable note of Judge Redfield on this point is as follows: The exception seems still to be recognized in England and Ireland, if the

§ 299. **When Defendant must produce Documents.** If the documents and papers, of which production is required, are admitted to be in the defendant's possession, he will be required to produce them, though they are *not referred to* in the answer, and though they relate to the defendant's title, provided they also relate to the plaintiff's title; but not otherwise.[1] If they *are referred to*, but are not admitted to be in his possession, the court cannot order their production, unless it appears that they are in the hands of some person over whom the defendant has control.[2] And if the defendant admits that he has the document in question, and

reference so incorporates the document with the answer as to make it substantially a part of it: Bell *v.* Johnson, 1 J. & H. 682; Peyton *v.* Lambert, 6 Ir. Eq. 9; McIntosh *v.* Gr. West. R. R. Co., 18 L. J. Ch. 170.

In Swinborne *v.* Nelson, 15 Eng. L. & Eq. 578 (16 Beav. 416; 22 Law J. N. S. Ch. 331), the Master of the Rolls, Sir John Romilly, said: "I am disposed to believe that the decision of Adams *v.* Fisher was intended by the Lord Chancellor to be limited to withholding only the production of the documents which could not assist the plaintiff in making out his title to the relief sought; at least the observations made by his Lordship, respecting the admission of counsel to the question put by the court, seemed to point to this result. However this may be, the authorities which relate to the subject were not commented on, nor brought to the attention of the court; and after the most careful consideration which I am able to give to this subject, I am of opinion, that if the case of Adams *v.* Fisher goes beyond the point I have last suggested, it is not in accordance with the long line of authorities before decided in this court; and, therefore, if I have to choose between that case and other cases decided by equally high authority, I feel myself compelled to follow those which are alone, in my opinion, consistent with the principle on which pleadings in equity can be clearly and safely established." And the court stated, in another part of the opinion, "It is impossible to lay down one rule on this subject of production of documents, and another upon answers to be put to interrogatories." In Howard *v.* Robinson, 5 Jur. N. S. 136, before Vice-Chancellor Kindersley, this question is carefully examined, and the principles discussed. The learned judge denied that the mere reference to a paper, by the defendant in his answer, gave the plaintiff any right to examine it. The plaintiff, it was admitted, always had the right to the inspection of any paper in the defendant's possession which would assist his case, but had no right to see any such document tending merely to establish defendant's case. And it would seem, upon principle, that the usual reference in an answer to a written instrument, for greater certainty, did not oblige the party to produce it merely for the inspection and advantage of his opponent, until the trial, and not then, unless he chose. The case of Hardman *v.* Ellames (2 My. & K. 732) is here examined, and, as far as this question is concerned, limited or explained. REDFIELD.]

[1] Hardman *v.* Ellames, 2 My. & K. 732; Bligh *v.* Berson, 7 Price 205; Firkins *v.* Lowe, 13 id. 21; Farrer *v.* Hutchinson, 3 Y. & C. 692; Burton *v.* Neville, 2 Cox Eq. 242.

[2] Hardman *v.* Ellames, *supra;* Darwin *v.* Clarke, 8 Ves. 158. And see Story, Eq. Pl. § 859; *supra*, § 296. [Where a solicitor was charged with fraud, and a deceased client, of whom there was no legal representative, was alleged to be a party to the fraud, it was held that the solicitor must produce documents bearing on the transaction, whether his own or those of his deceased client: Feaver *v.* Williams, 11 Jur. N. S. 902. The mortgagee of a testator advanced sums of money to his executrix, and the trustee of the mortgaged property, for the benefit of the *cestuis que trustent* under the will. In consideration of these advances he purchased the equity of redemption from the trustee. On a summons to compel him to produce the purchase deed and the preliminary agreement in a redemption suit by two of the *cestuis que trustent*, it was held that they must be produced, as they might disclose the dealings of the trustee with the trust property: Smith *v.* Barnes, 11 Jur. N. S. 924.]

offers to produce it *if the court should require him so to do*, this is merely a submission to the discretion of the court.[3] If they have already been produced before a commissioner, in order that the plaintiff may prove them as exhibits, the defendant is bound to have them in court at the hearing, though there has been no direct order for their production.[4]

§ 300. **Objection to Production of Documents.** The discovery and production of documents and papers by the defendant may be *successfully resisted*, by showing that they are *privileged*, either by professional confidence, or by their exclusively private character;[1] or, that the discovery and production would tend to involve him in a *criminal charge;* or subject him to a *penalty* or *punishment*, or to *ecclesiastical censures*, or to a *forfeiture of his estate*.[2] All these classes of exemptions having been fully treated in a preceding volume, any further discussion of them in this place is superfluous.[3] But it should be observed, that, regularly,

[3] Atkyns *v.* Wryght, 14 Ves. 213, 214, per Ld. Eldon.

[4] Wheat *v.* Graham, 7 Sim. 61.

[1] {In Lafone *v.* Falkland Island Company, 4 Kay & J. 34, it was held that answers to inquiries addressed by defendants in England to their agent in the Falkland Islands, by direction of their solicitor, for the purpose of procuring evidence in support of defendants' case, are within the rule as to protection. "The true test in such cases is, not whether the person who is at a distance and transmits the information, is the agent of the solicitor, and sent out by him, but whether, in transmitting that information, he was discharging a duty which properly devolved on the solicitor, and which would have been performed by the solicitor had the circumstances of the case admitted of his performing it in person."}

[2] {This rule does not prevent the government from using books and papers seized under the revenue laws as evidence: U. S. *v.* Hughes, 12 Blatchf. C. C. 553. Nor is it any substantial objection that it will expose the secrets of trade: The Don Francisco, 31 L. J. (M. & A.) 205.}

[3] See *ante*, Vol. I. §§ 237–254, 451–453. {A defendant is not bound to produce, by way of answer, any public documentary evidence of which he is the official keeper: Salmon *v.* Clagett, 3 Bland Ch. 145. But see Beresford *v.* Driver, 14 Beav. 387. The protection afforded to political documents does not depend upon the question whether the person called on to produce them is a party to the suit, but on the ground of the mischief to the public which would arise from the disclosure of such documents: Wadeer *v.* East India Company, 2 Jur. N. S. 407. A rector of a parish filed a bill to recover lands and tithes as belonging to the rectory. The defendants answered as to the tithes, but refused by their answer to give any discovery as to the land. Held, that they having submitted to answer, could not refuse discovery as to the land, on the ground that the bill, so far as it sought relief as to the land, was demurrable, as stating only a legal title in the plaintiff, without showing any grounds for equitable relief: Bates *v.* Christ's College, Cambridge, 8 De G. M. & G. 726. The reports of an accountant employed by a defendant's solicitor to investigate books are privileged from production: Walsham *v.* Stainton, 2 H. & M. 1. A trustee taking counsel's opinion to guide himself in the administration of his trust, and not for the purpose of his defence in a litigation against himself, is bound to produce them to his *cestui que trust*, but the relation of trustee and *cestui que trust* must for that purpose be first established. A mere claimant to an estate is not entitled to the production of cases and opinions taken by a trustee, and documents accompanying a case for the opinion of counsel are privileged: Wynne *v.* Humberston, 27 Beav. 421. So a married woman, living apart from her husband, must, as between herself and her husband, or those claiming under

the grounds of exemption on which the discovery is resisted ought to appear in the answer; though sometimes an *affidavit* may be filed, for the purpose of more fully showing that the documents in question support exclusively the title of the defendant, and relate solely to his defence, or are otherwise privileged; or that they are not in his custody or power.[4]

§ 301. **Order for Production.** The *order for production* of documents, in American practice, usually directs that they be deposited with the clerk of the court. But in special cases, the court will order that they be produced at the defendant's place of business, or at the office of his solicitor, or at the master's office, or elsewhere, according to the circumstances. And where books are to be produced, the defendant will have leave to seal up and conceal all such parts of them as, according to his affidavit previously made and filed, do not relate to the matters in question.[1]

him, disclose all correspondence with her solicitor which relates to business in which she and her husband were mutually interested, and in which there was nothing adverse to him. But where her interest is adverse to her husband, and where, rightly or wrongly, she acts as a *feme sole*, her communications and correspondence will be privileged: Ford *v.* De Pontès, 5 Jur. N. S. 993. A communication, to come within the principle of privilege, must be made by a solicitor to his client, or *vice versa*, and also in relation to the actual thing to which the interrogatory relates. It is not sufficient that the knowledge is stated to have been acquired during the subsistence of the relation of solicitor and client: Marsh *v.* Keith, 6 id. 1182. See also Thomas *v.* Rawlings, 27 Beav. 140, and Bluck *v.* Galsworthy, 3 L. T. N. S. 399.]

[4] Llewellyn *v.* Badeley, 1 Hare 527. And see Morrice *v.* Swaby, 2 Beav. 500; 3 Dan. Ch. Pr. 2066 (5th Amer. ed. vol. iii. 1834); [Felkin *v.* Lord Herbert, 30 L. J. Ch. 798. A defendant, after answering that he had not personally inspected the documents in his possession relating to the subject of the suit, stated that he was advised, and that, to the best of his knowledge, information, and belief, it was the fact, that the documents did not, nor did any of them in any way, make out, or evidence, or support, or tend to make out, or evidence, or support, the case, or any part of the case, made by the plaintiff, nor defeat or impeach the case or defence, nor any part of the case or defence, of the defendant, but were evidence in support of the defendant's case. Held, that as it appeared that the defendant had not inspected the documents, they were not protected from the order for their production: Manby *v.* Bewicke, 39 Eng. Law & Eq. 412; 3 Kay & J. 342; Att'y-Gen. *v.* London, 2 Mac. & Gord. 247. In a bill for an account, the plaintiff charged fraud and wilful neglect against the defendants, who interrogated him as to invoices and other documents in his (the plaintiff's) possession. The plaintiff's answer alleged that they were at New Orleans, and that he was unable to communicate with his clerks there, or to proceed thither to fetch them. The defendant excepted to this answer. Held, that such documents, which tended to establish or disprove the fraud charged, must be produced before the hearing, and were not fitting subjects of an inquiry in chambers; and that the plaintiff was bound to show that he has attempted to obtain the documents, and failed in that attempt, — a mere allegation that they are in a country where war is raging not being sufficient: Mertens *v.* Haigh, 8 L. T. N. S. 561.]

[1] See 1 Hoffm. Ch. Pr. 306–319, where the law on the subject of the production of documents, with the cases, will be found fully stated. The violation of the seals, by the adverse party, is punishable as a contempt: Dias *v.* Merle, 2 Paige 494. And see 2 Dan. Ch. Pr. 2064–2066, 5th Am. ed. vol. ii. 1836; Napier *v.* Staples, 2 Moll. 270; Titus *v.* Cortelyou, 1 Barb. 444. [This affidavit is only *prima facie* evidence that the

§ 302. **Defendant must file a Cross-bill for Discovery.** We have spoken of the production of documents by the defendant, because, by the regular course of practice in chancery, it is only by means of a bill, and therefore only by a plaintiff, that a discovery can be obtained; and, therefore, if the defendant would obtain the production of documents from the plaintiff, he must himself become a plaintiff, by *filing a cross-bill* in which case all the preceding rules will apply in his favor against the plaintiff in the original bill.[1] But, ordinarily, no answer to the cross-bill can be obtained, until the defendant has filed a full answer to the original bill, and complied with the order for the production of documents on his part.[2]

§ 303. **Exceptions to the Rule.** This general rule, that when a defendant would obtain the discovery and production of documents from the plaintiff, he can obtain it *only by a cross-bill*, is

sealed portions of the book contain nothing material to the cause in which they are produced. If the other party shows sufficient grounds to suspect that the sealed portion of the document does contain material evidence, the court or master will inspect that portion of the document and make such order thereupon as he shall deem proper: Titus *v.* Cortelyou, ib.

Where the answer sets forth extracts from the defendant's books, which are sworn to embrace everything in the books that relates to the subject-matter of the suit, the plaintiff cannot, upon motion, and on suggestion that the extracts given are, if not garbled, at least liable to suspicion, entitle himself to a general inspection of the books of the defendant relating to other matters. He is entitled to the production, for inspection, of the books which contain the extracts given, but the defendant is at liberty to seal up the other parts of the books; and the inspection must take place under the supervision of an officer of the court: Robbins *v.* Davis, 1 Blatchf. C. C. 238. Where the defendant was sued in equity, as surviving partner in a firm of commission wine merchants, and was required to set out in his answer a full account of the partnership transactions, for the six months preceding the decease of the former partner, it was held not sufficient to set out the accounts, by way of reference to a book in which they were contained, on the ground that the persons named were privileged customers; and upon exceptions to the answer upon that ground, it was declared that the defendant ought to have set out the account in a schedule in his answer, and that the objection that the names of the customers were privileged did not apply to such a case: Telford *v.* Ruskin, 1 Drew. & Sm. 148. But we apprehend that in such a case, unless the *names* of the customers were very essential, the court would not require them to be set out upon the schedule. And where interrogatories are in a form which would make it oppressive to require a detailed answer, a defendant may answer by reference to books, but he must refer to them with such explanation and in such a manner as to make it as convenient as possible for the plaintiff to consult them: Drake *v.* Symes, Johns. 647; 6 Jur. N. S. 318; Walker *v.* Poole, L. R. 21 Ch. D. 835.]

[1] [Bogert *v.* Bogert, 2 Edw. Ch. 399; White *v.* Buloid, 2 Paige (N. Y.) Ch. 164; Field *v.* Schieffelin, 7 Johns. (N. Y.) Ch. 252; Talmage *v.* Pell, 9 Paige (N. Y.) Ch. 410.] See Penfold *v.* Nunn, 5 Sim. 409, that a defendant cannot obtain such production from the plaintiff, merely by motion, though he makes oath that an inspection is necessary to enable him to answer the bill.

[2] 1 Dan. Ch. Pr. 2069, 3d Am. ed. 1390; Pr. of Wales *v.* E. of Liverpool, 1 Swanst. 123, 124. This rule is expressly adopted as a rule of practice, in cases in equity, in the national courts of the United States, and in the courts of some of the several States. See Rules U. S. Courts in Equity Cases, Reg. 72; Massachusetts Rules in Chancery, Reg. 13; Illinois, Rev. Stat. 1845, c. 21, § 29; Florida, Thompson's Dig. p. 459, § 11.

dispensed with in a few cases in the English practice, constituting *exceptions to the rule.* Formerly, when a document in the plaintiff's possession, mentioned in the bill, was necessary to the defendant, for the making of a full answer, the court has sometimes ordered the plaintiff to give him a copy of it; and at other times the court has stayed proceedings against the defendant, for not putting in his answer, until the plaintiff would give him an inspection of the documents in question; especially if both parties were equally entitled to the possession; as, for example, in the case of partnership books.[1] And in a more recent and celebrated case, where the plaintiff, in a bill against executors, stated that two promissory notes, of the same date, had been given by the testator, the one in English and the other in French currency, but of the same amount and for securing the payment of the one single sum of £15,000, mentioned in both notes; one of the executors made affidavit that he had inspected the former of the two notes, and had observed appearances on it tending to impeach its authenticity; and that he was informed and believed that the latter note had been produced for payment in Germany, and that an inspection of it was necessary, before he could make a full answer to the case stated in the bill; and moved that he might have time to make answer after such inspection should be given; it was held by Lord Eldon that this was sufficient ground to entitle the defendants to a production of the instrument before answer; and accordingly it was ordered, that the plaintiff be at liberty to come at any time in reply to the affidavit, and that in the mean time the defendants should not be called on to answer, until a fortnight after the instrument had been produced.[2] But in this country, in ordinary cases not regulated by statute, the plaintiff cannot be compelled, on motion, to give the defendant an inspection of his books and documents, in order to enable the defendant to answer the bill and make his defence; but if the plaintiff, on

[1] 3 Dan. Ch. Pr. 2070, 2071, 3d Am. ed. 1391; 1 Swanst. 124, 125; Potter *v.* Potter, 3 Atk. 719; Pickering *v.* Rigby, 18 Ves. 484.

[2] The Princess of Wales *v.* E. Liverpool, 1 Swanst. 114, 115, 125–127. The same rule was administered in Jones *v.* Lewis, 2 Sim. & Stu. 242; and though the order was discharged by Lord Eldon, on appeal (4 Sim. 324), yet the ground of the discharge does not appear, and it is hardly probable that he intended to reverse his previous decision in the case above mentioned. The same rule was also adopted in its principle by Lord Langdale, M. R., in Shepherd *v.* Morris, 1 Beav. 175. But its soundness, as a general rule, was questioned by the Vice-Chancellor of England, in Penfold *v.* Nunn, 5 Sim. 410, and again in Milligan *v.* Mitchell, 6 id. 186.

request, refuses to permit such inspection of books and documents, he will not be allowed to except to the answer for insufficiency in not stating their contents.[3] In cases of partnership, however, where the controversy is between the partners or their representatives, the party having possession of the partnership books and papers will be ordered, on motion, and in any stage of the suit, to place them in the hands of an officer of the court, for the inspection of the other party, and that he may take copies, if necessary.[4] And if documents are impeached by either party as false and fraudulent, they will be ordered to be brought into court for inspection.[5]

§ 304. **Rule in United States Courts.** But in the Federal courts of the United States, the necessity for resorting to the equity side, by a bill for the discovery of documents in aid of the jurisdiction at law, is entirely obviated by the statute,[1] which empowers all the courts of the United States, in the trial of actions at law, on motion, and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.* And if a plaintiff shall fail to comply with such order to produce books or writings, it is made lawful for the respective courts, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if the defendant shall fail to comply with such order, judgment may be entered against him by default. Under this statute it is requisite, whenever a judgment by nonsuit or default is intended to be claimed, that notice be given to the adverse party to produce the papers in question, describing them with sufficient particularity, and stating that on his failure to produce them it is intended to move for judgment against him. This judgment is obtained, after a rule *nisi* for the production of the papers, granted on motion, supported by the affidavit of the party applying.[2] If the adverse party makes oath that he

[3] Kelly *v.* Eckford, 5 Paige 548.
[4] Ibid. See also Christian *v.* Taylor, 11 Sim. 401.
[5] Comstock *v.* Apthorpe, 1 Hopk. Ch. 143; s. c. 8 Cowen 386.
[1] Stat. U. S. 1789, c. 20, § 15, 1 Stat. at Large, 82, Rev. Stat. U. S. (1878), § 724; Geyger *v.* Geyger, 2 Dall. 332.
[2] Hylton *v.* Brown, 1 Wash. C. C. 298, 300; Bas *v.* Steele, 3 id. 381, 386; Dunham *v.* Riley, 4 id. 126; U. S. *v.* Pins, Gilp. 306. See also Vasse *v.* Mifflin, 4 Wash. C. C. 519.

has not the papers, this may be met by the oath of two witnesses, or of one with other corroborating and preponderating evidence.[3]

[3] Hylton *v.* Brown, *supra;* Bas *v.* Steele, *supra.* This statute is held not to apply to proceedings *in rem;* because a judgment as by default cannot be rendered against a *defendant*, in proceedings of that kind; and because chancery will not compel a party to produce evidence which would subject him to a forfeiture: U. S. *v.* Pins, Gilp. 306.

In most of the several States, also, the necessity for a bill of discovery of documents is either entirely done away, or in a great degree obviated, by statutory provisions and rules of practice. In all the States, it is believed, office-copies of deeds and other documents required by law to be registered may be read in evidence by any party, other than the grantee or obligee; and in many of the States, deeds and other documents, acknowledged or proved before the proper magistrate or court in the mode provided by law, are admissible as *prima facie* evidence. See *ante*, Vol. I. §§ 91, 571, n., 573 and n. In some of these States, and in others also, summary modes are established for the discovery and production of books, papers, and documents, whenever they are material to the support or defence of any civil action or suit. Thus, by the Revised Statutes of New York, the Supreme Court is empowered, in such cases as shall be deemed proper, to compel any party to a suit pending therein to produce and discover books, papers, and documents in his possession or power, relating to the merits of any such suit, or of any defence therein: 2 Rev. Stat. p. 262, tit. 3, part 3, c. 1, § 30. To entitle a party to any such discovery, he is required to present a petition, verified by oath, to the court, or any justice thereof, or to any circuit judge in vacation, upon which an order may be granted for the discovery sought, or that the party against whom the discovery is sought should show cause why it should not be granted: ib. § 32. Every such order may be vacated by the court or magistrate by whom it was granted, upon satisfactory evidence that it ought not to have been granted; or, upon the discovery sought having been made; or, upon the party, required to make the discovery, denying on oath the possession or control of the books, papers, or documents ordered to be produced: ib. § 33. The books, papers, and documents thus produced are allowed the same effect, when used by the party requiring them, as if produced upon notice: ib. § 36.

By the Code of Practice, as amended in 1849, the court before which an action is pending, or any judge or justice thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action, or the defence therein. If compliance with the order be refused the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both: New York Code of Practice, § 388 [342].

These two provisions, of the Revised Statutes, and of the Code of Practice, have been deemed to stand well together, the former not being repealed by force of the latter: Follett *v.* Weed, 1 Code Rep. 65; Dole *v.* Fellows, 1 Code Rep. N. S. 146. And see Brown *v.* Babcock, 1 Code Rep. 66; Stanton *v.* Del. Mut. Ins. Co., 2 Sandf. S. C. 662; Moore *v.* Pentz, ib. 664. And the power thus vested in the court has been held to extend to all cases where one party desires to ascertain what documentary evidence his adversary holds upon which he is relying to sustain himself upon the trial; as well as to cases where evidence is sought in support of his own title: Powers *v.* Elmendorf, 2 Code Rep. 44.

By another provision of the same code, no *action* to obtain discovery under oath, in aid of the prosecution or defence of another action, can be allowed, nor can any examination of a party be had, on behalf of the adverse party, except in the manner afterwards prescribed in the same code; namely, as a witness, and in the manner of any other witness: New York Code of Practice, § 389. This section is held merely to abolish the chancery bill for discovery; and not to affect the mode by petition, prescribed in the statutes or code: Follett *v.* Weed, *supra.*

Regulations, substantially to the same effect, in regard to the production of documents, etc., may be found in the statutes of Iowa, Code of 1851, §§ 2423–2425; Arkansas, Rev. Stat. 1837, c. 23, §§ 50–53; Missouri, Rev. Stat. 1845, c. 136, art. 4, §§ 7–19; ib. c. 137, art. 2, §§ 31–34; Illinois, Rev. Stat. 1845, c. 83, § 12; Louisiana, Code of Practice, art. 140–142, §§ 473–475, 917–919, 1037; and Indiana, Rev. Stat. 1852, part

§ 305. **Documents procurable by Subpœna.** If documents, the production of which is desired, are *in the possession of one who is not a party to the suit*, he may be compelled by a *subpœna duces tecum* to produce them; and if the *subpœna* is not obeyed, he will be punished for contempt, on proof by affidavit that the documents are in his custody.[1]

§ 306. **Documents Produced on Notice.** In regard to *documents produced on notice*, it has already been stated as the *rule at law*, that, ordinarily, the party calling for their production, and offering them in evidence, must prove their execution, notwithstanding they came out of the custody of the adverse party, and are produced at the trial;[1] and that an exception to this rule is allowed, where the party producing the instrument is himself a party to it, claiming under it an abiding interest in the subject of the action;[2] or where the instrument was taken by the party producing it, in the course of his official duty as a public officer, as, for example, a bail-bond, taken by the sheriff, and produced by him on notice.[3] *In equity* this rule holds good to its full extent, as to documents in the hands of a *plaintiff;* but it is

2, c. 1, §§ 304–306. See also California, Rev. Stat. 1850, c. 142, §§ 294, 295; Georgia, 1 Cobb's Dig. pp. 463, 465; Rev. Stat. 1845, p. 529, c. 19, art. 7, § 146; Florida, Thompson's Dig. p. 459, § 11.

In Virginia, it is at the option of a party either to file a bill in chancery for the discovery and production of books and writings, or to apply to a commissioner of the court, by petition and affidavit, alleging his belief of the possession of such books and writings by the other party, and their materiality as evidence for him, and describing them with reasonable certainty; in which case the court, after notice to the adverse party, being satisfied of the truth of the allegations, and that the petitioner has no other means of proving the contents of the books and papers, will compel their production; unless the adverse party shall answer upon oath that they are not under his control: Code of 1849, c. 176, §§ 39, 40.

In Maine, the party requiring the production of books, papers, or documents in the possession of the opposite party, may file a rule with the clerk, and give notice of it to the other party, stating the fact, the ground of his claim of discovery and production, its necessity, and the time and place; and if the parties do not dispose of the subject by mutual arrangement, copies of the rule and proceedings may be transmitted to one of the judges, whose decisions and directions will be binding on the parties: Maine Sup. Jud. Court Rules in Chancery, Reg. 17. In Maryland, the chancellor is empowered, by statute, on application of either party on oath, to order and decree the production of any books, writings, or papers in the possession of the other party, containing evidence relative to the matters in dispute between them: Stat. 1798, c. 84, § 2 (Dorsey's ed.).

[1] See *ante*, Vol. I. §§ 558, 559. {But in such a case he should be sworn as a witness, so that he may state the reasons, if any he has, why he should not be compelled to produce the documents: Aikin *v.* Martin, 11 Paige (N. Y.) 499.}

[1] [Where the answer admits the execution and delivery of instruments, but denies their legal effect, such instruments may be given in evidence without proof of execution or delivery: Smith *v.* Gale, 144 U. S. 509.]

[2] *Ante*, Vol. I. §§ 560, 571; Betts *v.* Badger, 12 Johns. 223; Jackson *v.* Kingsley, 17 id. 158.

[3] Scott *v.* Waithman, 3 Stark. 168.

said that, as to documents in the hands of a *defendant*, the rule applies only to those of which the plaintiff is entitled to call for an inspection, but which the defendant has insisted on some privilege to withhold.[4]

§ 307. **Effect of Order to Produce.** The *effect of an order for the production of documents* is only to give the party obtaining the order the right to inspect and take copies of them. It does not make them evidence in the cause, except in those cases in which the mere circumstance of their coming out of the custody of the other party would, in itself, render them admissible. If, therefore, the party obtaining the order wishes to have them proved in the cause, or produced at the hearing, the order should be specially framed for that purpose. The order itself establishes the fact, that the documents came out of the adverse party's custody, into the hands of the officer of the court; and therefore, when they are produced in answer to a bill of discovery, it is not necessary, for the purpose of proving this fact, to read any part of the answer.[1]

§ 308. **Proof of Documents.** Having thus considered the subject of the *production*, we proceed, in the *second* place, to the PROOF OF DOCUMENTS. And here it may be generally observed, that written instruments, the execution of which is not admitted, and which do not prove themselves, must be proved by the same evidence in equity as at law.[1] The evidence for this purpose is

[4] Gresley on Evid. p. 173. If a document is stated in the bill, and admitted and referred to in the answer, it cannot be read from the bill, but ought still to be produced: Cox *v.* Allingham, Jac. 339.

[1] 3 Dan. Ch. Pr. 2068, 5th Amer. ed. vol. ii. 1837; Taylor *v.* Salmon, 3 My. & Cr. 422. And see *ante*, Vol. I. §§ 560–563. {An order having been made for production of books of account relating to the traffic of a railway company, with liberty for the plaintiff, "his solicitors and agents," to inspect, peruse, and take copies, the plaintiff's solicitor went to inspect them, accompanied by a professional accountant, who was the auditor of a neighboring railway company. Held, that the connection of the accountant with the other company made him an improper person to inspect the books, and that the plaintiff ought not to have introduced him: Draper *v.* Manchester, Sheffield, & Lincolnshire Railway Company, 3 De G. F. & J. 23.}

[1] *Ante*, Vol. I. §§ 563 *a*–584; 2 Dan. Ch. Pr. 1024, 5th Amer. ed. vol. i. 874–881. For the law respecting the proof of deeds, see *ante*, Vol. II. tit. Deed, §§ 293–299.

It is proper in this place to mention the provision made in the statutes of some of the States, for the solemn admission of the genuineness of documents intended to be used in the trial of causes, whether at law or in equity. The provision on this subject, in the New York Code of Practice, § 388 [341], is in the following words: "Either party may exhibit, to the other or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fail to give the admission, within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admis-

taken in the mode in which other evidence is taken in chancery proceedings, which is ordinarily by depositions before an examiner, commissioner, or other officer, and which will hereafter be stated.[2]

§ 309. **Exceptions to General Rule.** In certain cases, however, constituting *exceptions* to this general rule, witnesses may be examined *viva voce* at the hearing; namely, first, where the plaintiff, finding sufficient matter confessed in the answer to entitle him to a decree, sets down the cause for a hearing upon the bill, answer, and exhibits; and, secondly, where documents, letters, or other writings, essential to the justice of the cause, have been omitted to be proved before publication. But this is a limited indulgence, granted only to the party who is to use the documents; and is obtained by a special order, granted on motion, after notice to the adverse party, the documents and writings to be proved being described with sufficient particularity, both in the motion and in the order, and the omission of previous proof being satisfactorily accounted for.[1] If a replication has

sion; unless it appear, to the satisfaction of the court, that there were good reasons for the refusal." The same regulation is enacted in California: Rev. Stat. 1850, c. 142, § 294.

In other States, provision to the like effect is made by the Rules of Court. And in several States, where the suit or defence is professedly founded in whole or part on the deed or other instrument in writing of the adverse party, it is admissible in evidence without proof, unless such party shall expressly deny its genuineness under oath. See Texas, Hartl. Dig. art. 633, 634, 741, 742; Wisconsin, Rev. Stat. 1849, c. 98, § 85; Arkansas, Rev. Stat. 1837, c. 116, § 10; Missouri, Rev. Stat. 1845, c. 136, § 23; Ohio, Rev. Stat. 1841, c. 46, § 18; Virginia Code of 1849, c. 171, § 38; Illinois, Rev. Stat. 1845, c. 83, § 14; Indiana, Rev. Stat. 1852, part 2, c. 1, § 304.

The mode of proving public and private documents has been fully treated, *ante*, Vol. I. §§ 479–491, 501–521, 569–582.

[2] When a document or paper is proved by the deposition of a witness, it is usual for the magistrate or officer, who takes the deposition, to mark it with a capital letter, and to certify thereon that "this paper, marked with the (A) was *exhibited* to the deponent at the time of his being sworn by me, and is the same by him referred to in his deposition hereto annexed;" or "taken before me on" such a day, etc.; and hence such documents and papers are termed *Exhibits*. The same term is also applied to instruments which, on being *exhibited* to the adverse party, are thereupon solemnly admitted by him to be genuine, and may therefore be read in evidence without other proof; and is also, but with less accuracy, applied to certified official copies, admissible without other proof, and filed in the clerk's office, together with the bill or answer, to be read at the hearing. Exhibits proved by depositions should either be annexed to them, or so designated as to leave no reasonable doubts of their identity: Dodge *v.* Israel, 4 Wash. 323. In Georgia, it is required that copies of all deeds, and writings, and other exhibits, be filed with the bill or answer; and no other exhibits are to be admitted unless by order of court, for cause shown. Originals, not admitted in the answer, may be required at the hearing; and on application to the court, or to a judge in vacation, originals may be ordered to be deposited in the clerk's office, for the inspection of the adverse party: Rules of the Superior Court, in Equity, 1846, Reg. 17, Hotchk. Dig. p. 955.

[1] 2 Dan. Ch. Pr. 1025–1030, 5th Am. ed. vol. i. *881–*885; 1 Hoffm. Ch. Pr. 490; Graves *v.* Budgel, 1 Atk. 444; Barrow *v.* Rhinelander, 1 Johns. Ch. 559; Hughes *v.*

been filed, and the plaintiff's testimony is a mere exemplification of a record, which proves itself, he may read it at the hearing, on giving seasonable notice to the defendant of his intention, so that he may examine witnesses to explain or rebut its effect, if it can be explained.[2] But the course of the Court of Chancery is to confine the proof at the hearing to the verification of exhibits, excluding all examinations as to other facts; and not to refuse a party the liberty of proving them in that mode, where it can be done,[3] unless the execution or authenticity itself of the instrument is expressly denied, and is the point in controversy.[4] If the execution of the instrument is neither admitted nor denied by the defendant, it may be proved *viva voce* at the hearing.[5]

§ 310. **Proof of Exhibits.** Though, in *the proof of exhibits*, the course of examinations *viva voce* at the hearing, in modern practice, *does not necessarily exclude* every question that would admit of a *cross-examination*, yet it is restricted to a few simple points, such as the manual execution of the instrument, by the testimony of the subscribing witness, or by proof of the signature or handwriting of an instrument or paper not attested; or the custody and identity of an ancient document, produced by the librarian or registrar; the accuracy of an office-copy, produced by the proper officer, and the like.[1] It is not ordinarily allowed to prove in this mode the handwriting of attesting witnesses who are dead;[2] nor the due execution of a will, involv-

Phelps, 3 Bibb 198; Higgins *v.* Mills, 5 Russ. 287; Consequa *v.* Fanning, 2 Johns. Ch. 481. And see Dana *v.* Nelson, 1 Aik. 252. The liberty thus granted has been extended to the proof of exhibits on a rehearing, or on an appeal, which were not proved at the original hearing, or which have been subsequently discovered: Walker *v.* Symonds, 1 Meriv. 37, n.; Higgins *v.* Mills, *supra;* Dale *v.* Roosevelt, 6 Johns. Ch. 256; Williamson *v.* Hutton, 9 Price 194.

[2] Mills *v.* Pittman, 1 Paige 490. And see Pardee *v.* De Cala, 7 id. 132; Bachelor *v.* Nelson, Walk. Ch. 449; Miller *v.* Avery, 2 Barb. Ch. 582.

[3] Graves *v.* Budgel, 1 Atk. 444; Edgworth *v.* Swift, 4 Bro. P. C. 658.

[4] Att'y-Gen. *v.* Pearson, 7 Sim. 303; Booth *v.* Creswicke, 8 Jur. 323.

[5] Rowland *v.* Sturgis, 2 Hare 520. And see *supra*, § 291 *a*. {The rule excluding oral evidence at the hearing except to prove exhibits was upheld in De Butts *v.* Bacon, 1 Cranch C. C. 569; Consequa *v.* Fanning, 2 Johns. (N. Y.) Ch. 481; Bachelor *v.* Nelson, Walk. Ch. (Mich.) 449.

On an *ex parte* application the testimony of the attesting witness to an instrument was dispensed with, there being a difficulty in obtaining his evidence: Dierden, *In re*, 10 Jur. N. S. 673.}

[1] Gresl. Eq. Evid. pp. 188, 189; 2 Dan. Ch. Pr. 1025, 1026, 5th Am. ed. vol. i. 882, 833; Ellis *v.* Deane, 3 Moll. 63; Consequa *v.* Fanning, 2 Johns. Ch. 481; Graves *v.* Budgel, 1 Atk. 444. And see E. of Pomfret *v.* Lord Windsor, 2 Ves. 472.

[2] Bloxton *v.* Drewitt, Prec. Ch. 64; 2 Dan. Ch. Pr. 1027, 5th Am. ed. vol. i. 882, 883.

ing, as it does, the sanity of the testator;[3] nor a deed that is impeached in the answer, as against the party impeaching it;[4] nor a book or ancient map, not produced by an officer to whom the custody of it officially belonged.[5] But where the instrument or paper is an important document, leave will be granted to postpone the hearing for the purpose of proving it by interrogatories in the ordinary mode.[6] And, in examinations at the hearing, the court will sometimes permit a cross-examination, and will itself examine, *viva voce*, upon the suggestion of any question.[7] The court will also, in cases in which any exhibit may, by the present practice, be proved *viva voce* at the hearing of a cause, permit it to be proved by the *affidavit* of the witness who would be competent to prove the same *viva voce* at the hearing.[8]

§ 311. **Right of Adverse Party to inspect.** The formal proof of written documents in a cause does not, merely on that ground, entitle the adverse party to inspect them before the hearing; for it is the settled course of chancery, not to enable a party to see the strength of his adversary's case, or the evidence of his title, or "to pick holes in the deed," until the hearing of the cause.[1] But where an inspection has been called for and had, the instruments are admissible in evidence for both parties.[2]

§ 312. 4. **Witnesses.** It has already been seen, that, in many of the United States, trials of fact in chancery are had upon oral testimony delivered in open court, in the same manner as in

[3] Harris *v.* Ingledew, 3 P. Wms. 91, 93; Niblett *v.* Daniel, Bunb. 310; Eade *v.* Lingood, 1 Atk. 203.

[4] Barfield *v.* Kelley, 4 Russ. 355; Maber *v.* Hobbs, 1 Y. & C. 585.

[5] Lake *v.* Skinner, 1 Jac. & Walk. 9; Gresl. Eq. Evid. p. 189.

[6] Bloxton *v.* Drewit, *supra;* Bank *v.* Farques, Ambl. 145; Clarke *v.* Jennings, 1 Anstr. 173; Maber *v.* Hobbs, *supra.*

[7] Turner *v.* Burleigh, 17 Ves. 354; Consequa *v.* Fanning, 2 Johns. Ch. 481.

[8] Orders of August 26, 1841, Ord. 43; Law's Pract. U. S. Courts, p. 708. {In a suit for specific performance of an agreement for a lease, in which there were numerous affidavits, and the testimony very conflicting, an application was made to have an oral examination of the deponents. The application was refused, and it was said by Lord Westbury to be the duty of the judge not to have recourse to oral examination of the witnesses in a cause, unless he feels a difficulty in determining the weight of the evidence, or is in some degree of uncertainty or difficulty as to the side to which his judgment ought to incline: Farrall *v.* Davenport, 5 L. T. N. S. 436. It is well settled both in England and this country that exhibits may be proved by parol, — and such parol evidence may be placed upon record by a bill of exceptions: Gafney *v.* Reeves, 6 Ind. 71.}

[1] Davers *v.* Davers, 2 P. Wms. 410; 2 Str. 764; Hodson *v.* E. of Warrington, 3 P. Wms. 35; 2 Dan. Ch. Pr. 1030, 5th Am. ed. vol. i. 884.

[2] *Ante*, Vol. I. § 563.

trials at common law; and that the inclination of opinion in some other States is in favor of this mode of proof.[1] Nevertheless, it is an ancient and general rule in chancery to exclude oral testimony, and to receive none at the hearing except what is contained in written depositions. And as this rule is still acted upon in some of the States, and is partially and in a modified degree still recognized as a leading rule in others, it will be necessary to consider it in this place. The general subject naturally disposes itself into two branches: namely, first, the *competency of the witnesses;* and, secondly, the *manner in which their testimony is obtained.*

§ 313. **Competency.** And FIRST, as to the *competency of witnesses.* The rules of evidence, generally speaking, are the same in equity as at law, and every person who is a competent witness at law is also competent in equity. What has been said in the preceding volumes on this subject will therefore not be here repeated. But in certain cases courts of equity go further in this respect than courts of law, by examining the parties themselves as witnesses, — a practice wholly unknown to the ancient common law.[1] We are therefore here to consider in what cases persons, inadmissible as witnesses at law, are admissible in equity. These are chiefly *parties to the record;* for third persons, interested in the subject or event of the suit, or otherwise incompetent to testify at law, are for the same reasons excluded here also.

§ 314. **Plaintiffs and Co-plaintiffs.** A *plaintiff* in equity may sometimes *examine a co-plaintiff* as a witness. This is always permitted, when the adverse party consents; the ground for excluding him being his liability to costs, which rendered him interested in the event of the suit. But if the defendant will not consent, the bill, on motion, and giving security for costs,

[1] *Supra*, §§ 259, 264, 265. {In Massachusetts it is provided by statute (Pub. Stat. c. 169, § 66), that "in proceedings in equity, the evidence shall be taken in the same manner as in suits at law, unless the court, for special reasons, otherwise directs; but this shall not prevent the use of affidavits, where they have been heretofore allowed." And in c. 151, § 26, it is further provided, that "the testimony of witnesses examined orally before a single justice, upon any matter pending before him, in which an appeal is taken, shall be reported to the full court; and the court shall provide by general rules for some convenient and effectual means of having the same reported by the justice before whom the hearing is had, or by some person designated by him for that purpose. No oral evidence shall be exhibited to the full court, but the cause shall be heard, on appeal, upon the same evidence as on the original hearing; but the full court may grant leave to parties in special cases of accident or mistake, to exhibit further evidence, and may provide by general rules, or special order, for the conditions under and modes by which such evidence shall be taken."}

[1] *Ante*, Vol. I. §§ 329, 348–354.

may be amended by striking out the name of the co-plaintiff to be examined as a witness, and inserting his name as a defendant.[1] If he is only a trustee or a nominal plaintiff, he is a competent witness, of course, on the mere striking out of his name; but if he is not, and he still has an interest in the event of the suit, it must be released.[2] If his interest lies in a part only of the subject of the suit, as to which separate relief may be given, he may be examined in regard to the other part of the subject without a release.[3]

§ 315. **Plaintiffs and Defendants.** The *plaintiff may also examine one of several defendants*, as a witness, as to points in which the defendant examined has no interest, or on which his interest is balanced. Leave for this purpose is granted, of course, on motion and affidavit that the defendant is a material witness, and is not interested in the matters to which he is to be examined; subject to all just exceptions, such as the competency of his testimony, or the like; all which are open to the adverse party at the hearing. The affidavit of his freedom from interest is generally understood to mean only that he is not interested on the side of the party applying. But, though he be not thus interested, yet, if he is interested adversely to the rights of his co-defendants, as, for example, to exonerate himself by charging them, he cannot be examined.[1] Wherever a defendant is thus examined as a witness, he is subject to a cross-examination by the other defendants.[2]

§ 316. **Examination of Defendant works a Release.** This examination of a defendant by the plaintiff, as a witness, *ordinarily operates as an equitable release* to him, so far as regards the matters to which he is interrogated. No decree, therefore, can be had against him, except as to matters wholly distinct from those

[1] 1 Dan. Ch. Pr. pp. 457, 1037, 5th Am. ed. vol. i. 885, 886; Gresley, Eq. Evid. p. 339; Motteux *v.* Mackreth, 1 Ves. Jun. 142; Witts *v.* Campbell, 12 Ves. 493; Helms *v.* Franciscus, 2 Bland 544. But see Benson *v.* Chester, 1 Jac. 577.

[2] Eckford *v.* De Kay, 6 Paige 565; Hanly *v.* Sprague, 7 Shepl. 433; Hoffm. Master in Chan. pp. 19, 20; 1 Hoffm. Ch. Pr. 487.

[3] Lingan *v.* Henderson, 1 Bland 268.

[1] 1 Hoffm. Ch. Pr. 485; 2 Dan. Ch. Pr. 1038, 1039, 5th Am. ed. vol. i. 885; Man *v.* Ward, 2 Atk. 229; Hurd *v.* Partington, 1 Young 307; Fletcher *v.* Glegg, ib. 345; Ellis *v.* Deane, 3 Moll. 58; Rogerson *v.* Whittington, 1 Swanst. 39; Hardcastle *v.* Shafto, 2 Fowl. 100; Meadbury *v.* Isdall, 9 Mod. 438; Robinson *v.* Sampson, 10 Shepl. 388; Harvey *v.* Alexander, 1 Rand. 219; De Wolf *v.* Johnson, 10 Wheat. 367; Miller *v.* McCan, 7 Paige 457; Williams *v.* Beard, 3 Dana 158; Sproule *v.* Samuel, 4 Scam. 135; Taylor *v.* Moore, 2 Rand. 563.

[2] Benson *v.* Le Roy, 1 Paige 122; Hoffm. Master in Chan. pp. 20, 21; Robinson *v.* Sampson, *supra;* Hayward *v.* Carroll, 4 H. & J. 518; Tallmadge *v.* Tallmadge, 2 Barb. Ch. 290.

to which he was examined.[1] The reasons of this rule are, that it is inconsistent to allow the plaintiff to call on the defendant to assist him with evidence in his cause, and at the same time to act against him, in respect to the same matters; and also that, by so doing, the other parties may be wronged.[2] If the defendant, who is examined as a witness, is the party primarily liable to the plaintiff, the other defendant being only secondarily liable, the plaintiff cannot have a decree against either, upon *that part of the case* to which the examination was directed.[3] But the general rule we are considering does not apply to the case of a mere formal defendant, such as an executor or a trustee, against whom no personal decree is sought, and who has no personal interest in the subject as to which he is examined; nor to the case of a defendant who, by his answer, has admitted his own absolute liability, or who has permitted the bill to be taken *pro confesso* against him.[4]

§ 317. **When Defendant may examine Plaintiff.** In some cases, as we have heretofore seen,[1] *a defendant may examine the plaintiff* as a witness. Leave for this purpose may be obtained, wherever the plaintiff is but a nominal party, having no beneficial interest in the property in dispute; and the real party in interest will, in such case, be enjoined from proceeding at law.[2] A co-plaintiff may generally be examined as a witness for the defendant, by consent;[3] but leave will not be granted for one defendant to

[1] Weymouth *v.* Boyer, 1 Ves. Jun. 417; Lewis *v.* Owen, 1 Ired. Eq. 293; Palmer *v.* Van Doren, 2 Edw. Ch. 192; Bradley *v.* Root, 5 Paige 633; Lingan *v.* Henderson, 1 Bland 268. This rule is now abrogated, and a decree may be had, by virtue of the statute of 6 & 7 Vict. c. 85. See 2 Dan. Ch. Pr. 1042. {Cf. 14 & 15 Vict. c. 9, and 16 & 17 Vict. c. 83; 2 Dan. Ch. Pr. 3d Am. ed. 884.}

[2] Nightingale *v.* Dodd, Ambl. 583. And see Fulton Bank *v.* Sharon Canal Co., 4 Paige 127; Thomas *v.* Graham, Walk. Ch. 117.

[3] Bradley *v.* Root, 5 Paige 633. And see Thompson *v.* Harrison, 1 Cox Ch. C. 344; Meadbury *v.* Isdall, 9 Mod. 438; Palmer *v.* Van Doren, 2 Edw. Ch. 192; Nightingale *v.* Dodd, *supra;* Lewis *v.* Owen, 1 Ired. Eq. 290.

[4] Bradley *v.* Root, *supra.* And see Goold *v.* O'Keeffe, 1 Beat. 356; Ellis *v.* Deane, 3 Moll. 53; Thompson *v.* Harrison, *supra;* Murray *v.* Shadwell, 2 V. & B. 403. {A trustee may, in general, be a witness: Watertown *v.* Cowen, 4 Paige (N. Y.) 510; Neville *v.* Demeritt, 1 Green (N. J.) Ch. 321; Drum *v.* Simpson, 6 Binn. (Pa.) 481; Keim *v.* Taylor, 11 Pa. St. 163. But if a trustee is entitled to commissions, he is interested; and such interest must be released, before he can be a witness in those jurisdictions where interest renders a witness incompetent, and in those causes where his interest may be affected: Anderson *v.* Neff, 11 Serg. & R. (Pa.) 208; King *v.* Cloud, 7 Pa. St. 467.}

[1] *Ante*, Vol. I. § 361.

[2] Hougham *v.* Sandys, 2 Sim. & Stu. 221; Norton *v.* Woods, 5 Paige 249. And see Fereday *v.* Wightwick, 4 Russ. 114; Armiter *v.* Swanton, Ambl. 393.

[3] Walker *v.* Wingfield, 15 Ves. 178; Whately *v.* Smith, Dick. 650.

examine a co-plaintiff as a witness against another defendant, for the purpose of sustaining the bill against him.[4]

§ 318. **Co-defendants Witnesses for each other.** *Co-defendants may also be witnesses for each other.* The rule in courts of equity on this subject is founded on the same principle with the rule at law, which has formerly been stated ;[1] namely, that it ought not to be in the plaintiff's power to deprive the real defendant of his witnesses by making them defendants. And this principle applies, and therefore the testimony of a co-defendant may be had, in all cases where he is either a merely nominal defendant, or has no beneficial interest in the matter to which he is to be examined ; or his interest or liability is extinguished by release, or is balanced ; or where the plaintiff cannot adduce some material evidence against him ; or where no decree is sought, or none can be properly had against him.[2] If the witness, who was competent at the time of his examination, is afterwards made a defendant, his deposition may still be read.[3] And it makes no difference that relief is prayed against the defendant proposed to be examined as a witness, if the prayer be founded upon matters other than that to which he is to be interrogated ; or, in other words, if his interest be not identical with that of the party who examines him.[4]

[4] Eckford *v.* De Kay, 6 Paige 565. In the States of New York, Iowa, Indiana, Georgia, Louisiana, Texas, and California, where there is no distinction in the forms of proceeding, between cases at law and in equity, provision is made by statute, for the examination of parties by each other as witnesses. In Mississippi, and in Arkansas, in cases in equity, the defendant may insert in his answer any new matter of defence, and call on the plaintiff, or any of his co-defendants, as the case may be, to answer it on oath : Mississippi, Stat. Feb. 15, 1838. § 1 ; Ald. & Van Hoes. Dig. App. c. 7. Arkansas, Rev. Stat. 1837, c. 23, § 34. In several other States it is provided, that the defendant, after he has answered the bill, may exhibit interrogatories to the plaintiff, which he is compelled to answer. See Ohio, Rev. Stat. 1841, c. 87, § 26 ; Missouri, Rev. Stat. 1845, c. 137 ; art. 2, §§ 14, 15 ; New Jersey, Rev. Stat. 1846, tit. 33, c. 1, § 40 ; Wisconsin, Rev. Stat. 1849, c. 84, § 30 ; Alabama, Code of 1852, § 2914.

[1] *Ante*, Vol. I. § 358.

[2] Piddock *v.* Brown, 3 P. Wms. 288 ; Murray *v.* Shadwell, 2 V. & B. 401 ; Franklyn *v.* Colquhoun, 16 Ves. 218 ; Dixon *v.* Parker, 2 id. 219. And see Whipple *v.* Lansing, 3 Johns. Ch. 612 ; Neilson *v.* McDonald, 6 id. 201 ; 2 Cowen 139 ; Cotton *v.* Luttrell, 1 Atk. 451 ; Man *v.* Ward, 2 id. 228 ; Souverbye *v.* Arden, 1 Johns. Ch. 240 ; Kirk *v.* Hodgson, 2 id. 550 ; Beebe *v.* Bank of N. Y., 1 Johns. 577 ; Van Reimsdyk *v.* Kane, 1 Gall. 620 ; Clark *v.* Van Riemsdyk, 9 Cranch 153 ; Butler *v.* Elliott, 15 Conn. 187 ; Hawkins *v.* Hawkins, 2 Car. Law Repos. 627 ; Douglass *v.* Holbert, 7 J. J. Marsh. 1 ; Hodges *v.* Mullikin, 1 Bland 503 ; Ragan *v.* Echols, 5 Ga. 71. {A defendant may also be a witness against a co-defendant, where he is necessarily a party, and will not be affected by a decree against his co-defendant, and where his testimony is not in favor of his own interest : Farley *v.* Bryant, 32 Me. 474 ; Neilson *v.* McDonald, 6 Johns. (N. Y.) Ch. 201 ; Whipple *v.* Van Rensselaer, 3 id. 612 ; Miller *v.* McCan, 7 Paige (N. Y.) 457 ; Williams *v.* Beard, 3 Dana (Ky.) 158.}

[3] Cope *v.* Parry, 2 Jac. & Walk. 538 ; Brown *v.* Greenly, 2 Dick. 504 ; Bradley *v.* Root, 5 Paige 632.

[4] Ashton *v.* Parker, 9 Jur. 574 ; s. c. 14 Sim. 632. And see Daniell *v.* Daniell, 13 Jur. 164 ; Holman *v.* Bank of Norfolk, 12 Ala. 369.

Regularly, a defendant cannot examine his co-defendant, without an order for that purpose; which will be granted, of course, before the decree, saving all just exceptions, upon suggestion that he is not interested, leaving the question of his admissibility to be determined at the hearing; but after a decree, it is not a motion of course, but is granted only on special circumstances, and upon notice to the plaintiff.[5]

§ 319. **Mode of taking Testimony.** SECONDLY, as to *the mode of taking testimony.* It has already been seen, that in chancery, the regular course is to receive no testimony orally, except in the mere formal proof of exhibits; and that in several of the State courts this rule has been abolished, and evidence is received orally, in equity cases, in the same manner as at common law;[1] while in others the old rule has been variously modified. In view of this state of things, Congress, at an early period, expressly empowered the courts of the United States to regulate the practice therein, as may be fit and necessary for the advancement of justice; and particularly, in their discretion, and at the request of either party, to order the testimony of witnesses in cases in equity to be taken by depositions, in the manner prescribed by law for the highest courts of equity in the States where the courts of the United States may be holden; except in those States in which testimony in chancery is not taken by deposition.[2] And more recently, the Supreme Court of the United States has been empowered to pre-

[5] 2 Dan. Ch. Pr. 1044; Williams *v.* Maitland, 1 Ired. Eq. 93; Nevill *v.* Demeritt, 1 Green Ch. 321; Bell *v.* Jasper, 2 Ired. Eq. 597; Hopkinton *v.* Hopkinton, 14 N. H. 315; Paris *v.* Hughes, 1 Keen 1. By the statute 6 & 7 Vict. c. 85, removing from witnesses the objection of incompetency by reason of interest or infamy, defendants in chancery may be examined as witnesses for the plaintiff, and also for each other, "saving just exceptions." Whether, under this statute, co-defendants were entitled, *of right*, to examine each other as witnesses, in support of a common defence against the plaintiff, is a point upon which opposite opinions have been held. See Wood *v.* Rowcliffe, 11 Jur. 707, per Wigram, V. C., that they are; Monday *v.* Guyer, ib. 861, 1 De G. & S. 182, per Bruce, V. C., that they are not. {The omission to procure the previous order of the court for the examination of the defendant as a witness is a mere irregularity, and when it is apparent that no substantial injustice has been done to the other party, an objection on this ground ought not to prevail: Tolson *v.* Tolson, 4 Md. Ch. 119. The practice in Ohio is to take the deposition of a co-defendant in chancery without leave; subject to the right of the adverse party to except to it: Choteau *v.* Thompson, 3 Ohio St. 424.

Where the oath to the answer of a defendant, who does not appear to have any interest in the suit, is waived, it seems that his deposition may be taken, or he may be required to testify orally: Butterworth *v.* Brown, 26 Ill. 156. See also Wilson *v.* Allen, 1 Jones Eq. (N. C.) 24. The evidence taken by any party to a cause may be used by any of the other parties: Sturgis *v.* Morse, 26 Beav. 562.}

[1] *Supra*, §§ 251, 308, 309, 312.

[2] U. S. Stat. 1802, c. 31, § 25, 2 Stat. at Large, 166; Stat. 1793, c. 22, § 7, 1 Stat. at Large, 335; Rev. Stat. U. S. 918.

scribe, regulate, and alter the forms of process in the Circuit and District Courts, the forms of pleading in suits at common law, in admiralty, and *in equity*, and of *taking testimony* and of entering decrees, and, generally, to regulate the whole practice of the courts.[3] Pursuant to this authority, *Rules of Practice* have been made, by which, after the cause is at issue, *commissions* may be taken out either in vacation or term-time, to take testimony upon interrogatories filed in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories, on failure of which the commission may be issued *ex parte;* the commissioner to be appointed by the court, or by a judge thereof. But if the parties agree, the testimony may be taken upon oral interrogatories, propounded by the parties at the time of taking the depositions.[4] Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress, the substance of which has been stated in a preceding volume.[5] But in such case, if no notice has been given to the adverse party, of the time and place of taking the deposition, he may be permitted to cross-examine the witness, either under a commission, or by a new deposition, in the discretion of the court or judge.[6]

§ 320. **Same Subject.** In the *construction of these rules* it has been held, that in cases of disagreement between the parties as to the form of interrogatories and cross-interrogatories, it should be referred to a master to settle the proper form; subject to an appeal from his decision, which will be reviewed by the court, at

[3] U. S. Stat. 1842, c. 188, § 6, vol. v. p. 518. In the Judiciary Act of 1789, c. 20, § 30, 1 Stat. at Large, 88, Rev. Stat. U. S. § 861 *et seq.*, it was enacted, that "the mode of proof, by oral testimony and examination of witnesses in open court, shall be the same in all courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law." By the subsequent statute of April 29, 1802, c. 31, § 25, 2 Stat. at Large, 166, the imperative character of this provision was removed, so far as regards suits in equity, by leaving it "in the discretion of the court, upon the request of either party, to order the testimony of the witnesses therein to be taken in conformity to the regulations prescribed by law for the courts of the highest original jurisdiction in equity, in cases of a similar nature, in that State in which the court of the United States may be holden; *provided*, however, that nothing herein contained shall extend to the Circuit Courts which may be holden in those States in which testimony in chancery is not taken by deposition:" Conn *v.* Penn, 5 Wheat. 424. Provision is also made, by statute, for reducing oral testimony to writing, to be used in the Supreme Court on appeal, no other testimony being in such cases allowed: Stat. U. S. Sept. 24, 1789, c. 20, § 19, 1 Stat. at Large, 83; Stat. U. S. March 3, 1803, c. 93, § 2, 2 Stat. at Large, 244; The Boston, 1 Sumner 332.

[4] Rules for Circuit Courts in Equity, Reg. 67. {And where a party with knowledge of such an oral examination acquiesces in it, he waives his right to require written interrogatories: Van Hook *v.* Pendleton, 2 Blatch. C. C. 85.}

[5] *Ante*, Vol. I. §§ 322–324.

[6] Rules for Circuit Courts in Equity, Reg. 68.

the hearing, upon a view of the whole testimony; and that when exceptions are intended to be taken to such interrogatories and cross-interrogatories, they should be propounded as objections, before the commission issues, or they will be deemed to be waived.[1] All the interrogatories must be substantially answered. If the cross-interrogatories which were filed are not put to the witness, the deposition, ordinarily, cannot be read; but if the other party has unreasonably neglected to file any, it is at his own peril, and the deposition may, in the discretion of the court, be admitted.[2] If the commission is joint, it must be executed by all the commissioners;[3] if joint and several, the commissioners are competent to take the depositions of each other;[4] but in either case, if a person not named in the commission appears to have assisted in taking the examination, it is fatal to the admissibility of the deposition.[5]

§ 321. **Time for Return of Deposition; Publication.** By another rule,[1] the *time* ordinarily allowed *for the taking of testimony* is three months, after the cause is at issue; but it may be enlarged, for special cause shown. And immediately after the commissions and depositions are returned to the clerk's office, *publication* may be ordered by a judge of the court, or it may be enlarged at his discretion. But publication may at any time pass, in the clerk's office, by the written consent of the parties, duly entered in the order-book, or indorsed on the depositions or testimony.[2]

§ 322. **Depositions de Bene Esse.** It is also ordered, by another rule of the same court,[1] that after the filing of the bill, and

[1] Cocker *v.* Franklin Co., 1 Story 169; U. S. *v.* Hair Pencils, 1 Paine 400. And see Barker *v.* Birch, 7 Eng. Law & Eq. 46; 7 Scott N. R. 397.

[2] Ketland *v.* Bissett, 1 Wash. C. C. 144; Gilpins *v.* Consequa, 3 Wash. 184; Bell *v.* Davidson, ib. 328; Gass *v.* Stinson, 3 Sumn. 98. For the cases in which a deposition will be admitted in equity, notwithstanding the want of a cross-examination, see *ante*, Vol. I. § 554. See also *infra*, c. 3, § 1.

[3] Armstrong *v.* Brown, 1 Wash. C. C. 43.

[4] Lonsdale *v.* Brown, 3 Wash. 404.

[5] Willings *v.* Consequa, 1 Pet. C. C. 301.

[1] Rules for Circuit Courts in Equity, Reg. 69.

[2] {After an interlocutory decree, either party may take new evidence, provided it does not affect the facts decided in that decree: Summers *v.* Darne, 31 Gratt. (Va.) 791; Richardson *v.* Duble, 33 id. 730.

Where, by a rule in chancery, the time allowed for the taking of testimony was limited to four months, but a subsequent statute provided that "in all proceedings in equity the evidence shall be taken in the same manner as in suits at law," it was held that the statute necessarily supersedes the rules of court as to the taking and filing of depositions in chancery: Pingree *v.* Coffin, 12 Cush. (Mass.) 600.}

[1] Rules for Circuit Courts in Equity, Reg. 70.

before answer, upon affidavit that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a material fact, a commission may issue, as of course, to a commissioner appointed by a judge of the court, to take their examination *de bene esse*, upon due notice to the adverse party. These are the principal rules, adopted in the national tribunals, which affect the law of evidence in cases in equity; except such as may hereafter be mentioned. But it is further ordered, that in all cases where the rules prescribed do not apply, "the practice of the Circuit Court shall be regulated by the [then] present practice of the High Court of Chancery of England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held; not as positive rules, but as furnishing just analogies to regulate the practice."[2] And it is to be noted, that it is the practice of the Court of Chancery, and not that of the Exchequer, which thus forms the basis of the equity practice of the courts of the United States.[3] The same may be said of the course of practice in equity in all the State courts, so far as it has not been changed by express orders or immemorial usage, nor by statutes.

§ 323. **Depositions.** When *depositions* are taken under a commission, or by an examiner, the course is for the party to file in the clerk's office the *original interrogatories* to be propounded to the witnesses he would examine; giving opportunity to the adverse party, by reasonable notice prescribed by the rules, to file his *cross-interrogatories.*[1] These are to be signed by counsel, as a guaranty of their propriety and fitness to be put; after which the commission issues. The attendance of the witness before the commissioner or examiner is obtained by means of a *subpœna;*

[2] Rules for Circuit Courts in Equity, Reg. 90.

[3] Smith *v.* Burnham, 2 Sumn. 612; {West *v.* Paige, 1 Stockt. (N. J.) 203; Burrall *v.* Eames, 5 Wis. 260.} In some of the United States, the practice in equity, in cases not otherwise regulated, is expressly ordered to be in conformity to the rules of practice made by the Supreme Court of the United States. See Pennsylvania, Dunlop's Dig. c. 525, § 13, p. 834.

[1] {A party who has given notice that he intends to call a certain person as a witness, may not afterwards withdraw that witness, in order to avoid his being cross-examined. Nor if the party has, under the English Chancery rules, proposed to read a certain affidavit, can he, on being served with notice of cross-examination, withdraw the affidavit to avoid it: *In re* Quartz Hill Co., L. R. 21 Ch. D. 642; Clarke *v.* Law, 2 K. & J. 28.

But in the English Court of Bankruptcy the practice is to allow an affidavit to be used or not, as the party who filed it wishes. And if it is not read, the deponent is not subject to cross-examination: *Ex parte* Child; *In re* Ottaway, L. R. 20 Ch. D. 126.}

disobedience to which may be punished by attachment, as a contempt of court.[2] The course of examination upon interrogatories, and their character as proper to be put, has been sufficiently indicated in a preceding volume, when treating of the examination of witnesses.[3] But it may here be repeated, that the witness can be examined only to matters alleged in the bill or answer, or relevant to the issue.[4] Though interrogatories

[2] Rules for Circuit Courts in Equity, Reg. 78.

[3] *Ante*, Vol. I. §§ 431–469.

[4] The question whether, where a fact is charged and put in issue in a bill, the examination of witnesses to the conversations of the defendant are admissible to prove the fact unless such conversations are expressly charged in the bill as evidence of such fact, is a question upon which there is some diversity of opinion. The rule of practice in England seems to exclude the evidence in such cases: 2 Dan. Ch. Pr. 995, 996. But the authorities cited in support of the rule were reviewed with critical acumen, and the principle clearly expounded, in Smith *v.* Burnham, 2 Sumn. 612, by Story, J., who held that the evidence was admissible. In that case it was stated, in general terms, in the bill, that the defendant, at divers times, had spoken of the title in controversy as one belonging to the partnership claimed by the plaintiff; but the particulars of the time, place, and circumstances of the admissions were not stated in the bill. The interrogatories, filed by the plaintiff to elicit these conversations, were, on the defendant's petition, referred for impertinence; and the report of the master, which allowed them, being excepted to, the learned judge, in disposing of the exception, vindicated his dissent from the English rule, in an argument best stated in his own language. "The case of Hall *v.* Maltby," he observed "(6 Price, 240, 258, 259), is relied on in support of the exception; and certainly, if the language of that decision is to be taken in its full latitude, it is directly in point. In that case there was a charge of a fraudulent withdrawal of a tithable sheep from tithes; and Chief Baron Richards, at the hearing, rejected the evidence of conversations of the defendant, establishing the fact; because, though the fraudulent withdrawal was charged in the bill, the conversations were not:" ib. p. 614. "It is true that, in this case, there was a charge of fraud; and the Chief Baron seems to rely on that as important to his decision. And Lord Chancellor Hart, in Mulholland *v.* Hendrick (1 Molloy 359; s. c. Beatt. 277), in affirming the same doctrine, seems to have placed some reliance on the same fact, of its being a charge of fraud, considering fraud as an inference of law from facts, and not a mere fact. In other cases, however, he does not seem to rely on any such distinction. Indeed, it is very difficult to understand the ground of such a distinction. The facts to be established by such confessions and conversations, and admissions, are not so much fraud in the abstract, as evidence conducing to establish it. If, upon a charge of fraud in a bill, stating that certain acts done were fraudulently done, evidence of confessions, admitting the acts and the intent, cannot be given in evidence, unless those confessions are also charged in the bill, as evidence of the fraud; it seems to me, that the principle of the rejection of the evidence must apply equally to all other cases of confessions to establish facts, which are to prove any other charge in a bill. Take the present case. The main object of the bill and interrogatories is to establish a partnership in certain transactions between the plaintiff and defendant, out of which certain rights of the plaintiff have sprung, which he seeks to enforce by the bill. The confessions and admissions are not charged in the bill; but the partnership is. Now, partnership itself is not, in all cases, a mere matter of fact, but is often a compound of law and fact. And I cannot see a single ground upon which the evidence of confessions and admissions ought to be rejected in the case of a charge of fraud, which does not equally apply to the charge of partnership. In each case the evidence is, or may be, equally a surprise upon the party; and in each of them he is equally prevented from giving, by his answer, such denials and explanations as may materially affect the whole merits of the cause. It seems to me, then, that the doctrine, if it exists at all, must equally apply to all cases, where the fact charged in respect to which the confessions, conversations, or admissions are offered, as proofs, constitutes the gist of the matter of the bill. And yet I do not understand that such a doctrine, so universal, is anywhere established,

may be referred for scandal, it is doubtful whether they can be referred for mere impertinence;[5] but if the witness would object

unless it is so in Ireland, by Lord Chancellor Hart, who has discussed the subject in a variety of cases, and seems to assert it in broad terms. He has expressly refused to apply it to cases where written papers, letters, or documents are relied on as proofs of general facts charged in the bill; although such papers, letters, and documents are not charged as proofs in the bill (Fitzgerald *v.* O'Flaherty, 1 Molloy 350); unless, indeed, those papers, etc., are relied on as confessions of the party, which he treats as an exception to the general rule of evidence. 'The general rule' (said he on one occasion) 'is, that all evidence intended to be relied on at the hearing should be founded on some allegation, distinctly put on record, of fact, which it is calculated to support.' 'It is a very old principle, to be found very clearly stated in Vernon (Whaley *v.* Norton, 1 Vern. 483), but I must be greatly misread, if the evidence, and not only the fact to be proved by the evidence, must be put in issue, to entitle the evidence to be read.' He repeated the same remark with the same exception in Blacker *v.* Phepoe (1 Molloy 357, 358). The doctrine of Lord Chancellor Hart, to be deduced from all the cases decided by him, seems to be this: that, wherever confessions, conversations, or admissions of the defendant, either oral or written, are relied on in proof of any facts charged in the bill, they are inadmissible, unless such confessions, conversations, or admissions are charged in the bill; because they operate as a surprise upon the party, and he is deprived of any opportunity to deny or explain them in his answer. He admits the general rule to be the other way; and insists upon this as an exception to it. The question, then, really is, whether the exception, either in its general form, as asserted by Lord Chancellor Hart, or in its qualified form, as asserted by Lord Chief Baron Richards, has a real foundation in equity jurisprudence. Both of these learned judges rely on the case of Evans *v.* Bicknell (6 Ves. 174), in which they were counsel on opposite sides, to support that doctrine. Lord Chief Baron Richards says, that it was so decided in that case. Lord Chancellor Hart does not agree to that; but admits that he drew the bill in that case with a full knowledge of the exception. It is very certain that the point was not decided in the case of Evans *v.* Bicknell, if we are to trust to the printed report in 6 Ves. 174. And, upon the state of the pleadings, I do not see how the point could have arisen:" ib. pp. 616–618. "The case of Evans *v.* Bicknell (6 Ves. 176, 189, 192) does not sustain the doctrine of Lord Chief Baron Richards, or of Lord Chancellor Hart; and I have not been able to find a single decision in the English Court of Chancery which does sustain it. And yet if the doctrine had been well established, it seems to me almost impossible that it should not be found clearly stated in the books, as it must be a case of so frequent occurrence in practice. On the contrary, it seems to me that the case of Earle *v.* Pickin (1 Russ. & Mylne, 547) shows that no such rule is established in chancery:" ib. p. 621. "If, then, in the absence of authority in favor of the rule, we look to principle, it seems to me impossible that it can be supported. There is no pretence to say, that in general it is true, that, as to the facts to be put in issue, it is necessary not only to charge these facts in the bill, but also to state in the bill the materials of proof and testimony, by means of which these facts are to be supported. Lord Chancellor Hart has admitted this in the fullest manner, saying: 'The evidence of facts, whether documentary or not, need not be put in issue; evidence of confessions, whether documentary or not, must.' Why admissions or conversations, as materials of proof, should be exceptions from the general practice, I profess myself wholly unable to comprehend. Other papers and testimony may be quite as much matters of surprise, as documents or testimony, as conversations or admissions, and the circumstance, that conversations or admissions are more easily manufactured than other proofs, furnishes no ground against the competency of such evidence, but only against its cogency as satisfactory proof.

"Two grounds are relied on to support the exception. The first is, that the defendant may not be taken by surprise, and (as it has been said) admitted out of his estate; but may have an opportunity to cross-examine the witnesses. The second is, that the defendant may have an opportunity, in his answer, fully to deny, or to explain, the supposed admissions or conversations. Now, the former ground is wholly inapplicable to our practice, where the interrogatories and cross-interrogatories put to every witness

[5] Cox *v.* Worthington, 2 Atk. 236; White *v.* Fussell, 19 Ves. 113; Pyncent *v.* Pyncent, 3 Atk. 557.

to an interrogatory for this latter cause, he must do it by demurrer, before he answers.[6] But this right to demur is only

are fully known to both parties; and, indeed, in the laxity of our practice, where the answers of the witness are usually as well known to both parties. So that there is no general ground for imputing surprise. Indeed, in this very case, it is admitted by the learned counsel for the defendant, that there has not been any surprise. The second ground is applicable here. But, then, proofs, documentary or otherwise, may be offered as evidence of facts charged in the bill, as well as admissions and conversations, which it might be equally important for the defendant to have an opportunity to deny or to explain, in order to support his defence. Yet the evidence of such facts is not, therefore, inadmissible. So that the exception is not coextensive with the supposed mischief.

"But it seems to me that the exception would itself be productive of much of the mischief against which the practice of the English Court of Chancery is designed to guard suitors. In general, the testimony to be given by witnesses in a cause at issue in chancery is studiously concealed until after publication is formally authorized by the court. The witnesses are examined in secret upon interrogatories not previously made known to the other party. The object of this course is to prevent the fabrication of new evidence to meet the exigencies of the cause, and to take away the temptations to tamper with the witnesses. Now, if the exception be well founded, it will (as has been strongly pressed by counsel) afford great opportunities and great temptations to tamper with witnesses who are known to be called to testify to particular admissions and conversations. So that it may well be doubted, whether, consistently with the avowed objects of the English doctrines on the subject, such an exception could be safely introduced into the English chancery. There is another difficulty in admitting the exception; and that is, that there is no reciprocity in it; for while the defendant in a suit would have the full benefit of it, the plaintiff would have none, since his own admissions and conversations might be used, as rebutting evidence, against his claims asserted in the bill, although they were not specifically referred to in the answer.

"Several cases have been referred to, both in the English and the American reports, in which the case has been mainly decided upon the admissions or conversations of the parties, which were not specifically stated in the bill, or other pleadings. I have examined those cases; and although it is not positively certain that there were not, in any instance, any such admissions or conversations charged in the bill, yet there is the strongest reason to believe that such was the fact; and no comment of the counsel or of the court would lead us to the supposition, that there was imagined to be any irregularity in the evidence. I allude to the cases of Lench *v.* Lench (10 Ves. 511); Besant *v.* Richards (1 Tamlyn 509); Neathway *v.* Ham (ib. 316); Nerot *v.* Burnand (4 Russ. 247); Park *v.* Peck (1 Paige 477); Marks *v.* Pell (1 Johns. Ch. 594); and Harding *v.* Handy (11 Wheat. 103; s. c. 2 Mason 378). So far as my own recollection of the practice in the courts of the United States has gone, I can say that I have not the slightest knowledge that any such exception has ever been urged in the Circuit Courts, or in the Supreme Court, although numerous occasions have existed, in which, if it was a valid objection, it must have been highly important, if not absolutely decisive. Until a comparatively recent period, I was not aware that any such rule was insisted on in England or America, notwithstanding the case of Hall *v.* Maltby (6 Price 250, 252, 258). Indeed, Mr. Gresley, in his late Treatise on Evidence, has not recognized any such rule, although in one passage the subject was directly under his consideration, and he relied for a more general purpose on that very case. If it had been clearly settled in England, it would have scarcely escaped the attention of any elementary writer, professedly discussing the general doctrines of evidence in courts of equity.

"My opinion is, that the principle to be deduced from the case in 6 Price 250, before the Lord Chief Baron Richards, supported as it is by the other cases already cited before Lord Chancellor Hart, is not of sufficient authority to establish the exception contended for, as an exception known and acted upon in the Court of Chancery in

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[6] Parkhurst *v.* Lowten, 2 Swanst. 194. And see Bowman *v.* Rodwell, 1 Madd. 266; Langley *v.* Fisher, 5 Beav. 443. The demurrer, if the court can dispose of the question in that shape, will be tried in that form at once, without reserving it until the hearing: Carpmael *v.* Powis, 1 Phil. Ch. Ca. 687.

where the impertinence relates to himself; he cannot object to an interrogatory because it is immaterial to the matter in issue,

England, whose practice, and not that of the Court of Exchequer, furnishes the basis of the equity practice of the courts of the United States. I have a very strong impression that, in America, the generally received, if not the universal, practice is against the validity of the exception. If the authorities were clear the other way, I should follow them. But if I am to decide the point upon general principles, independent of authority, I must say, that I cannot persuade myself that the exception is well founded in the doctrines of equity jurisprudence, as to pleadings or evidence.

"The exception, therefore, to the master's report must be overruled. It would be a very different question, if the bill should contain no charges, as to admissions or conversations of the defendant, and the defendant should be surprised at the hearing by evidence of such admissions and conversations in support af the facts put in issue, whether the court would not, for the purpose of justice, enable the defendant to countervail such evidence, by giving him leave to offer other evidence, explanatory or in denial of it, upon reference to the master, or by an issue, as was done in the case of Earle *v.* Pickin (1 Russ. & Mylne 547). I imagine that one reason why, when evidence of admissions or conversations of the defendant is intended to be introduced, in support of facts charged in the bill, and put in issue, such admissions and conversations are so often charged in the bill, is to avoid the very difficulties in which the omission must leave the cause; viz., the little confidence which the court would give to it, as a species of evidence easily fabricated, and the inclination of the court to endeavor, by a reference or an issue, to overcome its force.

"I have not thought it necessary, in the view which has been taken of the exception to the report of the master, to consider with much care the other objection made to the exception; to wit, that the admissions and conversations are sufficiently charged in the bill to let in the evidence, even if the rule were as the plaintiff's counsel has contended it to be. The only charge bearing on this matter is, that 'at all the times aforesaid, as well as at divers other times, through all the negotiations aforesaid, as well as in many other negotiations in relation to the contract aforesaid, the said Daniel Burnham (the defendant) constantly spoke of the said interest in the said lands of the said Black as belonging to the said copartnership, and spoke of, recognized, and treated your orator as having an equal and copartnership right therein.' This language is somewhat indeterminate; for it is not charged whether the defendant spoke to the plaintiff or to third persons; and no persons in particular are named, with whom he held any conversations on the subject. If the rule contended for existed, I should greatly doubt whether such an allegation, in such loose and uncertain terms, was a sufficient compliance with it; for it would lie open to all the objections against which the rule is supposed to be aimed. The defendant, to so general a charge, could do no more than make a very general answer. So that he would be deprived of all the benefit of all explanations and denials of particular conversations. But it is unnecessary to dwell on this point, as the other is decisive:" ib. pp. 622, 627.

The same question was, eight years afterwards, again raised before this learned judge, in Jenkins *v.* Eldredge, 3 Story 183, who adhered to his former opinion, expressing himself as follows: "But here we are met by an objection, that much of the evidence stands upon confesssions and statements made by Eldredge, and testified to by the witnesses, which are not charged in the bill, so as to let them in as proper evidence. And in support of this objection, among other cases, Hughes *v.* Garner (2 Younge & Coll. 328), Graham *v.* Oliver (3 Beavan 124), Earle *v.* Pickin (1 Russ. & Mylne 547), and especially Attwood *v.* Small (6 Clark & Finnelly 360), are cited. I had occasion, in the case of Smith *v.* Burnham (2 Sumner 612), fully to consider this whole matter; and I remain of the opinion then expressed, that there is no difference, and ought to be no difference, in cases of this sort between the rules of a court of law and those of a court of equity, as to the admission of such evidence. Its admissibility may, however, be properly subject, under particular circumstances, to this qualification (which Lord Cottenham is said to have supported), that if one party should keep back evidence which the other might explain, and thereby take him by surprise, the court will give no effect to such evidence, without first giving the party to be affected by it an opportunity of controverting it. This course may be a fit one, in cases where, otherwise, gross injustice may be done; but I consider it as a matter resting in the sound discretion of the court, and not strictly a rule of evidence. But whatever may be the rule

for this is the right of the party alone.[7] Usually, but not necessarily, the interrogatories are closed by what is termed the general interrogatory, the form of which is prescribed in the rules,[8] and if propounded, this also must be answered as well as the others, or the deposition will be suppressed.[9] If a material part of the evidence comes out under the general interrogatory, this is no valid objection to the deposition.[10]

§ 324. **Mode of taking Examination.**[1] In *taking the examination* upon written interrogatories, the witness having been duly sworn, the commissioner or examiner is to *put the interrogatories singly* and *seriatim*, in the order in which they are written; and may explain to the witness their import and meaning; but should not permit him to read or hear any other interrogatory, until the one already propounded be fully answered; nor unnecessarily to depart until the examination is concluded. The answers must be written down by the commissioner, or examiner, or by his clerk in his presence and under his direction; after which, the whole is to be distinctly read over to the witness, and signed by him.[2] He may make any correction in his testimony, by an explanatory addition thereto, at any time before he departs from the presence of the commissioner or examiner, though the examination be signed and closed; but not afterwards, unless by leave of the court for that purpose.[3] The depositions are then certified by the commissioner or examiner, and sealed up with the commission or order of court, on the back

of evidence in England on this point, it is not so in America; and our practice in equity causes where the evidence is generally open to both parties, rarely can justify, if, indeed, it ever should require, the introduction of such a rule. Mr. Vice-Chancellor Wigram, in Malcolm *v.* Scott (3 Hare 39, 63), seems to me to have viewed the rule very much under the same aspect as I do. But, at all events, the practice is entirely settled in this court, and I, for one, feel not the slightest inclination to depart from it, be the rule in England as it may:" 3 Story 283, 284. See also Story, Eq. Pl. § 265 *a*, n.; *ante*, Vol. I. § 171, n.

[7] Ashton *v* Ashton, 1 Vern. 165; Tippins *v.* Coates, 6 Hare 21; Langley *v.* Fisher, 9 Jur. 1066; 5 Beav. 443.

[8] Rules for Circuit Courts in Equity, Reg. 71.

[9] See *supra*, § 320; Richardson *v.* Golden, 3 Wash. C. C. 109.

[10] Rhoades *v.* Selin, 4 Wash. C. C. 715.

[1] [See *ante*, Vol. I. § 320.]

[2] 2 Dan. Ch. Pr. 1061–1064, 1088–1090, 5th Am. ed. vol. i. 888–891, 920–937. It is to be remembered, that witnesses may always be examined *viva voce* by consent of parties, either by the parties or their counsel, or by the commissioner or examiner, or by a master if the case is before him. See Story *v.* Livingston, 13 Peters 359, 368; Rules for Circuit Courts in Equity, Reg. 78.

[3] 2 Dan. Ch. Pr. 1064, 1089, 5th Am. ed. vol. i. 929, 930; Abergavenny, Lord, *v.* Powell, 1 Mer. 130. And see Griells *v.* Gansell, 2 P. Wms. 646; s. c. 2 Eq. Cas. Abr. 59, pl. 6; Kingston *v.* Tappen, 1 Johns. Ch. 368.

of which his doings are certified; and the whole is returned to the court within the time limited by the rules. If a witness does not understand the English language, the commissioner, *virtute officii*, may appoint an interpreter,[4] who should be sworn truly to interpret between the commissioner and the witness; and the answers of the witness are to be taken down in English, through the interpreter.[5]

§ 325. **Depositions in Perpetuam.** Testimony may also be taken *in perpetuam rei memoriam* by a commission, issued pursuant to a bill filed for that purpose; which every court, having general jurisdiction in equity, has inherent power to sustain.[1] The commission is executed as in other cases. But as this subject is regulated by statutes in most of the United States, and the mode of taking depositions has been stated in a preceding volume,[2] with as much particularity as the nature of this treatise will permit, it will not, in this case, be further pursued.

§ 326. **Admissibility of Depositions.** In regard to the *admissibility* of depositions in equity, it is held, that where depositions, not legally entitled to be read, are admitted *by consent* of parties, this consent is coextensive with the cause, and under it the depositions may be read at every future hearing of the

[4] Amory *v.* Fellowes, 5 Mass. 225, 226; Gilpins *v.* Consequa, 1 Pet. C. C. 88. But Lord Nottingham established a rule that no alien should be examined as a witness, without a motion first made in court to swear an interpreter, so that the other side may know him and take their exceptions to him: 2 Swanst. 261, n. When a commission is sent abroad, it is usual to insert a special direction to employ an interpreter, if necessary: Lord Belmore *v.* Anderson, 4 Bro. Ch. C. 90. But this is superfluous; especially if they are authorized, in general terms, to examine such or such other witnesses as may come before them; for the interpreter is a witness: 5 Mass. 226.

[5] Lord Belmore *v.* Anderson, 4 Bro. Ch. C. 90; s. c. 2 Cox Eq. 288; 2 Dan. Ch. Pr. 1063, 1088; Gresley Eq. Evid. 119; Smith *v.* Kirkpatrick, 1 Dick. 103. At law, a deposition taken abroad is admissible, though it be written, signed, and sworn in a foreign language, and some weeks afterwards translated and certified under oath by the interpreter; the translation being annexed to and returned as part of the return to the commission: Atkins *v.* Palmer, 4 B. & Ald. 377. No good reason is perceived why it should not be equally admissible in equity.

[1] See Story, Eq. Pl. §§ 300–306; *ante*, Vol. I. § 324, 325. {In Ellice *v.* Roupell, 9 Jur. N. S. 530, Sir J. Romilly, M. R., declares that the proper mode of examining the defendant, where it is desired to perpetuate his testimony, in regard to the matter in which his interest is adverse to that of the plaintiff, is the same as that of examining all other witnesses; and it is only by so examining him that his deposition can be made evidence at any future period, in another suit. The rule in regard to bills for perpetuating testimony is here stated to be that the defendants, by consenting to answer the plaintiff's bill, admit his right to examine witnesses in the case, and that implies all that is demanded in the bill. For if there is really any *bona fide* controversy between the parties, the right to perpetuate the testimony follows as matter of course.}

[2] See *ante*, Vol. I. §§ 320–325. See also Gresley, Eq. Evid. 129–135; 3 Monthly Law Reporter, 256.

same cause, whether it be in the higher court, on appeal or in the same court, after the decree has been reversed in the appellate court, and the cause remanded for further proceedings.[1] And depositions, read at the hearing, are also admissible in evidence on the trial of an issue out of chancery.[2] If they have once been *read without objection* in the court below, this is evidence of consent, entitling them to be read in the higher court, on appeal.[3] The deposition of the party himself, in a bill of revivor, taken before the death of the original complainant, and while the deponent had no interest in the suit, is evidence for him at the final hearing.[4] So, if the deposition of the plaintiff is taken under an order obtained by the defendant, it is admissible in evidence for the plaintiff, though it goes to support his case.[5] But if the deponent becomes interested in the subject of the controversy, during the period between the beginning and the end of his examination, that portion of his testimony which was given before his interest commenced may, in the discretion of the court, be received, if it be complete and distinct as to the matters of which he speaks; and every part of his answers, as to matters to which his interest does not relate, will be received.[6] But no deposition will be admitted to be read, against a party brought in after it was taken, or too late to exercise the right of cross-examination.[7] Depositions *taken in another suit*, between the same parties or their privies in estate, may also be read at the hearing, after an order obtained for that purpose.[8]

[1] Vattier *v.* Hinde, 7 Pet. 252; Hinde *v.* Vattier, 1 McLean 110.

[2] Austin *v.* Winston, 1 Hen. & Munf. 33.

[3] Johnson *v.* Rankin, 3 Bibb 86; Gibbs *v.* Cook, 4 id. 535.

[4] Hitchcock *v.* Skinner, 1 Hoffm. Ch. 21; Brown *v.* Greenly, 2 Dick. 504.

[5] Lewis *v.* Brooks, 6 Yerg. 167.

[6] O'Callaghan *v.* Murphy, 2 Sch. & Lefr. 158; Fream *v.* Dickinson, 3 Edw. Ch. 300; 2 Dan. Ch. Pr. 1064. And see *ante*, Vol. I. § 168; Gresley, Eq. Evid. 366, 367; Haws *v.* Hand, 2 Atk. 615; Gosse *v.* Tracy, 2 Vern. 699; s. c. 1 P. Wms. 287; Cope *v.* Parry, 2 Jac. & Walk. 538.

[7] Jones *v.* Williams, 1 Wash. 230; Clary *v.* Grimes, 12 G. & J. 31; Jenkins *v.* Bisbee, 1 Edw. Ch. 377. And see *ante*, Vol. I. §§ 426, 554; Pretty *v.* Parker, 1 Cooper 38, n.

[8] 2 Dan. Ch. Pr. 1011–1016, 5th Am. ed. vol. i. 868–871; Brooks *v.* Cannon, 2 A. K. Marsh. 525; *ante*, Vol. I. §§ [163 *h*,] 523, 525, 552, 553; {Leviston *v.* French, 45 N. H. 21. In Lawrence *v.* Maule, 4 Drew. 479, it is held that, where, upon an issue between parties, the testimony of a witness since deceased has been received, which either of those parties might use against the other, that evidence may be used between the same parties, in any subsequent proceedings on the same issue; and in Williams *v.* Williams, 10 Jur. N. S. 608, the general rule is stated thus by Sir R. T. Kindersley, V. C.: "The principle upon which the court acts in these cases is, that if there is another suit instituted between the same parties or their representatives, and the

§ 327. **Rules of Examination.** The rules and principles, by which the examination of witnesses is conducted in equity, are in general the same which have been stated in a preceding volume as applied in courts of law; and therefore require no further notice in this place.[1]

§ 328. 5. **Inspection in Aid of Proof.** Trial by inspection, or personal examination of the subject of controversy, by the judge, was anciently familiar in the courts of common law;[1] and though, as a formal and distinct mode of trial, it has fallen into disuse, yet as a matter of proof, ancillary to other testimony, parties are still permitted, in all our tribunals, to exhibit to the court and jury, persons, models, and things not cumbrous, whenever the inspection of them may tend to the discovery of the truth of the matter in controversy. In courts of law, however, this is only permitted, or, at furthest, sometimes suggested, by the judge; it being seldom, if ever, ordered; but in courts of equity, the judge will often order the production of such subjects before him, for his own better satisfaction as to the truth. Thus he will order an *infant* to be produced in court for satisfactory proof of his existence, age, and discretion; or an *original document* or *book*, to be satisfied of its genuineness and integrity, or its age and precise state and character; or the like.[2] And where the subject is immovable, the court will order the party in possession to permit an inspection by witnesses.[3]

§ 329. **Same Subject.** But it is in bills of injunction, to restrain the violation of *patent-rights* and *copyrights*, that this power of a court of equity is most frequently called into exercise. In the case of patents, nothing is more familiarly seen than the machine or instrument itself, or an accurate working model, under inspection at the hearing. But in these cases it is not unusual, and in those of copyrights it is almost the invariable course, to refer it to a master or other competent person, who for this purpose represents the court, to compare critically the machine, map, book, work of art, or invention,

issue is substantially the same in both, that which would be, and in fact was, evidence in the former suit may be read in the latter, and the court may so order it to be used, 'saving all just exceptions.' "}

[1] See *ante*, Vol. I. §§ 431–469. See also 2 Dan. Ch. Pr. 1045–1051, 5th Am. ed. vol. i. *888–895.

[1] 3 Bl. Comm. 331; 9 Co. 30. [See *ante*, Vol. I. §§ 13*a*–13*j*.]

[2] Gresley, Eq. Evid. 451–454; Comstock *v.* Apthorpe, 8 Cowen 386; s. c. Hopk. Ch. 143. And see Louisiana, Code of Practice, art. 139.

[3] Kynaston *v.* E. Ind. Co., 3 Swanst. 249.

claimed as original, with that which is alleged to be piratical and spurious, and to report their opinion to the court;[1] though in cases easily capable of decision upon a brief inspection, without too great a demand upon the time of the judge, he will examine and decide for himself.[2]

§ 330. 6. **Further Information required by the Court.** The right of the judge to require further proof upon any point under his consideration, without the motion and even against the will of the parties, is peculiar to courts proceeding according to the course of chancery. At common law, no such power is recognized; the courts being obliged to try and determine the issue, upon such proofs as the parties may choose to produce before them, the jury finding the fact forthwith, according to the balance of the evidence in favor of the one side or the other. But in chancery the judge may not only postpone his judgment, but if he deems the evidence unsatisfactory, or is unable to solve the question upon the proofs already in the case, or from his own resources, he may require further information. This right of the judge is inherent in his office, and does not depend on any consent of the parties, nor whether the matters of which he would inquire have been put in issue by the pleadings. It may even be matter which both parties would fain conceal from his notice; as in the case supposed by Sir Thomas Plumer, M. R., of a bill for the specific performance of a contract for the purchase of a cargo, which, in the course of the evidence, would appear to have been smuggled; or where the principal transaction involved another which was illegal;[1] or, it may be matter possibly affecting the interests of persons not before the court.

§ 331. **Examinations Viva Voce.** One of the modes in which this right is exercised is by examining witnesses *viva voce*, in open court. Ordinarily, as we have seen, this course is not resorted to, except for the formal proof of exhibits. But it is employed in cases of *contempt;*[1] and in questions as to the *proper custody of a ward;*[2] and in other cases of emergency, immedi-

[1] Gyles *v.* Wilcox, 2 Atk. 141; Carnan *v.* Bowles, 2 Bro. Ch. C. 80; Leadbetter's Case, 4 Ves. 681; Mawman *v.* Tegg, 2 Russ. 385; Gray *v.* Russell, 1 Story 11; 2 Story, Eq. Jur. § 941.

[2] Butterworth *v.* Robinson, 5 Ves. 709; Sheriff *v.* Coates, 1 Russ. & My. 159; *Ex parte* Fox, 1 V. & B. 67.

[1] Parker *v.* Whitby, T. & R. 371.

[1] Moore *v.* Aylett, Dick. 643; Gascoygne's Case, 14 Ves. 183; Turner *v.* Burleigh, 17 id. 354.

[2] Bates, *ex parte*, Gresley, Eq. Evid. 494.

ately addressed to the discretion of the judge, or upon which he entertains doubt.[3]

§ 332. **Reference to Master.** Another of these modes is by *reference to a master*, his office being a branch of the court, whose instructions, therefore, he is bound implicitly to follow.[1] The subjects of such reference, which are numerous, may be distributed under three general heads: namely, the protection of absent parties against the possible neglect or malfeasance of the litigants; the more effectual working out of details, which the judge, sitting in court, is unable to investigate; and the supplying of defects or failures in evidence.[2] But a reference is never made to establish, in the first instance, a fact put in issue by the pleadings, and constituting an essential element in the controversy.[3]

§ 333. **Authority of the Master.** The *authority of the master*, which, by the former practice, was generally stated in every

[3] Bishop *v.* Church, 2 Ves. 100, 106; Lord, *ex parte*, ib. 26; Bank *v.* Farques, Ambl. 145. And see 4 Ves. 762, per Ld. Alvanley, M. R.; Barnes *v.* Stuart, 1 Y. & C. 139, per Alderson, B.; Margareson *v.* Saxton, ib. 532.

[1] Stewart *v.* Turner, 3 Edw. Ch. 458; Fenwicke *v.* Gibbes, 2 Desaus. 629; Smith *v.* Webster, 3 My. & C. 244. Hence, also, a witness before the master is protected from arrest, *eundo, morando, et redeundo:* Sidgier *v.* Birch, 9 Ves. 69.

[2] Adams, Doctr. of Eq. pp. [379], 672. {The facts which a master finds, like the verdict of a jury under the old chancery practice, are simply found for the satisfaction of the equity court, and these findings are not binding upon that court. The court of equity, however, will not disregard the findings, except upon very clear evidence that they are erroneous: Richards *v.* Todd, 127 Mass. 167; Thorpe *v.* Thorpe, 12 S. C. 154.

"The reference *for the protection of absent parties* is made where the claim, or the possibility of a claim, to the property in suit, belongs to creditors or the next of kin, or other persons entitled as a class, so that at the hearing it is uncertain whether they are all before the court. In order to remove this uncertainty, a reference is made to the master to ascertain the fact before any step is taken for ascertaining or distributing the fund. And, on the same principle, if a proposal of compromise or of arrangement by consent is made where any of the parties are infants or *femes covert*, and therefore unable to exercise a discretion, the court, before sanctioning the proposal, will ascertain by reference whether it is for their benefit: Fisk *v.* Norton, 2 Hare 381.

"A reference *for the working out of details* is principally made in matters of account, when the court declares that the account must be taken, and refers it to the master to investigate the items: Hart *v.* Ten Eyck, 2 Johns. (N. Y.) Ch. 518; Consequa *v.* Fanning, 3 id. 591; Barrow *v.* Rhinelander, ib. 614; Maury *v.* Lewis, 10 Yerg. 115. The same principle applies to the investigation of the vendor's title; for the court cannot undertake to peruse the abstract, but will devolve that duty on the master. In like manner it will be referred to a master to ascertain damages in a bill for specific performance, when the defendant has put it out of his power to convey (Woodcock *v.* Bennet, 1 Cowen (N. Y.) 711); to settle conveyances; to superintend sales; to appoint trustees, receivers, guardians, etc.; to judge of the impertinency or insufficiency in pleadings; and the like.

"A reference *to supply failures or defects in the evidence* is made when the evidence already given has induced a belief in the court that new matter might be elicited by inquiry, or where allegations have been made in the answer, though not established by proof, which, if true, would be material in the cause:" Adams, Doctrine of Eq. 379–382, Wharton's notes.}

[3] Lunsford *v.* Bostion, 1 Dev. Eq. 483; Holden *v.* Hearn, 1 Beav. 445.

order of reference, is now given, in the courts of the United States, by a general rule for that purpose.[1] This rule directs that the master shall regulate all the proceedings, in every hearing before him, upon every such reference; that he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference;[2] and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto;[3] and also to examine on oath, *viva voce*, *all* witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office,[4] or by deposition according to the acts of Congress, or otherwise, as hereafter mentioned; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally, to do all other acts, and direct all other inquiries and proceedings, in the matters before him, which he may deem necessary and proper to the justice and merits thereof, and to the rights of the parties. This summary of his powers, in a general rule made under the authority of an act of Congress, renders any special enumeration of powers in an order of reference wholly superfluous. And the course of proceeding here indicated, as well as the authority given to the

[1] Rules for Circuit Courts in Equity, Reg. 77.

[2] In accounting before the master, the oath of the party is not to be admitted as evidence to support items in an account, which, from their character, admit of full proof by vouchers, or other legal evidence: Harding *v.* Handy, 11 Wheat. 103, 127. As to the master's power to examine parties, see Seaton on Decrees, 11; 2 Dan. Ch. Pr. 1360, 1366 (5th Am. ed. 1188); Hollister *v.* Barkley, 11 N. H. 501. Parties may be examined *toties quoties*, at the discretion of the master; but witnesses may not, without an order: Cowslade *v.* Cornish, 2 Ves. 270; Hart *v.* Ten Eyck, 2 Johns. Ch. 513. But a *viva voce* examination of the party does not alter his rights; and therefore he cannot be cross-examined by his own counsel; but his answers, when responsive, are testimony, and he may accompany an answer by any explanation, fairly responsive to the interrogatory: Benson *v.* Le Roy, 1 Paige 122. Regularly, a special order is necessary to empower the master to examine the parties; but if this is omitted in the order of reference, and the master nevertheless examines a party on oath, without objection at the time, this is no ground of exception to the report: Copeland *v.* Crane, 9 Pick. 73. Before the master, co-defendants may examine each other: Simmons *v.* Gutteridge, 13 Ves. 262; but it seems that co-plaintiffs may not: Edwards *v.* Goodwin, 10 Sim. 123. An examination, like an answer, is evidence against none but the party examined: 2 Dan. Ch. Pr. 1378 (5th Am. ed. 1180); 2 Smith, Ch. Pr. 135.

[3] See Eng. Orders of 1828, Ord. 60, 72; Converse *v.* Hobbs, 64 N. H. 42.

[4] See Eng. Orders of 1828, Ord. 69; Bamford *v.* Bamford, 2 Hare 642; Adams, Doctr. of Equity, 382, 678. It has been doubted, whether, under the English order just referred to, which is substantially the same with the clause in the text, the master could, without an order, examine any witness *viva voce*, who had previously been examined in the cause; but in one case the Master of the Rolls seems clearly to have recognized the rule, that an order was necessary for a re-examination before the master, as well as for re-examination before the hearing: 2 Dan. Ch. Pr. 1394 (5th Am. ed. 1192); Rowley *v.* Adams, 1 My. & K. 543.

master, is believed to be in accordance with the general course of practice in the State tribunals.

§ 334. **Attendance of Witnesses.** *Witnesses*, who live within the district, may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or *before a master* or examiner appointed in any cause, by *subpœna*, issued in the usual form by the clerk of the court; and if a witness disobeys the *subpœna*, or refuses to give evidence, it will be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue by order of the court or of any judge thereof in the same manner as if the contempt were by refusing to appear or to testify in the court.[1]

§ 335. **Taking Accounts; Mode of Proceeding.** In *taking accounts*, any party, not satisfied with the account brought in against him, may *examine the accounting party viva voce*, or upon interrogatories in the master's office, or by deposition, as the master may direct.[1] All *affidavits*, *depositions*, and *documents*, which have been previously *made*, *read*, or *used*, in court upon any proceeding in the cause, *may be used before the master;*[2] and he may examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may seem to require; the testimony thus given being taken down in writing by the master, or some other person by his order, and in his presence, if either party requires it, in order that it may be used in court, if necessary.[3]

[1] Rules for Circuit Courts in Equity, Reg. 78.

[1] Ibid. Reg. 79. And see Eng. Orders of 1828, Ord. 61.

[2] Ibid. Reg. 80. And see Eng. Orders of 1828, Ord. 65; 2 Dan. Ch. Pr. 1379, 5th Amer. ed. 1187, 1188; Smith *v.* Althus, 11 Ves. 564; {Hazard *v.* Durant, 12 R. I. 99.} But the answer of one defendant cannot be used before the master, as an affidavit, against another defendant: Hoare *v.* Johnstone, 2 Keen 553. Nor can *ex parte* affidavits ordinarily be used before him: Cumming *v.* Waggoner, 7 Paige 603.

[3] Ibid. Reg. 81. And see Eng. Orders of 1828, Ord. 72; 2 Dan. Ch. Pr. 1379, 5th Amer. ed. 1188. The subject of examinations before a master was fully considered by the learned Chancellor Kent, in Remsen *v.* Remsen, 2 Johns. Ch. 495, 500–502, where the result of his investigation is stated in these words: "The general rules which are to be deduced from the books, or which ought to prevail on the subject of examinations before the master, and which appear to me to be best calculated to unite convenience and despatch with sound principle and safety, are, —

"1. That the parties should make their proofs as full, before publication, as the nature of the case requires or admits of, to the end that the supplementary proofs, before the master, may be as limited as the rights and responsibilities of the parties will admit.

"2. That orders of reference should specify the principles on which the accounts are

§ 336. **Re-examination by Master.** In the examination of witnesses before the master, it is not competent for him to examine as witnesses any persons *who have previously been examined in the cause*, without leave of the court. This rule is founded on the same reason which precludes the re-examination of a witness before the hearing; namely, the danger of perjury, which might be incurred from allowing a witness to depose a second time to the same facts, after the party adducing him has discovered the weak parts of the proof in his cause. And for the same reason,

to be taken, or the inquiry proceed, as far as the court shall have decided thereon; and that the examinations before the master should be limited to such matters, within the limits of the order, as the principles of the decree or order may render necessary.

"3. That no witness in chief, examined before publication, nor the parties, ought to be examined before the master, without an order for that purpose, which order usually specifies the subject and extent of the examination; and a similar order seems to be requisite when a witness, once examined, is sought to be again examined before the master, on the same matter. But it is understood to be the settled course of the court (1 Vern. 283, Anon.; 1 Vern. 470, Whicherly *v.* Whicherly; 2 Ch. Cas. 249, Everard *v.* Warren; Mosely, 252, Morely *v.* Bonge; Robinson *v.* Cumming, 2 Atk. 409, and 2 Fonb. 452, 460–462; see also O'Neill *v.* Hamill, 1 Hogan 183), that upon the defendant accounting before the master, he is to be allowed, on his own oath, being credible and uncontradicted, sums not exceeding forty shillings each; but then he must mention to whom paid, for what, and when, and he must swear positively to the fact, and not as to belief only; and the whole of the *items* so established, must not exceed £100; and the defendant cannot, by way of charge, charge another person in this way. The *forty* shillings sterling was the sum established in the early history of the court, and perhaps twenty dollars would not now be deemed an unreasonable substitute.

"4. That the master ought, in the first instance, to ascertain from the parties, or their counsel, by suitable acknowledgments, what matters or *items* are agreed to or admitted; and then, as a general rule, and for the sake of precision, the disputed *items* claimed by either party ought to be reduced to writing by the parties respectively, by way of charges and discharges, and the requisite proofs ought then to be taken on written interrogatories, prepared by the parties, and approved by the master, or by *viva voce* examination, as the parties shall deem most expedient, or the master shall think proper to direct, in the given case. That the testimony may be taken in the presence of the parties, or their counsel (except when by a special order of the court it is to be taken secretly); and it ought to be reduced to writing in cases where the master shall deem it advisable, by him, or under his direction, as well where a party as where a witness is examined.

"5. That in all cases where the master is directed by the order to report the proofs, the depositions of the witnesses should be reduced to writing by the master, and subscribed by the witnesses, and the depositions returned with his report to the court.

"6. That when an examination is once begun before a master, he ought, on assigning a reasonable time to the parties, to proceed with as little delay and intermission as the nature of the case will admit of to the conclusion of the examination; and when once concluded, it ought not to be open for further proof, without special and very satisfactory cause shown.

"7. That after the examination is concluded, in cases of references to take accounts, or make inquiries, the parties, their solicitors, or counsel, after being provided by the master with a copy of his report (and for which the rule of the 1st of November last makes provision), ought to have a day assigned them to attend before the master, to the settling of his report, and to make objections, in writing, if any they have; and when the report is finally settled and signed, the parties ought to be confined, in their exceptions to be taken in court, to such objections as were overruled or disallowed by the master." This outline of practice is believed to be pursued in all the States, where it is not otherwise regulated by special rules.

when leave is granted for the re-examination of a witness before the master, it is generally granted on the terms of having the interrogatories settled by the master; who, in so doing, will take care that the witness is not re-examined to the same facts.[1] But where the reason of the rule fails, the rule is not applied; as, for example, where the first examination has accidentally failed, by reason of the witness having then been incompetent from interest, which has since been removed.[2] So where a witness, previously examined, has made affidavit in support of a state of facts before the master, he may be examined *viva voce* before the master, to the matter of his affidavit.[3] So, where the previous examination was confined to the proof of exhibits at the hearing, he may be examined before the master, in proof of other exhibits.[4] But if a witness, who has been once examined to the matters in issue, is re-examined before the master, without a special order, though the re-examination be to matters not before testified to by him, it is an irregularity, and has been deemed a sufficient cause for suppressing the second deposition.[5] To the case of witnesses who have not already been examined, this rule requiring a special order is now generally understood not to apply; for it is said that, where a case is sent to a master, for inquiry into a fact, it is in the nature of a new issue joined; and what would be evidence in any other case upon that issue, is evidence before the master; the evidence already in the cause, upon the same matter, is admissible before him, and other witnesses, to the matter referred, may also be examined as of course.[6] But the rule does apply to the re-examination

[1] 2 Dan. Ch. Pr. 1383, 1384, 5th Amer. ed. 1192; Vaughan *v.* Lloyd, 1 Cox Ch. C. 312; Whitaker *v.* Wright, 2 Hare 321; Sawyer *v.* Bowyer, 1 Bro. Ch. C. 388, and cases cited in Perkins's n.; Jenkins *v.* Eldredge, 3 Story 299, 308, 309; Gass *v.* Stinson, 2 Sumner 605.

[2] Sanford *v.* ——, 1 Ves. Jun. 398; s. c. 3 Bro. Ch. C. 370; Callow *v.* Mince, 2 Vern. 472.

[3] 2 Dan. Ch. Pr. 1385; Rowley *v.* Adams, 1 My. & K. 543.

[4] Ibid.; Courtenay *v.* Hoskins, 2 Russ. 253.

[5] Smith *v.* Graham, 2 Swanst. 264. But the suppression was made without prejudice to any application for the re-examination of the witness. And see Greenaway *v.* Adams, 13 Ves. 360; Vaughan *v.* Lloyd, 1 Cox Ch. C. 312. See also Jenkins *v.* Eldredge, 3 Story 299, 308, 309, where the general rule was reviewed and acted upon by Story, J. But where the examination before the master was confined to points collateral to the matters in issue at the hearing, it has recently been held that an order was not a necessary prerequisite: 1 Hoffm. Ch. Pr. 538; Swinford *v.* Horne, 5 Madd. 379. And such, it seems, had been the practice for more than a century, as appears from Medley *v.* Pearce, West 128, per Ld. Hardwicke.

[6] Smith *v.* Althus, 11 Ves. 564; Hough *v.* Williams, 3 Bro. Ch. C. 190; Gass *v.* Stinson, 2 Sumn. 605, 612. But see Willan *v.* Willan, 1 Cooper Ch. C. 291; Hoffman's Master in Chancery, 45, 46.

of witnesses who have once been examined before the master to the same facts, it being held irregular, except upon a special order.[7]

§ 337. **Feigned Issue; Jury Trial.** A *third mode* in which the court obtains further information for itself, is, by sending a *feigned issue* to a court of law, for *trial by a jury*. It will be recollected, as we have already seen, that, according to the doctrine of equity, the facts are finally found by the Chancellor, and that, of course, all the subordinate means of ascertaining them, and verdicts among the rest, are used only for his information, and not imperatively to govern and control his judgment. Hence it is, that it is competent and usual for him to order the terms on which the trial shall proceed, and what evidence the parties shall respectively admit or adduce.[1] Thus, in directing an issue, the court will, in its discretion, order the parties to make such admissions as it thinks are *necessary to raise the question* to be determined; that they produce at the trial any books, papers, and documents in their possession, power, or control, which it may deem useful for a full investigation of the matter in issue, and which, as we have heretofore seen, it may order in the principal cause;[2] and that witnesses who have deposed in the cause may be examined *viva voce*, or their depositions read at the trial; that new witnesses shall not be adduced, without sufficient previous notice of their names, residences, and additions, to enable the other party to ascertain their character. The court will also, in its discretion, designate which party shall hold the affirmative of the issue; will order that the trial be by a struck jury, if either party desire it, and the justice of the case so requires; and will impose such

[7] Remsen *v.* Remsen, 2 Johns. Ch. 500; Cowslade *v.* Cornish, 2 Ves. 270.

[1] {U. S. *v.* Samperyac, 1 Hemp. 118; Ward *v.* Hill, 4 Gray (Mass.) 593; Waterman *v.* Dutton, 5 Wis. 413.} Whether, in such case, the parties ought to be deprived of the use of any legal evidence, *quære;* and see Beachinall *v.* Beachinall, 1 Vern. 246. In this case, Lord Nottingham, in directing a trial at law, ordered that a certain deed should not be given in evidence; and for this cause, on review, the Lord Keeper reversed the decree. In Apthorp *v.* Comstock, 2 Paige 482, where the genuineness of a deed was in question, the Chancellor, in directing an issue, ordered that the proof of the execution of the deed, taken before the commissioner, prior to its registration, and which entitled it to be read at law, should not be received at the trial as any evidence of the execution of the deed, or of the genuineness of any of the signatures upon it; to which order no exception was taken. And in Elderton *v.* Lack, 2 Phil. 680, it was held that, where the plaintiff's title to relief in equity depended on a legal right, the court ought not to interfere with the trial of that right in a court of law, by requiring the defendant to admit any fact upon which that right depended. And see Smith *v.* E. of Effingham, 10 Beav. 589.

[2] See *supra*, §§ 295–307.

restrictions upon the parties as will prevent all fraud or surprise on the trial.[3]

§ 338. **Whether Parties may be examined.** Whether the court, in directing an issue, has a right to *order the parties themselves to be examined*, without their consent, is a question upon which there appears to have been some conflict of opinion. It is agreed that this may be done where the parties are merely nominal or fiduciary. Where the facts in dispute rest only in the knowledge of the parties, or where oath is so balanced by oath that it is proper for a jury to weigh their credit, — as, for example, where an injunction is asked for upon the affidavit of one party, and opposed upon that of another, and an issue is in consequence directed, — it is also considered proper that both the parties themselves should be examined. In such cases they are not considered as witnesses for themselves, or for each other, but as witnesses for the court, to satisfy its own conscience.[1] In other cases such examinations have been refused, unless by mutual consent and subject to the discretion of the court;[2] and even then it has been observed, that the practice of allowing parties to be examined for themselves is to be resorted to with great caution, and never, unless under the peculiar circumstances of the case justice could not be attained without it; and certainly never, when, from the position of the parties, an unfair advantage would be given by it to one over the other. Thus, where the fact in issue appeared to have occurred in the presence of only the plaintiff and a late partner of the defendants, who was since dead, an examination of both parties was held improper, as calculated to give the plaintiff an undue advantage.[3] The order for the examination of a party does not

[3] 2 Dan. Ch. Pr. 1296, 1297 [3d Amer. ed. 1097]. See Apthorp *v.* Comstock, 2 Paige 482, 485, for a precedent of the exercise of this power of directing the course of the trial, mentioned in the text. {The feigned issue may also be amended in a proper case and upon proper application: Waterman *v.* Dutton, 5 Wis. 413. Where issues are awarded in a suit in equity, after proofs are taken, the court may, in its discretion, direct that, in the trial of those issues, the depositions already taken may be read, unless the attendance of the witnesses is actually procured, and also that such further evidence may be adduced, including the testimony of the parties, as by law would be competent on the trial of such issues: Clark *v.* Society, 44 N. H. 382.}

[1] De Tastet *v.* Bordenave, 1 Jac. 516; Dister, *ex parte*, Buck's Cas. 234. And see Hepworth *v.* Heslop, 6 Hare 622; 13 Jur. 384; 2 Dan. Ch. Pr. 1298; 1 Hoffm. Ch. Pr. 505, 506; Fletcher *v.* Glegg, 1 Younge 345.

[2] Howard *v.* Braithwaite, 1 V. & B. 374; Gardiner *v.* Rowe, 4 Madd. 236; Hepworth *v.* Heslop, *supra*.

[3] Parker *v.* Morrell, 2 Phil. 453; 12 Jur. 253.

affect the character or weight of his evidence; it only removes the objection which arises from his being a party in the cause.[4]

§ 339. **Mode of Trial.** According to the course of the Court of Chancery, the trial of an issue directed to a court of law is generally conducted in the same manner, and by the same rules, as are observed in other trials at law, unless the Court of Chancery, in ordering the issue, has given different directions. In those States, however, in which a trial by jury, in cases in equity, may be claimed *as of right*, it is conceived that, in the absence of any statute expressly, or by clear implication, empowering the court to impose terms on the parties, or to interfere with their legal rights in regard to the course of proceeding in the trial, no such power could lawfully be exercised.[1] But where no such right of the parties exists, this power of the court remains, as long recognized in chancery proceedings in England, with the modifications which have been adopted here, in our State tribunals, or created by statutes. But where the devisee in a will seeks to establish it against the heir, the invariable course of chancery requires that the due execution of the will should be proved by the examination of all the attesting witnesses who are in existence and capable of being examined; and that the same course be pursued upon the trial of an issue of *devisavit vel non;* except in the cases where, by the rules of evidence, in courts of law, their production may be dispensed with. For as a decree in support of the will is conclusive upon the heir, against whom an injunction would be granted, if he should disturb the possession after the decree, it is held to be reasonable that he should have the opportunity of cross-examining all the witnesses to the will, before his right of trying the title of the devisee is taken from him.[2]

[4] Rogerson *v.* Whitington, 1 Swanst. 39.

[1] {Franklin *v.* Greene, 2 Allen (Mass.) 522. In Ward *v.* Hill, 4 Gray (Mass.) 593, the ordering of an issue to a jury in a suit in equity, upon the application of the complainant, was held to be within the discretion of the court, and not open to exception.} In Marston *v.* Brackett, 9 N. H. 336, 345, the right exercised by the court seems clearly to have been derived from the statute. The practice on this point, in the different States, is various and unsettled. But where the right of a party to a trial by jury is absolute, and uncontrolled by any constitutional or statutory limitation, it is conceived that the power of the court, as a Court of Chancery, to modify the exercise of the right is taken away. It is only where the trial depends on the pleasure of the court that the course of proceeding can be thus modified. Cujus est *dare ejus* est disponere.

[2] See *ante*, Vol. II. § 694, and the cases there cited. See also McGregor *v.* Topham, 3 H. L. Cas. 132. {And this is the practice in Kentucky: Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460.}

§ 340. 7. **Evidence allowed on Special Order.** Another mode in which a Court of Chancery, in the exercise of its discretion, and to do complete justice and equity upon the merits, will administer the law of evidence by more flexible rules than are recognized in the common law, is apparent in the allowance of evidence upon special order; which is done, either by admitting some kinds of evidence which it would be *inconvenient* and *unreasonably expensive* to produce in the regular way; or by permitting the parties to supply *defects and omissions of proof* and to give *explanatory evidence*, at later stages in the cause than the ordinary rules will allow. One instance of the former class is in the admission of *viva voce* testimony in the *proof of exhibits* at the hearing, instead of requiring proof by depositions, in the ordinary course; a subject which we have already considered in another connection.[1] Another case of the same class was where the vouchers in support of an account were impounded in the Ecclesiastical Court, which does not give up anything once impounded; and the expense of having the officer to attend the master would be considerable; in which case the Lord Chancellor directed the master to allow items upon vouchers, which it should be verified by affidavit were so impounded.[2] On the same principle, an account kept forty-nine years ago, by a person since deceased, was ordered to be received by the master as *prima facie* evidence of the particular items in the account to be taken by him pursuant to the prayer of the bill; throwing on the other side the burden of impeaching them.[3]

§ 341. **Answers, etc., in other Causes.** Upon special order, the court will permit the parties to read at the hearing any *answers*, *depositions*, or *other proceedings taken in another cause*, and this without requiring a foundation first to be laid, by proving the bill and answer in the cause in which the depositions or other subsequent proceedings were taken. Complete mutuality or identity of all the parties has been shown, in a previous volume, not to be necessary; it being sufficient if the point or matter in issue were the same in both cases, and the party against whom the evidence is offered, or those under whom he claims, had full power to cross-examine the witnesses.[1] Nor is it necessary to this end that the

[1] *Supra*, §§ 308–310, 319.
[2] Nielson *v.* Cordell, 8 Ves. 146.
[3] Chalmer *v.* Bradley, 1 Jac. & Walk. 65.
[1] *Ante*, Vol. I. §§ 522, 523, 536, 553. And see Eade *v.* Lingood, 1 Atk. 204; Coke *v.* Fountain, 1 Vern. 413; Nevil *v.* Johnson, 2 id. 447; Mackworth *v.* Penrose,

parties to the present suit, or those whom they represent, should have sustained the relations of plaintiff and defendant in the former suit; it is sufficient that they were parties to the suit, though on the same side. The reason for this was given by Lord Hardwicke, who observed that it frequently happens that there are several defendants, all claiming against the plaintiff, and also having different rights and claims among themselves; and the court then makes a decree, settling the rights of all the parties; but that a declaration for that purpose could not be made, if the decree and proceedings could not afterwards be admitted in evidence between the defendants; and the objection, if allowed, would occasion the splitting of one cause into several.[2]

§ 342. **Depositions in Cross-causes.** In regard to *depositions taken in a cross-cause*, it is requisite that the witnesses be examined before publication in the original cause has passed, otherwise the depositions are liable to be suppressed.[1] But if the point in issue in both cases is the same, and the depositions in the cross-cause were taken before either party had examined witnesses in the original cause, they may be read in the latter cause.[2] And depositions taken in the cross-cause, to matters not put in issue by the original cause, may be read, notwithstanding they were taken after publication had passed in the original cause.[3] On the same principle, where depositions, taken in an original cause, are admitted to be read in a cross-cause, such parts only are admissible as were pertinent to the issue in the original cause.[4]

§ 343. **Depositions taken in other Courts.** In the exercise of the same liberal discretion, evidence taken in the *exchequer* has been allowed to be read between the same parties, litigant in chancery.[1]

1 Dick. 50; Humphreys *v.* Pensam, 1 My. & C. 580; Roberts *v.* Anderson, 3 Johns. Ch. 371, 376; Dale *v.* Rosevelt, 1 Paige 35; Paynes *v.* Coles, 1 Munf. 373; Harrington *v.* Harrington, 2 How. (Miss.) 701; Att'y-General *v.* Davison, McCl. & Y. 160. Where suits between several parties, who are not the same in each suit, are consolidated and tried at once by mutual agreement, it seems that depositions taken in one of the suits may be admitted on the trial against any of the parties, though they were not original parties to the particular suit in which the deposition was taken: Smith *v.* Lane, 12 S. & R. 80. {The answer of a defendant in another suit is admissible as an admission, though it was not filed in that case: Matson *v.* Melchor, 42 Mich. 477.}

[2] Askew *v.* Poulterers' Co., 2 Ves. 89. But in such case the evidence is not conclusive: ibid. And see Chamley *v.* Lord Dunsany, 2 Sch. & Lefr. 690, 710; 2 Dan. Ch. Pr. 1013.

[1] Pascall *v.* Scott, 12 Sim. 550.

[2] Wilford *v.* Beasely, 3 Atk. 501; 2 Dan. Ch. Pr. 1011; Christian *v.* Wrenn, Bunb. 321.

[3] Ibid.

[4] Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339.

[1] Magrath *v.* Veitch, 1 Hog. 127. And see Williams *v.* Broadhead, 1 Sim. 151.

So, of an examination in the *Admiralty Court*.[2] And depositions taken by the defendant in a suit which was afterwards dismissed by the complainant, may be read in a subsequent suit between the same parties, for the same cause, where the same witnesses cannot again be had.[3] So, if a deposition taken *de bene esse* is read at the hearing when it might have been effectually objected to for irregularity, and an issue is afterwards directed, it is of course to order it to be read at the trial notwithstanding the irregularity.[4]

§ 344. **Evidence of Parties and Interested Witnesses.** The *evidence of parties* and of *interested witnesses*, also, will sometimes be allowed on special order in equity where it is found essential in order *to detect and reach a fraudulent transaction*, or *to discover the true and real intention of a trust or use*, declared in a deed. Thus, upon an allegation that the defendant's title to the estate in question was *fraudulent*, the plaintiff was permitted to read the deposition of Mrs. Haughton, the defendant's grantor, to impeach her title to the estate, and to show that it was only a pretended title, done with no other view than to assist the defendant in carrying on a fraud.[1] So, a *trustee*, having the legal interest in the estate, but being merely nominal in every other respect, may be examined as a witness in equity as to the merits or intention of the trust title; though it is otherwise at law.[2] So, in the case of a fraudulent abstracting of the plaintiff's money or goods by the defendant, a court of equity will admit the plaintiff's own oath as to the extent or amount of his loss, *in odium spoliatoris;* while at law, this rule, though in several cases it has been freely admitted as a rule of necessity, yet has sometimes been questioned.[3] In directing an *account*, also, the court will sometimes direct it to be taken with the admission of certain documents or testimonies, not having the character of legal evidence. In cases of this sort, a distinction is made, upon the following principle laid down by Lord Eldon: If parties have been permitted, for a long course of years, to deal with property as their own; considering themselves under no obligation to keep accounts as though

[2] Watkins *v.* Fursland, Toth. 192.

[3] Hopkins *v.* Stump, 2 H. & J. 301.

[4] Gordon *v.* Gordon, 1 Swanst. 166. The death of the witnesses, or their absence beyond the reach of process, seems to be requisite in such cases: ib. 171, n.; Fry *v.* Wood, 1 Atk. 445; Coker *v.* Farewell, 2 P. Wms. 563; Carrington *v.* Carnock, 2 Sim. 567.

[1] Man *v.* Ward, 2 Atk. 228.

[2] 2 Atk. 229, per Ld. Hardwicke.

[3] Childrens *v.* Saxby, 1 Vern. 207. See *ante*, Vol. I. § 348, and cases there cited.

there was any adverse interest, and having no reason to believe that the property belongs to another, — though it would not follow that, being unable to give an accurate account, they should keep the property, yet the account, in such cases, would be directed, not according to the strict course, but in such a manner as, under all the circumstances, would be fit. But, where both parties knew that the property was the subject of adverse claim, and those who desired to have the rules of evidence relaxed had undertaken that there should be no occasion for deviating from the strict rule, but that there should be clear accounts, and that the other party should have his property without hazard of loss from the want or the complication of accounts, the case is then widely different; and a previous direction to the master to receive testimony not having the character of legal evidence would introduce a most dangerous principle.[4]

§ 345. **Evidence supplementary.** A more frequent occasion for a special order for the admission of evidence out of course arises when such evidence is necessary to supply *defects or omissions* in the proofs already taken, and *discovered before the final hearing.* These are either discovered and become material in consequence of something unexpectedly occurring in the course of the proceedings;[1] or they happened by accident, or from inadvertence. In the former case, relief is usually given by leave to file a supplemental bill, or a bill of review, or a supplemental answer, and to adduce evidence in its support. But the course of the court, as we have already had occasion to observe, requires that, as far as practicable, the examination of every witness should be taken at one sitting, and without interruption; and that after the witness has signed his deposition, and "turned his back upon the examiner," no opportunity should be given for tampering with him, and inducing him to retract, contradict, or explain away, in a second examination, what he has already stated in the first. This rule, however, is not universally imperative; for it seems that leave to re-examine a witness, even *before* publication, will be granted,

[4] Lupton *v.* White, 15 Ves. 443.

[1] Where an old paper-writing, material in the cause, was discovered after publication, and was not provable, *viva voce*, as an exhibit, leave was granted to prove it upon interrogatories and a commission: Clarke *v.* Jennings, 1 Anstr. 173. So, where two witnesses were relied upon to prove handwriting, but, on examination, both declared their disbelief of it, the party was permitted to examine other witnesses to that point, since the previous examination furnished no reason why this should not be done: Greenwood *v.* Parsons, 2 Sim. 229.

whenever the grounds of the motion for that purpose are such as would support an application for a bill of review; or, more generally speaking, that an exception to the rule will be admitted, whenever the special circumstances render it necessary, for the purposes of justice, to make one.[2] But, generally, a special order for the re-examination of a witness, for the purpose of supplying a defect in his former examination, will not be made until publication has passed in the cause; for the propriety of granting the application cannot readily be seen, without inspecting the depositions already taken.[3] Yet in special cases, where a clear mistake was capable of specific correction by reference to documents and other writings, this has been permitted before publication; the re-examination being restricted to that alone.[4] The order for the re-examination of a witness is always founded upon one or the other of the grounds before mentioned, namely, accident or surprise; and the rule is the same whether he is to be re-examined before the hearing, or upon a reference to the master, the reasons in both cases being the same.[5]

§ 346. **Re-examination.** Where *depositions have been suppressed* on account of some accidental irregularity, either in the conduct of the cause, or in the examination of the witnesses, the court, in its discretion, will permit a re-examination of the witnesses, upon the original interrogatories, if they were proper, or upon fresh ones, if they were not.[1] So, *where the witness has made a mistake* in his testimony,[2] or has omitted to answer some parts of the interrogatories,[3] or, the *examiner has omitted* to take down or has erroneously taken down some part of his answer;[4] and, in other like cases, where the defect of evidence has resulted from *accident*

[2] 2 Dan. Ch. Pr. 1150, 5th Am. ed. vol. i. 858; Cockerell *v.* Cholmeley, 3 Sim. 313, 315; Rowley *v.* Adams, 1 My. & K. 543, 545, per Sir J. Leach, M. R. And see Hallock *v.* Smith, 4 Johns. Ch. 650; Beach *v.* Fulton Bank, 3 Wend. 573, 580; Hamersly *v.* Lambert, 2 Johns. Ch. 432; Gray *v.* Murray, 4 id. 412.

[3] 2 Dan. Ch. Pr. 1153, 5th Am. ed. vol. i. 953. See also Lord Abergavenny *v.* Powell, 1 Mer. 130, 131, per Ld. Eldon; Stanney *v.* Walmsley, 1 My. & C. 361, per Ld. Cottenham.

[4] Kirk *v.* Kirk, 13 Ves. 280; s. c. ib. 285, Ld. Erskine.

[5] *Supra*, § 336.

[1] 2 Dan. Ch. Pr. 1147, 1148, 1150, 5th Am. ed. vol. i. 952; Wood *v.* Mann, 2 Sumn. 316, 323. And see Curre *v.* Bowyer, 3 Swanst. 357; Healey *v.* Jagger, 3 Sim. 494.

[2] Byrne *v.* Frere, 1 Moll. 396; Turner *v.* Trelawny, 9 Sim. 453.

[3] Potts *v.* Curtis, 1 Younge, 343.

[4] Bridge *v.* Bridge, 6 Sim. 352; Kingston Trustees *v.* Tappen, 1 Johns. Ch. 368. If the omission was through the culpable negligence or inattention of the party or his counsel, a re-examination will be refused: Healey *v.* Jagger, *supra;* Asbee *v.* Shipley, 5 Madd. 467; Ingram *v.* Mitchell, 5 Ves. 299.

or *inadvertence*, leave to supply the defect and correct the error, by a re-examination of the witness, will be granted; the re-examination being restricted to the supply of the defect, or the correction of the error, without retaking any other parts of the testimony, unless the entire original deposition has been suppressed.[5] The ordinary method of showing to the court the fact and cir-

[5] See Hood *v.* Pimm, 4 Sim. 101. "There is," said the Vice-Chancellor of England, "an abundance of cases to show that, uniformly, from the earliest times, courts of equity have relieved against mere errors of examiners, commissioners, witnesses, solicitors, and counsel, and, when there has been an accidental defect in evidence, have, before the hearing, at the hearing, and at the rehearing of a cause, allowed the defect to be supplied. In Bloxton *v.* Drewit (Prec. in Chan. 64), an order was made to prove a deed *viva voce*. It turned out that the attesting witnesses were dead, and leave was given, at the hearing, to prove the deed. In Spence *v.* Allen (ib. 493), after depositions had been suppressed because they were leading, which was the error of counsel, leave was given to file new interrogatories; and a similar leave was given in the case of Lord Arundel *v.* Pitt (Amb. 585). In the case of Griells *v.* Gansell (2 P. Wms. 646), a deposition has been taken erroneously, by the examiner, or through mistake of the witness, and leave was given to correct the mistake. And in two instances, in the case of Kirk *v.* Kirk (13 Ves. 280–285), where witnesses had made mistakes, the mistake was corrected; in one instance, on the application of the defendant; in the other, on the application of the witness. In Shaw *v.* Lindsey (15 id. 380), and in Ferry *v.* Fisher (ib. 382), there cited, the court relieved against the error of commissioners in taking depositions; and though it suppressed the erroneous depositions, directed the witnesses to be examined over again. In Lord Cholmondeley *v.* Lord Clinton (2 Mer. 81), where the intention was to examine witnesses properly, and, by mistake of the solicitor, an error happened, the court relieved; and Lord Eldon said he was clear the court had an undoubted right to rectify a mere slip in its proceedings. Lord Eldon indeed says, in Willan *v.* Willan (19 Ves. 590), 'after publication, previous to a decree, you cannot examine witnesses further, without great difficulty, and the examination is generally confined to some particular facts.' But this shows Lord Eldon's opinion, that leave might be given in a proper case. In Wallis *v.* Hodgson (2 Atk. 56; 1 Russ. 527, n.), Lord Hardwicke, after he had gone through the hearing of a cause, postponed it, and gave leave to exhibit interrogatories to prove the sanity of the testator. It appears, from the report (2 Atk. 56), that he thought it a mere matter of form. In Bank *v.* Farquharson (Amb. 145; s. c. 1 Dick. 167), Lord Hardwicke, before the hearing of a cause, adjourned it, in order that a deed might be proved, which could not be proved merely as an exhibit. In Sandford *v.* Paul (3 Bro. Ch. C. 370), Lord Thurlow, on motion before the hearing, where a mistake had happened, allowed a witness, who had been examined, to be re-examined. In the Attorney-General *v.* Thurnall (2 Cox Ch. C. 2), on motion at the hearing, leave was given to enter into further evidence, so as to let in the copy of a will. In Walker *v.* Symonds (1 Mer. 37, n.), leave was given, on a rehearing, to read exhibits not proved at the hearing. In Cox *v.* Allingham (Jac. 337), upon petition, after the hearing leave was given to enter into new evidence as to the loss of a deed, so as to let in evidence of a copy. In Moons *v.* De Bernales (1 Russ. 307), and Abrams *v.* Winshup (ib. 526), upon application in the course of the hearing, leave was given to enter into further evidence as to the death of a person, and the sanity of a testator; and in Williams *v.* Goodchild (2 id. 91), Lord Eldon expressed an opinion that, on a rehearing upon special application, new evidence might be received. In Williamson *v.* Hutton (9 Price 187), the Court of Exchequer permitted a rehearing on the ground of new evidence discovered since the hearing, and gave leave, not merely to prove exhibits *viva voce*, but to exhibit interrogatories to prove them. In Coley *v.* Coley (2 You. & Jerv. 44), the Chief Baron, when the cause was set down for hearing, gave leave, on motion, to examine two further witnesses to a will, when one only had been examined; and though in Wyld *v.* Ward (2 id. 381), he would not allow proof of the lease at the rehearing, unless it could be proved as an exhibit, his reason seems to have been, that he thought the omission to prove it at the hearing arose from mere neglect; not accident, but blamable neglect:" 4 Sim. 110–113.

cumstances of the mistake is by the affidavit of the witness: but this may also appear from the certificate of the commissioner or magistrate, or upon the face of the deposition, or otherwise; for the court, when once it has knowledge of the fact, will act upon it, in whatsoever manner that knowledge may have been obtained.[6]

§ 347. **Amendment of Deposition.** Sometimes, in cases of a clear mistake involving only a verbal alteration, the court, instead of ordering a re-examination of the witness, *will permit the deposition to be amended in open court.* This has been done by the alteration of a date, stated by the witness by mistake;[1] by the correction of a mistake of the examiner,[2] especially where the witness was aged and very deaf;[3] where the name of the party defendant was mistaken in the interrogatories;[4] and in other like cases; the mistake being first clearly shown and proved to the entire satisfaction of the court.[5]

§ 348. **Impeachment of Witnesses.** Another case, in which evidence will be allowed to be taken out of the ordinary course, and upon special order is, *to impeach the credit of witnesses* who have already been examined. To obtain an order for this purpose, it is necessary that "articles" first be filed, charging the bad character of the witness in point of veracity whose credit it is intended to impeach, and stating the general nature of any disparaging facts which it is intended to prove.[1] The object for which the articles are required is, to give notice to the adverse party whose witnesses are to be objected to, that he may be prepared to meet the objection. And, as it is a rule of chancery practice that witnesses are not to be examined to any matters not put in issue by the pleadings, and as the character of a witness cannot in that manner be put in issue, it is obvious that any examination as to the character of a witness would be impertinent to the issue, and therefore must be suppressed, unless it

[6] Shaw *v.* Lindsey, 15 Ves. 381, per Lord Eldon. And see Kirk *v.* Kirk, 13 id. 285.

[1] Rowley *v.* Ridley, 1 Cox Ch. C. 281; s. c. 2 Dick. 657.

[2] Griells *v.* Gansell, 2 P. Wms. 646. And see Ingram *v.* Michell, 5 Ves. 297; Penderil *v.* Penderil, W. Kel. 25.

[3] Denton *v.* Jackson, 1 Johns. Ch. 526.

[4] Curre *v.* Bowyer, 3 Swanst. 357.

[5] Rowley *v.* Ridley, *supra;* Darling *v.* Staniford, 1 Dick. 358. And see Kenny *v.* Dalton, 2 Moll. 386.

[1] See 2 Dan. Ch. Pr. 1158, 1159, 5th Am. ed. vol. i. 957, 958, for the form of the articles. See also 1 Hoffm. Ch. Pr. 489.

were previously allowed upon motion and a special order.[2] The order usually directs that the party be at liberty to examine witnesses as to credit, and as to such particular facts only as are *not* material to what is in issue in the cause; and under it the party may examine witnesses as to the general reputation of the witness who is impeached, and may also contradict him as to particular facts, not material to the issue, and may prove previous declarations of the witness, contrary to what he afterwards testified on his examination.[3] No interrogatory is permitted as

[2] Mill *v.* Mill, 12 Ves. 406.

[3] 2 Dan. Ch. Pr. 1160, 1161, 5th Am. ed. vol. i. 960, 961; Vaughan *v.* Worrall, 2 Swanst. 395, and cases cited *arg.* by Sir Samuel Romilly. The doctrine on this subject was reviewed by Chancellor Kent, in Troup *v.* Sherwood, 3 Johns. Ch. 562–565; and was recognized and briefly expounded by Mr. Justice Story, in Wood *v.* Mann, 2 Sumn. 321; and afterwards more particularly in Gass *v.* Stinson, ib. 605. "The general course of practice," he observes, "is that, after publication has passed of the depositions (though it may be before), if either party would object to the competency or credibility of the witnesses, whose depositions are introduced on the other side, he must make a special application by petition to the court, for liberty to exhibit articles, stating the facts and objections to the witnesses, and praying leave to examine other witnesses, to establish the truth of the allegations in the articles by suitable proofs. Without such special order, no such examination can take place; and this has been the settled rule ever since Lord Bacon promulgated it in his Ordinances (Ord. 72). Upon such a petition to file articles, leave is ordinarily granted by the court, as of course, unless there are special circumstances to prevent it. There is a difference, however, between objections taken to the competency and those taken to the credibility of witnesses. Where the objection is to competency, the court will not grant the application after publication of the testimony, if the incompetency of the witness was known before the commission to take his deposition was issued; for an interrogatory might then have been put to him, directly on the point. But, if the objection was not then known, the court will grant the application. This was the doctrine asserted by Lord Hardwicke, in Callaghan *v.* Rochfort (3 Atk. 643), and it has been constantly adhered to ever since. The proper mode, indeed, of making the application, in such case, seems to have been thought by the same great judge to be, not by exhibiting articles, but by motion for leave to examine the matter, upon the foundation of ignorance at the time of the examination. But, upon principle, there does not seem to be any objection to either course; though the exhibition of articles would seem to be more formal, and, perhaps, after all, more convenient and certain in its results. But where the objection is to credibility, articles will ordinarily be allowed to be filed by the court, upon petition, without affidavit, after publication. The reason for the difference is said by Lord Hardwicke, in Callaghan *v.* Rochfort (ib. 643), to be, because the matters examined to in such cases are not material to the merits of the cause, but only relative to the character of the witnesses. And, indeed, until after publication has passed, it cannot be known what matters the witnesses have testified to; and, therefore, whether there was any necessity of examining any witnesses to their credit. This latter is the stronger ground; and it is confirmed by what fell from the court in Purcell *v.* McNamara (8 Ves. 324). When the examination is allowed to credibility only, the interrogatories are confined to general interrogatories as to credit, or to such particular facts only as are not material to what is already in issue in the cause. The qualification in the latter case (which case seems allowed only to impugn the witness's statements as to collateral facts) is to prevent the party, under color of an examination, to credit, from procuring testimony to overcome the testimony already taken in the cause, and published, in violation of the fundamental principle of the court, which does not allow any new evidence of the facts in issue after publication. The rule and the reasons of it are fully expounded in Purcel *v.* McNamara (ib. 324, 326); Wood *v.* Hammerton (9 id. 145); Carlos *v.* Brok (10 id. 49, 50); and White *v.* Fussell (1 V. & B. 151). It was recognized and enforced by Mr. Chancellor Kent, in Troup *v.*

to any fact already in issue in the cause; and in regard to the character of the witness, the only inquiry is as to his general reputation for truth and veracity, as has been stated in a preceding volume.[4]

Sherwood (3 Johns. Ch. 558, 562–565). When the examination is to general credit, the course in England is to ask the question of the witnesses whether they would believe the party sought to be discredited upon his oath. With us, the more usual course is to discredit the party by an inquiry what his general reputation for truth is; whether it is good, or whether it is bad:" 2 Sumn. 608–610. And see Piggott *v.* Croxhall, 1 Sim. & Stu. 467. This course, in its strictness, is conceived to apply only in those courts whose practice is similar to that formerly in use in the High Court of Chancery in England.

[4] And see *ante*, Vol. I. § 461, and cases there cited.

CHAPTER III.

OF THE EXCLUSION OF EVIDENCE.

§ 349. 1. **Suppression of Depositions before the Hearing.** In the course of proceedings in the courts of common law, objections to the competency of testimony can be made only at the trial, when the testimony is offered; there being no existing rule by which the questions of its admissibility can be heard by the court at an earlier stage of the cause. But, in chancery, the objection may be heard and the point settled, either at or before the hearing of the cause.[1] Ordinarily, the time to apply for the suppression of depositions is after publication has passed; for, until that time, it is seldom that it can be known whether any cause for their suppression exists. But it is not necessary to wait until publication; for if the ground of objection is previously apparent, in any manner whatever, the court, on motion and proof of the fact, will make an order for suppressing the testimony.[2] Thus, where it was shown, before publication, that the deposition of the witness, who was also the agent of the party producing him, was brought, already written, to the commissioners, and taken by them in that form, it was suppressed.[3] So, where the deposition was prepared beforehand by the attorney of the party, it was suppressed before publication.[4]

§ 350. **Grounds of Suppression.** The usual grounds on which depositions are suppressed are, either that the *interrogatories are leading;*[1] or that the interrogatories and the answers to them are *scandalous* and *impertinent;* or that the witness was *incompetent;*

[1] {"A motion to suppress testimony is, under ordinary circumstances, addressed wholly to the discretion of the Chancellor, and is one of those incidental questions in practice, which must rest mainly in discretion:" Partridge *v.* Stocker, 36 Vt. 110.}

[2] {"As, according to the present practice" (English), "the examination is conducted by the examiner, and many of the objections formerly applicable to evidence are abolished, it can scarcely happen that cases for the suppression of depositions will occur hereafter:" 2 Dan. Ch. Pr. 3d Am. ed. 961.}

[3] Shaw *v.* Lindsey, 15 Ves. 380.

[4] Anon., Ambl. 252, n. 4 (Blunt's ed.); 2 Dan. Ch. Pr. 1147.

[1] [See *ante*, Vol. I. § 434.]

or that some *irregularity* has occurred in relation to the depositions. When the objection is for either of the two former causes, it is referred to a master to ascertain and report the fact, and the question is presented to the court upon exceptions to his report.[2] If the exceptions are sustained, the deposition will be suppressed; totally, if the objection goes to the whole, otherwise only as to the objectionable part. Thus, if one interrogatory alone is reported as leading, the deposition as to that interrogatory only will be suppressed; and if part only of the interrogatory be leading, then that part, and so much of the answer as is responsive to it, will be suppressed.[3] And where depositions are suppressed because the interrogatories are leading, it is not usual to grant leave to re-examine the witnesses; though it will sometimes be permitted under special circumstances; as, for example, where the interrogatories were improperly framed through inadvertence, and with no improper design.[4] But no reference is ordinarily made for *impertinence alone*, not coupled with scandal;[5] unless it be on special application at the hearing of the cause;[6] or where the impertinence consists in the examination of witnesses, to discredit other witnesses, without a special order for that purpose; in which latter case there may be a reference either before or after publication.[7] And where exceptions are taken after publication and before the hearing, for the *incompetency* of a witness, a special application is made to the court for leave to exhibit articles, stating the facts, and praying leave to examine other witnesses to establish the truth of them; and, if the facts were not known until after publication, the application will be granted.[8] The *causes* which render a witness incompetent have been considered in a preceding volume.[9]

[2] 2 Dan. Ch. Pr. 1141, 1143, 5th Am. ed. vol. i. 951, 952, and notes.

[3] Ibid. 1143.

[4] Ibid.; Lord Arundel *v.* Pitt, Ambl. 585.

[5] White *v.* Fussell, 19 Ves. 113. And see Cocks *v.* Worthington, 2 Atk. 235, 236; Pyncent *v.* Pyncent, 3 id. 557; 2 Dan. Ch. Pr. 1049, 1144, 5th Am. ed. vol. i. 895, 951.

[6] 2 Dan. Ch. Pr. 1144; Osmond *v.* Tindall, Jac. 627.

[7] Mill *v.* Mill, 12 Ves. 407.

[8] Callaghan *v.* Rochfort, 3 Atk. 643; Gass *v.* Stinson, 2 Sumn. 608. Objections to the competency of a witness, *if known*, and not made at the time of taking a deposition under the act of Congress, will be deemed to have been waived: U. S. *v.* Hair Pencils, 1 Paine 400. So, where a witness, *known* to be incompetent, was cross-examined, this is a waiver of the objection, on the part of the party by whom he was cross-examined: Charitable Corp. *v.* Sutton, 2 Atk. 403; Corp. of Sutton *v.* Wilson, 1 Vern. 254.

[9] See *ante*, Vol. I., §§ 326–430.

§ 351. **Irregularities in Taking.**[1] In regard to *irregularities* in the manner of taking depositions, when it is recollected that the mode in which they are to be taken is distinctly prescribed either in statutes or in rules of court, or in both, it is evident that any departure from the rules so prescribed must vitiate the entire proceeding; and accordingly, in such cases, the deposition will be suppressed.[2] The irregularities, when not apparent upon the face of the proceedings, should be shown to the court by affidavit. But there are other irregularities, occasioned by a departure from rules not expressed in formal orders, but long recognized in chancery practice, for which also depositions will be liable to be suppressed. Thus, it is a cause of suppression, if the general interrogatory be not answered;[3] if the deposition be taken before persons, some of whom are not named in the commission;[4] if a joint commission be not executed by all the commissioners;[5] if the cross-interrogatories be not put;[6] if all proper interrogato-

[1] [See *ante*, Vol. I. §§ 320, 516, 552.]

[2] See *ante*, Vol. I. §§ 320–324, for the manner in which depositions, in general, are to be taken. The peculiarities of local practice in the State courts are foreign from the design of this work.

[3] Richardson *v.* Golden, 3 Wash. C. C. 109; Dodge *v.* Israel, 4 id. 323. [So depositions taken after an appeal from the lower court will be suppressed: Perkins *v.* Testerment, 3 G. Gr. (Iowa) 207. Where a defect or omission is apparent on the face of depositions, the usual practice in chancery is to move to suppress them, but not to exclude them for irrelevancy, or on account of the matter deposed to: Vaugine *v.* Taylor, 18 Ark. 65.]

[4] Willings *v.* Consequa, 1 Pet. C. C. 301; Banert *v.* Day, 3 Wash. C. C. 243. So, where it appeared that the evidence had been taken by a clerk to the commissioners, and the effect of some of the depositions had been communicated to the agent of the other side: Lennox *v.* Munnings, 2 Y. & J. 483.

[5] Armstrong *v.* Brown, 1 Wash. C. C. 43.

[6] Gilpins *v.* Consequa, 3 Wash. C. C. 184; Bell *v.* Davidson, ib. 328. And see Davis *v.* Allen, 14 Pick. 313; Bailis *v.* Cochran, 2 Johns. 417. But see, for a qualification of this rule, *ante*, Vol. I. § 554. The refusal of the witness to be cross-examined is no cause for suppressing the deposition; but is punishable as a contempt: Courtenay *v.* Hoskins, 2 Russ. 253. The effect of the want of a cross-examination, upon the admissibility of the deposition, was fully considered by Story, J., in Gass *v.* Stinson, 3 Sumner 98. That case being before a master, and the plaintiffs being desirous of the testimony of a witness who was dangerously ill, a commissioner was agreed on by the parties to take his answers to interrogatories; and they were accordingly taken to the interrogatories filed by the plaintiff; no objection being made to the commissioner's proceeding immediately, upon those interrogatories alone, until others could be filed, saving to the defendant all other benefit of exception. The witness lived several months afterwards, during which the commissioner proceeded with the examination from time to time, as the witness was able to bear it; but before the filing of any cross-interrogatories, and after answering, on oath, all the direct interrogatories, the witness died. The defendant objected to the admission of the deposition, for the want of a cross-examination; but the master admitted it; and for this cause, among others, his report was excepted to. The learned judge, on this point, delivered his opinion as follows: "The general rule at law seems to be, that no evidence shall be admitted, but what is or might be under the examination of both parties. So the doctrine was laid down by Lord Ellenborough, in Cazenove *v.* Vaughan (1 Maule & Selw. 4, 6), and his Lordship on that occasion added: 'And it is agreeable to common sense, that what

ries on either side do not appear to have been substantially an-

is imperfect, and, if I may so say, but half an examination, shall not be used in the same way as if it were complete.' The same principle seems recognized in Attorney-General *v.* Davison (1 McClel. & Younge 160). But neither of these cases called for an explicit declaration as to what would be the effect of a regular, direct examination, where the party had died before any cross-examination. In —— *v.* Brown (Hardres 315), in the case of an ejectment at law, the question occurred, whether the examination of a witness, taken *de bene esse* to preserve his testimony upon a bill preferred and before answer, upon an order of court, where the witness died before he could be examined again, and he being sick all the mean time, so that he could not go to be examined, was admissible on the trial of the ejectment; and it was ruled, after consultation with all the judges, that it could not be, 'because it was taken before issue joined in the cause; and he might have been examined after.' From what is said in the same book in Watt's Case (ib. 332), it seems to have been held, at that time, that, if witnesses are examined *de bene esse* before answer upon a contempt, such depositions cannot be made use of in any other court but the court only where they were taken. And the reason assigned is, 'because there was no issue joined, so as there could be a legal examination.' It may well be doubted, if this doctrine would prevail in our day, at least in courts of equity. Indeed, it seems directly against the decision of the court of King's Bench in Cazenove *v.* Vaughan (1 Maule & Selw. 4, 6); for in that case it was ruled, that a deposition taken *de bene esse*, where the party might have cross-examined, and did not do so, nor take any step to obtain a cross-examination, might be read in a trial at law, the witness having gone abroad. On that occasion, the court said: 'If the adverse party has had liberty to cross-examine, and has not chosen to exercise it, the case is then the same as if he had cross-examined; otherwise the admissibility of the evidence would depend upon his pleasure whether he will cross-examine or not, which would be a most uncertain and unjust rule.'

"But it is the more important to consider how this matter stands in equity; for, although the rules of evidence are, in general, the same in equity as at law, they are far from being universally so.

"It seems clear, that, in equity, a deposition is not, of course, inadmissible in evidence, even if there has been no cross-examination, and no waiver of the right. Thus, if a witness, after being examined on the direct interrogatories, should refuse to answer the cross-interrogatories, the party producing the witness will not be deprived of the benefit of his direct testimony; for, upon application to the court, the witness would have been compelled to answer. So it was held in Courtenay *v.* Hoskins (2 Russ. 253). But if the witness should secrete himself, to avoid a cross-examination, there the court would, or at least might, suppress the direct examination: Flowerday *v.* Collet (1 Dick. 288). In such a case, a cross-examination is still possible; and the very conduct of the witness, in secreting himself, has a just tendency to render his direct examination suspicious.

"But where the direct interrogatories have been fully answered, and an inevitable accident occurs, which, without any fault on either side, prevents a cross-examination, I do not know that a like rule has been established, or that the deposition has been suppressed. So far as authorities go, they incline the other way. In Arundel *v.* Arundel (1 Chan. 90), the very case occurred. A witness was examined for the plaintiff, and was to be cross-examined for the defendant; but before he could be cross-examined he died. Yet the court ordered the deposition to stand. Copeland *v.* Stanton (1 P. Wms. 414) is not an adverse authority; for, in that case, the direct examination was not completed, and the witness had not signed the deposition, so far as it went; and, the examination being postponed to another day, he was the next morning taken suddenly ill, and died. The court denied the motion to allow the deposition, as far as it had been taken. But the court refused, because the examination was imperfect; and, indeed, until the witness had signed the examination, he was at liberty to amend and alter it in any part. In O'Callaghan *v.* Murphy (2 Sch. & Lefr. 158), Lord Redesdale allowed the deposition of a witness, whose examination had been completed, but who died before his cross-examination could be had, to be read at the hearing; deeming it proper evidence, like the case of a witness at *Nisi Prius*, who, after his examination, and before his cross-examination, should suddenly die, under which circumstances, he thought, that the party producing him would not lose the benefit of the evidence he had already given. But the want of such cross-examination ought to abate the force of the testimony. However, the point was not positively and finally ruled, as, upon

swered;[7] if the deposition is in the handwriting of the party, or his agent, or his attorney;[8] if it is taken after argument of the cause, without a special order;[9] if it was copied by the deponent in the commissioner's presence, from a paper which the deponent had previously drawn up at a different place;[10] or which was otherwise previously prepared;[11] if the commissioner is found to have been the agent, attorney, landlord, partner, near relative, or creditor of the party in whose behalf he was nominated; or was otherwise unfit, by reason of interest or partiality, to execute

examining the cross-interrogatories, they were not found to apply to anything to which the witness had testified in his direct examination, and therefore the deposition was held admissible. In Nolan *v.* Shannon (1 Molloy 157), the Lord Chancellor held, that the direct examination of a witness might be read at the hearing, where a cross-examination had been prevented by his illness and death. My own researches, and those of the counsel, have not enabled me to find any other cases in which the question has been raised; and in the latest book of Practice (1 Smith's Chan. Pr. 294), no other case is alluded to on the subject than that of Copeland *v.* Stanton (1 P. Wms. 414). So that the general doctrine is far from being established in the manner which the argument for the defendant has supposed, and appears strongly to lead the other way.

"But if it were, I should have no doubt that the special circumstances of this case would well create an exception. The direct examination was taken by consent. No cross-interrogatories were ever filed. The witness lived several months after the original examination was begun; and there is not the slightest proof, that, if the cross-interrogatories had been filed, they might not have been answered. Under such circumstances, I am of opinion, that the omission to file the cross-interrogatories was at the peril of the defendant. I do not say that he was guilty of laches. But I put it upon this, that, as his own delay was voluntary, and the illness of the witness well known, the other party is not to be prejudiced by his delay. His conduct either amounted to a waiver of any objection of this sort, or to an election to take upon himself the whole hazard of the chances of life. It appears to me, that the case falls completely within the principles laid down in Cazenove *v.* Vaughan (1 Maule & Selw. 4, 6)." See 3 Sumn. 104–108. {So when the plaintiff was examined as a witness in the cause, and an opportunity was offered the defendant for cross-examination, but the defendant did not then do so, and afterwards died without cross-examining the plaintiff, it was held that the evidence should stand: Hay's Appeal, 91 Pa. St. 265.

The affidavit of a witness who dies before he can be cross-examined is admissible, unless the witness had kept out of the way to avoid cross-examination: Davies *v.* Otty, 34 L. J. Chanc. 252. A plaintiff whose evidence was of great importance to the issue in the suit, made an affidavit which was duly sworn and filed. He then died. No notice of the affidavit was given to the defendant, and they had not cross-examined the plaintiff upon it. The court allowed the affidavit to be received at the hearing of the cause on motion for decree: Tanswell *v.* Scurrah, 11 L. T. N. S. 761.}

[7] Bell *v.* Davidson, *supra*. And see Moseley *v.* Moseley, Cam. & Nor. 522. But, if substantially answered, it is sufficient: Nelson *v.* U. S., 1 Pet. C. C. 235, 237. Misbehavior of the witness, in giving his testimony, may also be cause for suppressing it: Phillips *v.* Thompson, 1 Johns. Ch. 139, 140. {A deposition is not to be wholly rejected for the omission of the witness to answer a particular interrogatory fully, unless his answer is so imperfect or evasive as to induce the court to believe that he wilfully kept back material facts within his knowledge: Stratford *v.* Ames, 8 Allen (Mass.) 579.}

[8] Moseley *v.* Moseley, *supra;* Allen *v.* Rand, 5 Conn. 322; Amory *v.* Fellowes, 5 Mass. 219, 227; Burtch *v.* Hogge, Harringt. Ch. 31. And see Smith *v.* Smith, 2 Greenl. 408.

[9] Dangerfield *v.* Claiborne, 4 Hen. & Munf. 397. {Or after appeal from the lower court: Perkins *v.* Testerment, 3 Iowa 307.}

[10] U. S. *v.* Smith, 4 Day 126; Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339, 346.

[11] Shaw *v.* Lindsey, 15 Ves. 380. And see 4 Inst. 279, ad calc.

the commission.[12] But it is to be noted, that where a party cross-examines a witness upon the merits, this, so far as regards himself alone, and not his co-parties, is a waiver of objection to any previous irregularity in the taking of the deposition, and of any objection to his competency, which was then known;[13] and that all objections to depositions *which might have been obviated by a re-examination of the witness* will be considered as waived, unless made before the hearing.[14]

§ 352. **Same Subject.** But though the court is generally strict in requiring a compliance with its rules of practice in regard to the taking of depositions; yet where an irregularity has evidently arisen from *mistake*, and the party has *acted in good faith*,

[12] 2 Dan. Ch. Pr. 1076, 1077; 3d Am. ed. 927 *c*; 5th Am. ed. vol. i. 916, 917. In New Hampshire an uncle of the party has been held incompetent to take a deposition in the cause: Bean *v.* Quimby, 5 N. H. 94. In Massachusetts a son-in-law was held competent under the circumstances of the case: Chandler *v.* Brainard, 14 Pick. 285. But in both cases the doctrine of the text was asserted. And see Lord Mostyn *v.* Spencer, 6 Beav. 135; Wood *v.* Cole, 13 Pick. 279; Coffin *v.* Jones, ib. 441.

[13] Mechanics' Bank *v.* Seton, 1 Pet. 299, 307; Bogert *v.* Bogert, 2 Edw. Ch. 399; Gass *v.* Stinson, 2 Sumn. 605; Charitable Corp. *v.* Sutton, 2 Atk. 403; Sutton *v.* Wilson, 1 Vern. 254. And see *ante*, Vol. I. § 421. The rule on this subject is, that the party, objecting to the competency of testimony, ought to take the exception as soon as the cause of it comes to his knowledge. Lord Eldon held that the party, in such case, was bound to make it reasonably clear that, at the date of the examination of the witness, he had no knowledge of the objection; otherwise, he would be deemed to have waived it: Vaughan *v.* Worrall, 2 Swanst. 400. The reason of the rule, and its qualification in equity, were thus stated by Sir William Grant, M. R., in Moorhouse *v.* De Passou, 19 Ves. 434: "At law, a party waives any objection to the competence of a witness by pursuing his cross-examination, after the witness appears to be interested. Formerly, the inquiry, whether a witness was interested, could be made only upon the *voir dire;* now, if the interest comes out at any period, his evidence is rejected. Here there is no such opportunity of inquiring into the competence of the witness by the *voir dire;* and, until the depositions are published, it cannot be known whether the witness has, or has not, admitted the fact upon which the objection arises. The waiver at law arises from pursuing the examination, after the objection to the competence of the witness is known; but it is difficult to say how an unknown objection can be waived. The witness may deny all interest in the cause; and, upon the supposition that he is competent, it may be very material to the other party to cross-examine him. Under these circumstances, the principle leads to this conclusion, that in equity the cross-examination of a witness in utter ignorance of his having given an answer to an interrogatory, showing that he has an interest in the cause, cannot amount to a waiver of the objection to his competence." The exhibition of articles to discredit a witness is also held a waiver of any objection on the ground of irregularity in taking the deposition: Malone *v.* Morris, 2 Moll. 324.

[14] Kimball *v.* Cook, 1 Gilm. 423. In Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339, it appeared by the examiner's certificate, that the examination commenced June 28, and was continued to July 5, and for this cause it was moved to suppress the deposition; but the motion was refused by Chancellor Kent, who observed that "It would seem to be too rigorous, when the other party has had the benefit of a cross-examination, and has not raised the objection until the hearing, when *no re-examination can be had*, and when no ill use is stated to have been made of the irregularity. The question whether the deposition shall be suppressed, is a matter of discretion; and in Hamond's Case, Dick. 50, and in Debrox's Case, cited 1 P. Wms. 415, the deposition of a witness, examined after publication, was admitted; in the one case, because the opposite party had cross-examined, and, in the other, because the testimony would otherwise have been lost forever: 2 Johns. Ch. 345.

it will *permit the deposition to stand;* and this, especially, where the other party has done anything which may have sanctioned the proceeding.[1] In such cases, if the mistake is capable of correction in court, or can be otherwise relieved, the court, in its discretion, will either *amend the deposition*, or otherwise afford the appropriate remedy.[2] Thus, where, after the examination of the plaintiff's witnesses, under a commission, it was discovered that the *title of the cause* was accidentally *mistaken* in the commission, the court refused to suppress the depositions, but ordered the clerk to amend the commission in that particular, and granted a new commission for the examination of the defendant's witnesses.[3] So, where a witness was inadvertently examined and cross-examined, two days *after publication*, the court refused to suppress the deposition.[4] So where depositions were taken abroad, and the commissioners refused to allow the defendant a *reasonable time* to prepare cross-interrogatories, the court would not suppress the depositions, but granted the defendant a new commission, to other commissioners, for the cross-examination of the plaintiff's witnesses, and the examination of his own.[5] And here it may be added, that, though it is a general rule that depositions once suppressed cannot be used in the same cause, yet, where the objection does not go to the competency of the witness, if it should happen that the witness could not be examined again, the order of suppression does not go the length of preventing the court from afterwards directing that the deposition may be opened, if necessity should require that the rule be dispensed with.[6]

§ 353. 2. **Objections at the Hearing.** The causes already mentioned, for which depositions may be suppressed before the hearing, may also be shown at the hearing with the same effect. But we have seen the reluctance of the court to suffer testimony

[1] 2 Dan. Ch. Pr. 1145, 1146, 5th Am. ed. vol. i. 950, 951. {"A deposition ought not to be suppressed for a failure to comply with the rules in a mere matter of form, unless such failure proceeds from bad faith, rather than from accident and mistake:" Partridge *v.* Stocker, 36 Vt. 109.}

[2] See as to amending depositions, *supra*, § 347.

[3] Robert *v.* Millechamp, 1 Dick. 22. And see O'Hara *v.* Creagh, 2 Irish Eq. 419. {If affidavits are taken before the suit in which they are to be used is commenced, they should not be entitled at all: Sterrick *v.* Pugsley, 1 Flip. C. C. 350.}

[4] Hamond *v.* ——, 1 Dick. 50. So where the depositions were taken during an abatement of the suit, the fact not being known at the time: Sinclair *v.* James, 1 Dick. 277.

[5] Campbell *v.* Scougall, 19 Ves. 552. For other instances see Curre *v.* Bowyer, 3 Swanst. 357; Lincoln *v.* Wright, 4 Beav. 166; Pearson *v.* Rowland, 2 Swanst. 266.

[6] Shaw *v.* Lindsey, 15 Ves. 381, per Ld. Eldon.

to be lost, by any accidental defect or irregularity, not going to the merits, and capable of supply or amendment; and the readiness with which its discretionary powers will be exerted to cure defects and prevent the delay of justice. Hence it is that objections capable of being obviated in any of the modes we have mentioned, either by amendment in open court or by a new commission, new interrogatories or a re-examination, are seldom made at so late a stage of the cause as the hearing; the usual effect being unnecessarily to increase the expense, and to cause delay, — circumstances which the judge may not fail to notice, to the party's disadvantage, in the subsequent disposition of the cause. The objections usually taken at the hearing are therefore those only which were until then undiscovered, or incapable of being accurately weighed, or which, if sustained, are finally fatal to the testimony. Of this nature are deficiencies in the amount of the proof required to overbalance the weight of the answer; impertinence or irrelevancy of the testimony; its inadmissibility to control the documentary or other written evidence in the cause, or to supply its absence; its inferior nature to that which is required; and the incompetency of the witnesses to testify, either generally in the cause, or only to particular parts of the matters in issue.[1] Some of these subjects, so far as they have been treated in a preceding volume, will not here be discussed; our present object being confined to that which is peculiar to proceedings in equity.

§ 354. **Quantity of Proof.** And, *first*, in regard to the *quantity of proof* required to overbalance the answer. We have already seen[1] that, where the answer is responsive to the allegations in the bill, and contains clear and positive denials thereof, it must prevail; unless it is overcome by the testimony of one positive witness, with other adminicular proofs sufficient to overbalance it, or by circumstances alone sufficient for that purpose. This

[1] [Williams *v.* Vreeland, 30 N. J. Eq. 576; Atlantic, etc. Co. *v.* Fitzpatrick, 2 Gray (Mass.) 279; Whitney *v.* Heywood, 6 Cush. (Mass.) 82; Lord *v.* Moore, 37 Me. 208; Hellman *v.* Wright, 1 Wy. Terr. 190; Fielding *v.* Lahens, 2 Abb. (N. Y.) App. Dec. 111.

Objections based on irregularities in the manner of taking the depositions, if discovered before the hearing, should be brought to the notice of the court by a motion to suppress the depositions: Doane *v.* Glenn, 21 Wall. (U. S.) 33; Eslava *v.* Mazange, 1 Woods C. C. 623; Vilmar *v.* Schall, 61 N. Y. 564.]

[1] *Supra*, § 289. See also *ante*, Vol. I. § 260; Alam *v.* Jourdan, 1 Vern. 161; Mortimer *v.* Orchard, 2 Ves. Jun. 244; Walton *v.* Hobbs, 2 Atk. 19; Smith *v.* Brush, 1 Johns. Ch. 461; 2 Poth. Obl. App. No. 16, by Evans, pp. 236–242.

rule, whatever may have been its origin or principle, is now perfectly well settled as a rule of evidence in chancery. The testimony of a single witness, however, is not in such cases utterly rejected; but when it is made apparent to the court that the positive answer is opposed only by the oath of a single witness, unaided by corroborating circumstances, the opposing testimony is simply treated as insufficient, but is not suppressed; for the court will still so far lay stress upon it, as it serves to explain any collateral circumstances,[2] and the circumstances, thus explained, may react so as to give effect to the evidence by the operation of the rule, that one witness, with corroborating circumstances, may prevail against the answer.[3]

§ 355. **Irrelevancy, Impertinence, Immateriality.** *Secondly*, as to the objection that the evidence is *impertinent* or *irrelevant* or *immaterial*, terms which, in legal estimation and for all practical purposes, are generally treated as synonymous; the character of this kind of testimony, and the principle on which it is rejected at law, have already been sufficiently considered.[1] It is unimportant whether the evidence relates to matters not contained in the pleadings; or to matters admitted in the pleadings and therefore not in issue or to matters which, though in issue, are immaterial to the controversy, and therefore not requisite to be decided: as in either case it is equally open to objection. And the rule in equity is substantially the same as at law. Thus, in regard to *matters not contained in the pleadings*, where the bill was for specific performance of a contract for the purchase of an estate, by bidding it off at auction, and the defence was that puffers were employed, proof of the additional fact, that the auctioneer declared that no bidder on the part of the plaintiff was present, was rejected.[2] So, where the bill was to set aside a sale, on the ground of fraud practised by the defendant against the plaintiff, evidence that the defendant was the plaintiff's

[2] Anon., 3 Atk. 270; E. Ind. Co. *v.* Donald, 9 Ves. 283.

[3] Gresley, Eq. Ev. pp. 4, 227.

[1] *Ante*, Vol. I. §§ 49–55. And see Cowan *v.* Price, 1 Bibb 173; Langdon *v.* Goddard, 2 Story 267; Knibb *v.* Dixon, 1 Rand. 249; Contee *v.* Dawson, 2 Bland 264; Piatt *v.* Vattier, 9 Pet. 405. Proofs without allegations, and allegations without proof, are alike to be disregarded: Hunt *v.* Daniel, 6 J. J. Marsh. 398. {If any incompetent evidence is admitted to go before the jury when the court has directed the trial of an issue by a jury, and there is sufficient evidence to base a decree upon, without taking the verdict of the jury into account, a decree will not be disturbed by reason of the admission of such incompetent evidence before the jury: Steptoe *v.* Pollard, 30 Gratt. (Va.) 689.}

[2] Smith *v.* Clark, 12 Ves. 477, 480.

attorney at the time of sale, as the fact from which the fraud was to be inferred, was rejected, because not stated in the bill.[3]

§ 356. **Particularity in Pleading; Specific Facts.** It is *not necessary*, however, that *all the specific facts* to be proved should be stated in the pleadings: it is sufficient that their character be so far indicated by the pleadings as to prevent any surprise on the other party; and hence it is that circumstances, not specifically alleged, may often be proved under general allegations. Thus, for example, where there is a general allegation that a person is *insane*, or is *habitually drunken*, or is of a *lewd and infamous character;* evidence of particular instances of the kind of character, thus generally alleged, is admissible.[1] So, where the bill was for specific performance of an agreement to continue the plaintiff in an office, and in the answer it was alleged that the plaintiff had not accounted for *divers fees* which he had received by virtue of the office, and had concealed *several instruments and writings* belonging to the office; evidence of particular instances and acts of the misbehavior alleged was admitted.[2] And where, in a bill by an executor for relief against certain bonds given by the testator, alleged to have been extorted from him by threats and menaces and by undue means, and not for any real debt, it was answered that the bonds were for money lent and for other debts; evidence that the defendant was a *common harlot*, and that the bonds were given *ex turpi causa*, was held admissible.[3] But the general allegation, in cases of this class, must be so far specific as to show the nature of the particular facts intended to be proved. Therefore, where, to a bill by the wife, against her husband, for the specific performance of marriage articles, the defendant answered that the wife had withdrawn herself from him, and had lived separately, and *very much misbehaved herself;* evidence of particular acts of adultery was held inadmissible, as not being with sufficient distinctness put in issue by so general a charge.[4]

§ 357. **Evidence by Way of Inducement.** But it does not follow that evidence, inadmissible as direct testimony, is there-

[3] Williams *v.* Llewellyn, 2 Y. & J. 68.
[1] Whaley *v.* Norton, 1 Vern. 484; Clark *v.* Periam, 2 Atk. 337; Carew *v.* Johnston, 2 Sch. & Lefr. 280.
[2] Wheeler *v.* Trotter, 3 Swanst. 174, n.
[3] Matthew *v.* Hanbury, 2 Vern. 187.
[4] Sidney *v.* Sidney, 3 P. Wms. 269, 276.

fore to be utterly rejected; for such evidence may sometimes be admitted in proof of *collateral facts*, leading by way of *inducement* to the matter directly in issue. Thus, in a bill to impeach an award, testimony relating to the merits, though on general grounds inadmissible, may be read for the purpose of throwing light on the conduct of the arbitrators.[1] So in a bill by the vendee, to set aside a contract for the purchase of lands, on the ground of fraudulent misrepresentations by the vendor, evidence of the like misrepresentations, contemporaneously made to others, is admissible in proof of the alleged fraudulent design.[2] And, on a kindred principle, facts apparently irrelevant may sometimes be shown, for the purpose of establishing a more general state of things, involving the matter in issue; as, for example, where acts of ownership exercised in one spot have been admitted to prove a right in another, a reasonable probability being first made out that both were once parcels of the same estate belonging to one owner, and subject to one and the same burden.[3]

§ 358. **Facts admitted in Pleadings.** In regard to *facts already admitted in the pleadings*, evidence in proof or disproof of which is therefore inadmissible, the rule applies only where the admission is full and unequivocal, and therefore conclusive upon the party; and this will be determined by the court, in its discretion, upon the circumstances of the particular case.[1]

§ 359. **Secondary Evidence.** *Thirdly*, as to the objection, that the evidence offered is inadmissible as a *substitute for better evidence*, alleged to exist or to *control the effect of a writing.* The subject of primary and secondary evidence, and the duty of the party to produce the best evidence which the nature of the case admits, having been treated in a preceding volume,[1] it is sufficient here to observe, that the principles and distinctions there stated are recognized as well in equity as at law. In some cases, however, which fall under the maxim, "Omnia præsumuntur, in odium spoliatoris," courts of equity will go

[1] Goodman *v.* Sayers, 2 J. & W. 259. For the application of a similar principle at law, see Gibson *v.* Hunter, 2 H. Bl. 288; Bottomley *v.* U. S., 1 Story 143–145; Crocker *v.* Lewis, 3 Sumn. 1; *supra*, § 15.

[2] Bradley *v.* Chase, 9 Shepl. 511.

[3] Gresley, Eq. Evid. p. 236; Tyrwhitt *v.* Wynne, 2 B. & A. 554. And see *ante*, Vol. I. § 52.

[1] Gresley, Eq. Evid. pp. 237, 238.

[1] *Ante*, Vol. I. §§ 82–97, 105, 161, 168, [563 *a et seq.*]

beyond courts of law, in giving relief, by reason of the greater flexibility of their modes of remedy. Thus, where the king had a good title in reversion at law, as against the heir in tail, but "the deeds whereby the estate was to come to him were not extant, but *very vehemently suspicious* to have been suppressed and withholden by some under whom the defendants claimed;" it was decreed, that the king should hold and enjoy the land *until the defendants should produce the deeds.*[2]

§ 360. **Parol Evidence to control Writing.** In regard to the *admissibility of parol evidence to control the effect of a writing*, we have already seen that the rule, subject to the modifications which were stated under it,[1] is inflexible, that extrinsic verbal evidence is not admissible, at law, to contradict or alter a written instrument. In equity, the same general doctrine is admitted; subject, however, to certain other modifications, necessarily required for that relief which equity alone can afford. For equity relieves, not only against fraud, but against accidents and the mistakes of parties; and whenever a written instrument, in its terms, stands in the way of this relief, it is obvious that parol evidence ought to be admitted, to show that the instrument does not express the intention of the parties, or, in other words, to control its written language by the oral language of truth. It may express more, or less, than one of the parties intended; or, it may express something different from that which they both intended: in either of which cases, and in certain relations of the parties before the court, parol evidence of the fact is admissible as indispensable to the relief.[2] The prin-

[2] R. *v.* Arundel, Hob. 109, commented on, 2 P. Wms. 748. And see Dalston *v.* Coatsworth, 1 id. 731, and cases there collected; Saltern *v.* Melhuish, Ambl. 247; *ante*, Vol. I. § 37.

[1] *Ante*, Vol. I. §§ 275–305.

[2] {It has been held that when the relief sought is the reformation of a contract, no mistake will be corrected which was not a mutual mistake, and that the instrument will only be reformed so as to express those terms of the contract which were mutually agreed upon: Dulany *v.* Rogers, 50 Md. 524; National Ins. Co. *v.* Crane, 16 id. 260; Parsons *v.* Bignold, 15 L. J. N. S. Ch. 379; Humphreys *v.* Hurtt, 20 Hun (N. Y.) 398; Petesch *v.* Hambach, 48 Wis. 443; Schoonover *v.* Dougherty, 65 Ind. 463; Harvey *v.* U. S., 13 Ct. of Cl. 322; Ramsey *v.* Smith, 32 N. J. Eq. 28; Mead *v.* Westchester Fire Ins. Co., 64 N. Y. 453; Ranney *v.* McMullen, 5 Abb. (N. Y.) N. C. 246; Harter *v.* Christoph, 32 Wis. 248. See *post*, § 363. If, however, before the contract is made, there is a mistake of one party as to a material fact, and the other party, knowing the mistake of the first, and intending to take advantage of it, enters the contract, these facts amount to a fraud, and the court of equity will reform the contract: Bryce *v.* Lorillard Fire Ins. Co., 55 N. Y. 240. Any mistake which is proved to be a mere clerical error in reducing a contract, judgment, etc., to writing may be corrected in equity: Pitcher *v.* Hennessey, 48 id. 415; Huss *v.* Morris, 63 Pa. St. 367; Nixon *v.* Carco, 28 Miss. 414; Ward *v.* Allen, 28 Ga. 74.}

ciple upon which such evidence is admitted is, not that it is necessary, for the sake of justice, to violate a sound rule of law by contradicting a valid instrument which expresses the intent and agreement of the parties; but, that the evidence goes to show, that, by accident or mistake, the instrument does not express their meaning and intent; and to establish an equity, *dehors* the instrument, by proving the existence of circumstances entitling the party to more relief than he can have at law, or rendering it inequitable that the instrument should stand as the true exponent of his meaning. These facts being first established,[3] as independent grounds of equitable relief, the court, in the exercise of its peculiar functions as a court of equity, will proceed to afford that relief, and, as incidental to or a part of such relief, will decree that the instrument be so reformed as to express what the parties actually meant to express, or that it be cancelled, or held void, or that the obligor be absolved from its specific performance, as the case may require.[4]

[3] {The party who asserts a mistake has the burden of proving it, and he must make it plain to the court that such a mistake exists. It is impossible to lay down any rule as to the amount of evidence which will be required to satisfy a court of equity of the existence of any facts. The court is not bound by any of the common-law rules as to preponderance of evidence or reasonable doubt, but goes on the old principle that in any equity cause the conscience of the Chancellor must be satisfied. It is, however, established by the decisions in Chancery that some facts require more proof than others. The existence of a mistake in a contract is such a fact, and the courts have often indicated by their language what relative degree of proof they require. Thus it has been said that the proof must be such as will strike all minds alike, as being unquestionable, and free from reasonable doubt: Tucker *v.* Madden, 44 Maine, 206; Hileman *v.* Wright, 9 Ind. 126; Davidson *v.* Greer, 3 Sneed (Tenn.) 384; Ruffner *v.* McConnel, 17 Ill. 212; Linn *v.* Barkey, 7 Ind. 69. See Leuty *v.* Hillas, 2 De G. & J. 110; Bunce *v.* Agee, 47 Mo. 270. So it has been said that the mistake should be proved as much to the satisfaction of the court as if it were admitted by the other party (Ford *v.* Joyce, 78 N. Y. 618), or that it should be proved beyond a reasonable doubt (Muller *v.* Rhuman, 62 Ga. 332; Hinton *v.* Citizens' M. Ins. Co., 63 Ala. 488), or by clear and satisfactory proof: Remillard *v.* Prescott, 8 Or. 37; McCoy *v.* Bayley, ib. 196. No more definite rule, however, can be laid down than that the amount of proof required in each case must depend upon its circumstances, but the mistake must be clearly proved by the evidence: Sable *v.* Maloney, 48 Wis. 331; Harvey *v.* U. S., 13 Ct. of Cl. 322; Rowley *v.* Flannelly, 30 N. J. Eq. 612; McDonell *v.* Milholland, 48 Md. 540; Mead *v.* West Chester Fire Ins. Co., 64 N. Y. 453; Tripp *v.* Hasceig, 20 Mich. 254; Hunter *v.* Bilyeu, 30 Ill. 228; Weidebusch *v.* Hartenstein, 12 W. Va. 760; Reese *v.* Wyman, 9 Ga. 430; Leitensdorfer *v.* Delphy, 15 Mo. 160; Hervey *v.* Savery, 48 Iowa 313; Lockhart *v.* Cameron, 29 Ala. 355; Davidson *v.* Greer, 3 Sneed (Tenn.) 384; City R. R. Co. *v.* Veeder, 17 Ohio 385; Tucker *v.* Madden, 44 Me. 206; Linn *v.* Barkey, 7 Ind. 69; Hileman *v.* Wright, 9 id. 126; Ruffner *v.* McConnel, 17 Ill. 212.}

[4] This important distinction was adverted to by Lord Thurlow, in the case of Irnham *v.* Child, 1 Bro. C. C. 92, and was afterwards more fully expounded by Lord Eldon, in Townshend (Marq.) *v.* Stangroom, 6 Ves. 328, in the following terms: "It cannot be said, that because the legal import of a written agreement cannot be varied by parol evidence, intended to give it another sense, therefore in equity, when once the court is in possession of the legal sense, there is nothing more to inquire into. Fraud is a distinct case, and perhaps more examinable at law; but all the doctrine of the court, as to cases of unconscionable agreements, hard agreements, agreements entered

§ 361. **Bills for Specific Performance.** Therefore, where the bill is for the *specific performance* of a contract in writing, parol

into by mistake or surprise, which therefore the court will not execute, must be struck out, if it is true, that, because parol evidence should not be admitted at law, therefore it shall not be admitted in equity upon the question, whether, admitting the agreement to be such as at law it is said to be, the party shall have a specific execution, or be left to that court, in which, it is admitted, parol evidence cannot be introduced. A very small research into the cases will show general indications by judges in equity, that that has not been supposed to be the law of this court. In Henkle *v.* Royal Exchange Assurance Co. (1 Ves. 317), the court did not rectify the policy of insurance; but they did not refuse to do so upon a notion, that, such being the legal effect of it, therefore this court could not interfere; and Lord Hardwicke says expressly, there is no doubt the court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof, that would be rectified. This is loose in one sense, leaving it to every judge to say whether the proof is that proper proof that ought to satisfy him; and every judge who sits here any time must miscarry in some of the cases, when acting upon such a principle. Lord Hardwicke, saying the proof ought to be the strongest possible, leaves a weighty caution to future judges. This inconvenience belongs to the administration of justice, that the minds of different men will differ upon the result of the evidence; which may lead to different decisions upon the same case. In Lady Shelburne *v.* Lord Inchiquin (1 Bro. C. C. 338), it is clear Lord Thurlow was influenced by this, as the doctrine of the court; saying (1 Bro. C. C. 341), it was impossible to refuse, as incompetent, parol evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties: but he also thought it was to be of the highest nature; for he adds that it must be irrefragable evidence. He therefore seems to say, that the proof must satisfy the court what was the concurrent intention of all parties; and it must never be forgot to what extent the defendant, one of the parties, admits or denies the intention. Lord Thurlow saying the evidence must be strong, and admitting the difficulty of finding such evidence, says, he does not think it can be rejected as incompetent.

"I do not go through all the cases, as they are all referred to in one or two of the last. In Rich *v.* Jackson, there is a reference to Joynes *v.* Statham, and a note of that case preserved in Lord Hardwicke's manuscript. He states the proposition in the very terms: that he shall not confine the evidence to fraud; that it is admissible to mistake and surprise; and it is very singular, if the court will take a moral jurisdiction at all, that it should not be capable of being applied to those cases; for in a moral view there is very little difference between calling for the execution of an agreement obtained by fraud, which creates a surprise upon the other party, and desiring the execution of an agreement which can be demonstrated to have been obtained by surprise. It is impossible to read the report of Joynes *v.* Statham, and conceive Lord Hardwicke to have been of opinion, that evidence is not admissible in such cases; though I agree with Lord Rosslyn that the report is inaccurate. Lord Rosslyn expressly takes the distinction between a person coming into this court, desiring that a new term shall be introduced into an agreement, and a person admitting the agreement, but resisting the execution of it by making out a case of surprise. If that is made out, the court will not say the agreement has a different meaning from that which is put upon it; but supposing it to have that meaning, under all the circumstances it is not so much of course that this court will specifically execute it. The court must be satisfied, that under all the circumstances it is equitable to give more relief than the plaintiff can have at law; and that was carried to a great extent in Twining *v.* Morrice (2 Bro. C. C. 326). In that case, it was impossible to impute fraud, mistake, or negligence; but Lord Kenyon was satisfied the agreement was obtained by surprise upon third persons, which therefore it was unconscientious to execute against the other party interested in the question. It has been decided frequently at law, that there could be no such thing as a puffer at an auction. That, whether right or wrong, has been much disputed here (Conolly *v.* Parsons, 3 Ves. Jr. 625, n.). In that case, we contended that all the parties in the room ought to know the law. Lord Kenyon would not hear us upon that; and I do not much wonder at it: but Blake, being the common acquaintance of both parties, and having no purpose to bid for the vendor, unfortunately was employed to bid for the vendee; and others, knowing that he was generally employed for the

evidence is admissible in equity to show, that by mistake, not originated in the defendant's own gross carelessness, the writing expresses something materially different from his intention, and that therefore it would be unjust to enforce him to perform it.[1] Thus, where a bill was filed for the specific performance of an agreement to convey certain premises, which, as the defendant alleged, included, by mistake, a parcel not intended to be conveyed; parol evidence of this fact was admitted, and the bill was thereupon dismissed.[2] So, where the bill was for the specific performance of an agreement to make a lease, upon a certain rent; the defendant was admitted to show, by oral evidence, that the rent was to be a clear rent, the plaintiff paying all taxes. And where a mortgage was intended to be made by two deeds, the one absolute, and the other a defeasance, which latter the mortgagee omitted to execute, the mortgagor was admitted to show the mistake. And in these cases it makes no difference in the principle of relief whether the omission is charged as a pure and innocent mistake, or as a fraud.[3] But the mistake must be a *mistake of fact;* for as to mistakes of law,

vendor, thought the bidding was for him. Lord Kenyon said, that was such a surprise upon the transaction of the sale that he would leave the parties to law ; and yet it was impossible to say that the vendee appointing his friend, without the least notion, much less intention, that the sale should be prejudiced, was fraud, surprise, or anything that could be characterized as morally wrong. That case illustrates the principle, that circumstances of that sort would prevent a specific performance; and that it is competent to this court, at least for the purpose of enabling it to determine whether it will specifically execute an agreement, to receive evidence of the circumstances under which it was obtained; and I will not say there are not cases in which it may be received, to enable the court to rectify a written agreement, upon surprise and mistake, as well as fraud; proper, irrefragable evidence, as clearly satisfactory that there has been mistake or surprise, as in the other case, that there has been fraud. I agree, those producing evidence of mistake or surprise, either to rectify an agreement, or calling upon the court to refuse a specific performance, undertake a case of great difficulty; but it does not follow that it is therefore incompetent to prove the actual existence of it by evidence :" 6 Ves. 333–339. {Insurance policies are often the subjects of this kind of equitable relief. If either party to the policy can show by conversations or letters relating to the policy, or by the application for the policy, that it was intended to contain something more than it does contain or not to contain some stipulations that it does contain, a court of equity will reform it: Mercantile Ins. Co. *v.* Jaynes, 87 Ill. 199 ; Brugger *v.* State Investment Co., 5 Sawy. (C. Ct.) 304; Mead *v.* Westchester Fire Ins. Co., 64 N. Y. 453 ; Hearn *v.* Equitable Safety Ins. Co., 4 Cliff. C. C. 192; Hay *v.* Star Fire Ins. Co., 77 N. Y. 235.

So a grantee may show that a clause in a deed, by which he assumed to pay a certain incumbrance on the granted premises, was inserted without his consent: Kilmer *v.* Smith, ib. 226.}

[1] King *v.* Hamilton, 4 Pet. 311, 328 ; Western R. R. Co. *v.* Babcock, 6 Met. 346 ; Adams, Doctr. of Eq. p. 84 ; 1 Story, Eq. Jur. §§ 152–156 ; *ante,* Vol. I. § 296 *a.*

[2] Calverley *v.* Williams, 1 Ves. Jr. 210.

[3] Joynes *v.* Statham, 3 Atk. 388 : Mason *v.* Armitage, 13 Ves. 25. And see Rich *v.* Jackson, 4 Bro. C. C. 514 ; s. c. 6 Ves. 334 ; Townshend (Marq.) *v.* Stangroom, 6 Ves. 328; Hunt *v.* Rousmanier, 8 Wheat. 174, 211 ; Brainerd *v.* Brainerd, 15 Conn. 575 ; Fishell *v.* Bell, 1 Clarke Ch. 37.

though the decisions are somewhat conflicting, yet the weight of authority is now clearly preponderant, that mere *mistakes of law* are not remediable, except in a few cases, peculiar in their character, and involving other elements in their decision.[4]

§ 362. **Bills for Rescission of Contracts.** Upon the same general principle of equitable relief, where the bill seeks that a contract may be *rescinded* or *cancelled*, or *given up*, parol evidence is admissible to prove extraneous facts and transactions inconsistent with the terms of the contract, and thus indirectly contradicting them.[1]

§ 363. **Bills to Reform Contract.** So, where the bill is brought to *reform a written instrument of contract*, or of *conveyance*, whether it be executory or executed being immaterial, parol evidence is generally admissible to show a mistake in the instrument. But the proof in this case must be of a *mutual mistake;* for though a mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific performance, it is only where the mistake is mutual that equity will decree an *alteration in the terms* of the instrument.[1] Whether this ought to be done upon merely

[4] Hunt *v.* Rousmaniere, 1 Pet. 15; Bank United States *v.* Daniel, 12 id. 32, 55; 1 Story, Eq. Jur. 116; {Toops *v.* Snyder, 70 Ind. 554; Heavenridge *v.* Mondy, 49 id. 434; Lesslie *v.* Richardson, 60 Ala. 563; Snell *v.* Atlantic Ins. Co., 98 U. S. 85; Gebb *v.* Rose, 40 Md. 387; Goltra *v.* Sanasack, 53 Ill. 456; Leavitt *v.* Palmer, 3 N. Y. 19; McAninch *v.* Laughlin, 13 Pa. St. 371. But when both parties to a contract are ignorant that a certain right which the contract purports to grant no longer exists, by reason of the action upon it of some law, and both parties suppose it to be granted by the contract, then the mistake, being of the existence of the right, is a mistake of fact, and the contract will be reformed: Blakeman *v.* Blakeman, 39 Conn. 320. There is a great difference between introducing parol evidence for the purpose of showing that the writing does not express the *true intention* of the parties, and introducing it for the purpose of showing the circumstances which make it inequitable and unconscientious that the intention should be carried out: Stoutenburgh *v.* Tompkins, 1 Stockton Ch. (N. J.) 332.}

[1] 1 Story, Eq. Jur. § 161; 2 Story, Eq. Jur. § 694; id. Redfield's ed. vol. i. §§ 694, 694 *a*; Mitford's Plead. in Eq. p. 103 (3d ed.); Boyce *v.* Grundy, 3 Pet. 210. {Oral evidence that an instrument purporting to be an agreement between husband and wife was signed with a mutual understanding that they were not legally bound thereby, is admissible on a bill to cancel the agreement: Earle *v.* Rice, 111 Mass. 17. But where husband and wife each had drawn a will in favor of the other, and, by mistake, each signed the will drawn by the other, it was held that there was no will: Alter's Appeal, 67 Pa. St. 341.}

[1] Adams, Doctr. of Equity, p. 171; 1 Story, Eq. Jur. §§ 155, 157. And see the notes to Woollan *v.* Hearn, in White & Tudor's Leading Cases in Equity (Am. ed.), by Hare & Wallace, vol. ii. part 1, pp. 546–596, where all the cases on this subject are collected and reviewed. {But equity will interfere only as between the original parties or those claiming under them in privity; such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts. As against *bona fide* purchasers for a valuable consideration without notice, courts of equity will grant no relief: 1 Story, Eq. Jur. § 165, and cases cited. Also same, Redfield's ed. §§ 164 *a*–164 *g*, and notes containing the latest cases.}

verbal evidence, where there is no previous article or memorandum of agreement or other proof in writing, by which to reform the instrument, has sometimes been doubted, but is now no longer questioned. The written evidence may be more satisfactory, but the verbal evidence is clearly admissible; for the written evidence may be only a letter, or a memorandum, of no higher degree, in legal estimation, than oral testimony, though more distinct and certain in the conviction it may produce.[2] It is therefore only required that the mistake be either admitted, or distinctly proved to the satisfaction of the court; and though the undertaking may be one of great difficulty, especially against the positive denial of the answer, yet the reported cases show that this may be done. The language of the learned judges on this point implies no more than this, that, in determining whether such proof has been given, great weight will be allowed to what is properly sworn in the answer.[3] But whether, in a bill to reform a written instrument, and in the absence of any allegation or charge of fraud, and on the ground of accident and mistake alone, verbal evidence is admissible to prove a distinct and independent agreement, not mentioned or alluded to in the written instrument, to do something further than is there stated, and *which the Statute of Frauds requires to be proved by writing*, is a point involved in no little doubt, by the decided cases. In those which have fallen under the author's notice the evidence has been held admissible, in cases not within the statute;[4] but in regard to those to which the statute applies,

[2] {Hearn *v.* Equitable Safety Ins. Co., 4 Cliff. C. C. 192; Brugger *v.* State Investment Co., 5 Sawy. C. C. 304.}

[3] See *ante*, note 1; and Gillespie *v.* Moon, 2 Johns. Ch. 585, 600, where this point was considered, and the authorities reviewed. See also Townshend *v.* Stangroom, 6 Ves. 328; Shelburne *v.* Inchiquin, 1 Bro. C. C. 338, 341; Barstow *v.* Kilvington, 5 Ves. 593; Newsom *v.* Bufferlow, 1 Dev. Ch. 379; Inskoe *v.* Proctor, 6 Monr. 311. Where the mistake alleged in the bill is admitted in the answer, but the answer sets up an agreement different from that alleged in the bill, parol evidence is admissible to prove what was the real agreement: Wells *v.* Hodge, 4 J. J. Marsh. 120. How far a court of equity ought to be active in granting relief by a *specific performance*, in favor of a party seeking, first, to reform the contract by parol evidence, and then, in the same bill, to obtain performance of it as thus reformed, is a point upon which learned judges have held different opinions. The English judges have, on various occasions, refused to grant the relief prayed for under such circumstances; and at other times have expressed strong opinions against it. But in this country, as will be seen in the note below, the weight of opinion is in favor of granting the relief; and it has accordingly been granted: Gillespie *v.* Moon, *supra;* Keisselbrack *v.* Livingston, 4 Johns. Ch. 144; Bellows *v.* Stone, 14 N. H. 175. And see 1 Story, Eq. Jur. § 161; *ante*, Vol. I. § 296 *a;* Wooden *v.* Haviland, 18 Conn. 101.

[4] Baker *v.* Paine, 1 Ves. 456, was an agreement for the sale of goods, between vendor and purchaser. And see Bellows *v.* Stone, 14 N. H. 175; Wesley *v.* Thomas, 6 H. & J. 24.

the decisions in England are not uniform,[5] neither are those in the United States; but the weight of modern opinions in the

[5] In the following English cases verbal evidence was admitted; namely, in Rogers *v.* Earle, 1 Dick. 294, to rectify a mistake of the solicitor, in drawing a marriage settlement; in Thomas *v.* Davis, ib. 301, to rectify a mistake in a conveyance, by the omission of one of the parcels of land intended to be conveyed; in Sims *v.* Urry, 2 Ch. Ca. 225, to prove a mistake in the penal sum of a bond by writing it *forty* instead of *four hundred* pounds, for which latter sum the heir of the obligor was accordingly charged.

But such evidence was rejected, or held inadmissible, in Hardwood *v.* Wallace, cited in 2 Ves. 195, where it was proposed to prove a mistake in drawing a marriage settlement, and thereby to exclude all the daughters of a second marriage; in Woollam *v.* Hearn, 7 id. 211, where it was proposed to prove a parol agreement for a lower rent than was inserted in the lease, which was for seventeen years; and in Att.-Gen. *v.* Sitwell, 1 Y. & C. 559, 582, 583, where it was attempted to show by parol evidence that, in a contract with the Crown for the sale of the manor of Eckington, with the appurtenances, the advowson was omitted by mistake.

In the following American cases, also, verbal evidence, in cases within the Statute of Frauds, was held inadmissible: Dwight *v.* Pomeroy, 17 Mass. 303, where the plaintiff, being a creditor of an insolvent debtor, who had executed a deed of assignment in trust for the benefit of his creditors, filed his bill against the trustees to reform an alleged mistake in the trusts expressed in the deed. So, in Elder *v.* Elder, 1 Fairf. 80, where the written agreement was for the conveyance of a "lot of land in Windham, formerly owned by J. E.," and the plaintiff proposed to prove by parol that it was intended to include the adjoining land in Westbrook, under the same ownership, but that this was omitted by mistake. In Osborn *v.* Phelps, 19 Conn. 63, an agreement for the sale of lands was drawn in two separate instruments; one to be signed by the vendor, and the other by the purchaser, and neither of the instruments containing any reference to the other; but each was signed by the wrong party by mistake, which the plaintiff sought to prove by parol evidence, but the court (Ellsworth, J., *strenue dissentiente*) held it inadmissible.

But in other American cases such evidence, upon great consideration, has been held admissible. The principal of these is Gillespie *v.* Moon, 2 Johns. Ch. 585, which was a bill for relief, and for the reconveyance of a parcel of land, which had been included, by mistake or fraud, in a deed of conveyance; and upon general grounds, after a review of the cases by the learned Chancellor Kent, verbal evidence of the mistake was admitted, and a reconveyance decreed. So in Tilton *v.* Tilton, 9 N. H. 385, where tenants in common agreed to make partition pursuant to a verbal award, and executed deeds accordingly; but in the deed to the plaintiff a parcel assigned to him was omitted by mistake, and, in a bill for relief, verbal evidence of the mistake was held admissible, and relief thereupon decreed. So, in Langdon *v.* Keith, 9 Vt. 299, where, upon the transfer of a part only of several promissory notes secured by mortgage, an assignment of the mortgagee's entire interest in the mortgage was made by mistake, instead of a part; and relief was decreed, upon the like proof. So, in De Riemer *v.* Cantillon, 4 Johns. Ch. 85, where a portion of the land purchased at a sheriff's sale was, by mistake, omitted in his deed to the purchaser; and, upon parol evidence of the fact, the judgment debtors were decreed to convey to the purchaser the omitted parcel. And see Keisselbrack *v.* Livingston, ib. 144; 1 Story Eq. Jur. § 161, and notes; Hogan *v.* Del. Ins. Co., 1 Wash. C. C. 422; Smith *v.* Chapman, 4 Conn. 344; Watson *v.* Wells, 5 id. 468; Chamberlain *v.* Thompson, 10 id. 243; Wooden *v.* Haviland, 18 id. 101.

In several cases the evidence, upon which the mistake was corrected, was partly verbal and partly in writing, the former being admitted without objection. See Exeter *v.* Exeter, 3 My. & Cr. 321; Shipp *v.* Swann, 2 Bibb 82.

In others, usually cited upon the point in question, the evidence was in letters, or other writings, signed by the party in whose favor the mistake was made. See Randal *v.* Randal, 2 P. Wms. 464; Barstow *v.* Kilvington, 5 Ves. 593; Bedford *v.* Abercorn, 1 My. & Cr. 312; Jalabert *v.* Chandos, 1 Eden 372; Pritchard *v.* Quinchant, Ambl. 147.

In other cases, also, frequently cited in this connection, the bill sought a specific performance of the contract as it was written; in which case, as the court is not bound to decree a performance unless the plaintiff is equitably entitled to it, under all the circumstances, it is everywhere agreed that verbal evidence is admissible, on the part

former country seems opposed to the admission of parol evidence, and in this country is in its favor.[6] It is, however, universally agreed, that the statute interposes no obstacle to relief

of the defendant, to show that the writing does not express the real intent of the parties. See Rich *v.* Jackson, 4 Bro. Ch. C. 514; 6 Ves. 334, n.; Clarke *v.* Grant, 14 id. 519; Higginson *v.* Clowes, 15 id. 516; Clinan *v.* Cooke, 1 Sch. & Lefr. 22.

[6] {In Atty.-Gen. *v.* Sitwell, 1 Y. & C. 559, Baron Alderson, in delivering his judgment, said: "I cannot help feeling that, in the case of an executory agreement, first to reform and then to decree an execution of it, would be virtually to repeal the Statute of Frauds. The only ground on which I think the case could have been put, would have been that the answer contained an admission of the agreement as stated in the bill; and the parties mutually agreeing that there was a mistake, the case might have fallen within the principle of those cases at law, where there is a declaration on an agreement not within the statute, and no issue taken upon the agreement by the plea; because, in such case, it would seem as if, the agreement of the parties being admitted by the record, the case would no longer be within the statute. I should then have taken time to consider, whether, according to the *dicta* of many venerable judges, I should not have been authorized to reform an executory agreement for the conveyance of an estate, where it was admitted to have been the intention of both parties that a portion of the estate was not to pass. But in my present view of the question, it seems to me that the court ought not, in any case, where the mistake is denied, or not admitted by the answer, to admit parol evidence, and upon that evidence to reform an executory agreement."

In Wood *v.* Midgley, 27 Eng. Law & Eq. 206, 5 De G. Mac. & G. 41, the bill averred that the defendant entered into an agreement to purchase an estate, the terms of which were to be reduced to writing, and signed by the parties the next morning. The bill also alleged that the defendant paid fifty pounds as a deposit, and took a receipt, but that he had refused to complete the purchase, and had never signed the agreement. The plaintiff prayed for a specific performance, the defendant demurred to the bill on the ground that the case came within the Statute of Frauds, and the objection was sustained.

The American rule, as stated by Mr. Greenleaf in the text, was adhered to in Conaway *v.* Gore, 24 Kan. 389, when it was held to be no defence to a suit to reform a deed, that the agreement for the sale was oral, though required by the Statute of Frauds to be in writing, and in accord are Petesch *v.* Hambach, 48 Wis. 443; Prior *v.* Williams, 3 Abb. (N. Y.) App. Dec. 624. In the case of Glass *v.* Hulbert, 102 Mass. 24, Wells, J., gives an exhaustive review of the authorities on this point, and states the law as follows: — "When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the Statute of Frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest, or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the Statute of Frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel, to deprive the party of his right to set up that defence: Jordan *v.* Sawkins, 1 Ves. Jr. 402; Osborn *v.* Phelps, 19 Conn. 63; Clinan *v.* Cooke, 1 Sch & Lef. 22. The fact that the omission or defect in the writing by reason of which it failed to convey the land, or express the obligation which it is sought to make it express or convey, was occasioned by mistake, or by deceit and fraud, will not alone constitute such an estoppel. There must concur, also, some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it, as if it were executed with the knowledge and acquiescence of the other party, either express or implied, for which he would be left without redress if the agreement were to be defeated. Upon a somewhat extended examination of the decisions in regard to the effect of the Statute of Frauds upon the right to have equitable relief where the writing is defective, although many of them, when the relief has been granted, hardly come within this definition in the apparent character of the particular facts upon which they were decided, yet we are satisfied that this principle of discrimination is the only one which can give consistency to the great mass of authorities upon this subject." The case of Gillespie *v.* Moon, 2 Johns. Ch. 585, referred to by Mr. Greenleaf in note 2, was followed in De Peyster *v.* Hasbrouck, 1 Kern. (N. Y.) 591, and the decision in Wiswall *v.* Hall, 3 Paige (N. Y.) 313, is to the same effect.}

against *fraud*, whether actual or constructive; and, therefore, courts of equity have always unhesitatingly relieved parties against deeds and other instruments, which have been *fraudulently* made to express more or less than was intended by the party seeking relief. It is difficult to perceive any moral or equitable distinction between a fraud previously conceived, and afterwards consummated in the execution of the instrument, and a fraud subsequently conceived, and attempted to be consummated by an iniquitous literal adherence to the terms of an instrument, which, by accident or mistake, does not express what was intended. Nor is it easy to discern any substantial reason why equity should not treat both as alike fraudulent, and relieve, on the same principle, as well against the one as against the other. Surely there can be no moral difference between cheating another by purposely betraying him into a mistake, and cheating him by taking advantage of a mistake already accidentally made.

§ 364. **Parol Evidence to show a Deed to be a Mortgage.** Parol evidence is also admitted in equity, to prove that a deed of conveyance, made *absolute* by mistake or accident, was *intended only as a mortgage.* This evidence has always been admitted in bills to redeem, in which mode the point usually occurs; but the principle of admissibility is applied to other cases of mistake and accident, as well as of fraud, wherever justice and equity require its application.[1] Such evidence is also admitted to prove a *parol agency* for the purchase of lands, in order to raise a trust for the benefit of the principal, where the agent has purchased and taken the conveyance in his own name.[2] So, in a bill to reform a bond, and for relief, parol evidence is admissible to prove that the bond, made joint by mistake, was intended to be joint and several; or that the name of the wrong person was inserted as obligee.[3]

[1] Strong *v.* Stewart, 4 Johns. Ch. 167; Joynes *v.* Statham, 3 Atk. 389; 1 Pow. on Mort. 120, 151 (Rand's ed.); Washburn *v.* Merrills, 1 Day 139; Slee *v.* Manhattan Co., 1 Paige 48; Marks *v.* Pell, 1 Johns. Ch. 595. And see 2 Cruise's Dig. tit. 15, c. 1, § 11, n. 1 (Greenleaf's ed.); James *v.* Johnson, 6 Johns. Ch. 417; Henry *v.* Davis, 7 id. 40; Clark *v.* Henry, 2 Cowen 324; Whittick *v.* Kane, 1 Paige 202; Irnham *v.* Child, 1 Bro. Ch. C. 92, and cases in Perkins's notes; 2 Story, Eq. Jur. §§ 768, 1018. See also *ante*, § 362, n., and Vol. I. § 284, n.

[2] Jenkins *v.* Eldredge, 3 Story 181, 285, 292, 293; Morris *v.* Nixon, 1 How. (U. S.) 118; s. c. 17 Pet. 109.

[3] Wiser *v.* Blachly, 1 Johns. Ch. 607; 1 Story, Eq. Jur. § 164. [See also U. S. *v.* Price, 9 How. (U. S.) 83; Weaver *v.* Shryock, 6 Serg. & R. (Pa.) 262; Stiles *v.* Brock,

§ 365. **Trusts; Statute of Frauds.** In cases of *trusts*, it has already been stated that the Statute of Frauds requires that they be proved by some writing, but that this relates only to express trusts, intentionally created by the parties, and not to *resulting* and *implied trusts*, arising out of collateral facts. Such facts, therefore, may be proved by parol evidence.[1] And though they go to contradict the terms of a deed, yet if they also go to prove fraud, parol evidence is admissible, in order to "force a trust upon the conscience of the party."[2] And irrespective of any allegation of fraud, it has been settled, upon great consideration, that parol evidence is admissible to prove that the purchase-money for an estate was paid by a third person, other than the grantee named in the deed, in order to establish a trust in favor of him who paid the money.[3] It is also admissible to charge a trust upon an executor, or a devisee, who has *prevented* the testator from making *provision in his will* for the plaintiff, by expressly and verbally undertaking with the testator to fulfil his wishes in that respect,[4] or by fraudulently inducing him to make a new will without such provision,[5] or the like; the will thus procured being in favor of the defendant, as executor, devisee, or legatee. And in some cases of *trusts imperfectly expressed*, parol evidence has been held admissible in explanation of the intent. Thus, where a testator devised his estate to his wife, "having a perfect confidence that she will act up to *those views which I have communicated to her*, in the ultimate disposal of my property after her decease;" the wife afterwards died intestate; and a bill was filed by his two natural children for relief, against his heir and

1 Pa. St. 215; Moser *v.* Libenguth, 2 Rawle (Pa.) 428; Jones *v.* Beach, 2 De G. M. & Gord. 886.]

[1] *Ante*, Vol. I. § 266. [In Cook *v.* Fountain, 3 Swanst. 585, Lord Nottingham said: "There is one good, general, infallible rule that goes to both these kinds of trusts. (He had included all trusts in two kinds, — express or implied.) It is such a general rule as never deceives; a general rule to which there is no exception; and that is this: the law never implies, the court never presumes, a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate. And so at last every case in court will become *casus pro amico*." Judge Story thinks this statement of the rule is too strong: 2 Story, Eq. Jur. § 1195.]

[2] 2 Story, Eq. Jur. § 1195.

[3] See Boyd *v.* McLean, 1 Johns. Ch. 582, where the cases on this point are collected and reviewed by Kent, Ch. See also Botsford *v.* Burr, 2 id. 405; 2 Story, Eq. Jur. § 1201, n.; Pillsbury *v.* Pillsbury, 5 Shepl. 107; Runnels *v.* Jackson, 1 How. (Miss.) 358; 1 Spence, Eq. Jur. Chan. 571.

[4] Oldham *v.* Litchfield, 2 Vern. 506. And see Reech *v.* Kennigate, Ambl. 67; Drakeford *v.* Wilks, 3 Atk. 539.

[5] Thynn *v.* Thynn, 1 Vern. 296. See also 2 Story, Eq. Jur. § 781.

next of kin, and her heir and administrator, alleging that the testator, at the time of making his will, desired his wife to give the whole of his estate, after her death, to the plaintiffs, and that she promised so to do; parol evidence was admitted in proof of this allegation.[6]

§ 366. **Parol Evidence to rebut Presumptions.** In certain cases of *presumptions of law*, also, parol evidence is admitted in equity to rebut them. But here a distinction is to be observed between those presumptions which constitute the settled legal *rules of construction* of instruments, or, in other words, *conclusive presumptions*, where the construction is *in favor of the instrument*, by giving to the language its plain and literal effect; and those presumptions which are raised *against the instrument*, imputing to the language, *prima facie*, a meaning different from its literal import. In the latter class of cases, parol evidence is admissible to rebut the presumption, and give full effect to the language of the instrument; but in the former class, where the law conclusively determines the construction, parol evidence is not admissible to contradict or avoid it. Thus, where the same *specific thing* is given twice to the same legatee, in the same will, or in the will and again in a codicil, and where two *pecuniary* legacies of *equal* amount are given to the same legatee in one and the same instrument, the second legacy in each case is presumed to be a mere repetition of the first; but as this presumption is against the language of the will, parol evidence is admissible, where the subject is capable of such proof, to show that the second bequest was intended to be additional to the first. Such would be the case, where the bequests were of sums of money, or of things of which the testator had several; as, for example, one of his horses, without a particular specification of the animal.[1] But where two legacies of quantities *unequal* in amount are given to the same person by the same instrument, or where two legacies are given, *simpliciter*, to the same person by *different* instruments, whether the amounts or quantities in the latter case be equal or unequal, the law conclusively presumes the second bequest to be additional to the first; and this construction being in favor of the language of the instru-

[6] Podmore *v.* Gunning, 7 Sim. 644; s. c. 5 id. 485; {Dyer *v.* Dyer, 2 Cox Ch. C. 92.}

[1] 1 Spence, Eq. Jur. Chan. p. 566; Coote *v.* Boyd, 2 Bro. C. C. 521, 527, 528, per Ld. Thurlow; as expounded by Ld. Alvanley, in Osborne *v.* D. of Leeds, 5 Ves. 368, 380, and by Sir E. Sugden, in Hall *v.* Hill, 1 Con. & Law, 149, 150.

ment, by a positive rule of law, parol evidence will not be admitted to control it.[2] The rule, in short, amounts to this: that parol evidence is *not* admissible to *prove* that the party did not mean what he has said; but that, when the law *presumes* that he did not so mean, parol evidence *is* admissible to prove that he did, by rebutting that presumption; it not being conclusive, but disputable. And the rule is applied, not only to cases purely testamentary, but to cases where there was first a will and then an advancement,[3] or first a debt and then a will,[4] as well as to others.

§ 367. **Declarations of Parties.** The parol evidence mentioned in the preceding section, as inadmissible, refers to the *verbal declarations* of the party.[1] In both classes of the cases referred to, parol evidence is clearly admissible to show any *collateral facts* relating to the party, such as his family, fortune, relatives, situation, and the like, from which the meaning of the instrument in question can be collected.[2] And where the language is clear, and there is no presumption of law to the contrary, yet the question of intent remains to be collected from the entire instrument; and two bequests in the same will may be ascertained to be either cumulative or substitutionary, according to the *internal evidence* of intention thus collected.[3]

§ 368. **Competency of Parties.** *Fourthly*, as to the objection, that the *witness is incompetent to testify* in the cause. The competency of the *parties* in a suit in equity, as witnesses, and the mode of obtaining their testimony, having already been considered,[1] it remains only to speak of the competency of other witnesses. On this point, the general rule in equity is the same as at law, witnesses being held incompetent in both courts, by reason of deficiency in understanding, deficiency in religious principle,

[2] Ibid. And see Hooley *v.* Hatton, 1 Bro. C. C. 390, n.; Foy *v.* Foy, 1 Cox Ch. C. 163; Baillie *v.* Butterfield, ib. 392; Hurst *v.* Beach, 5 Madd. 351; Hall *v.* Hill, 1 Con. & Law. 120, 138, 156; s. c. 1 Dru. & War. 94; Lee *v.* Pain, 4 Hare 201, 216; Brown *v.* Selwin, Cas. temp. Talbot, 240.

[3] Rosewell *v.* Bennett, 3 Atk. 77; Biggleston *v.* Grubb, 2 Atk. 48; Monck *v.* Monck, 1 Ball & B. 298; Shudal *v.* Jekyll, 2 Atk. 516.

[4] Fowler *v.* Fowler, 3 P. Wms. 353; Wallace *v.* Pomfret, 11 Ves. 542. The cases on this subject are reviewed, and the whole doctrine is fully and ably discussed, by Lord Chancellor Sugden, in Hall *v.* Hill, *supra*.

[1] See *ante*, Vol. I. §§ 289, 296; Guy *v.* Sharp, 1 My. & K. 589.

[2] Ibid. The "circumstances of the case," which Chancellor Kent held admissible, in Dewitt *v.* Yates, 10 Johns. 156, undoubtedly were the collateral facts here alluded to, since he refers to no others, in delivering his judgment.

[3] Russell *v.* Dickson, 2 Dru. & War. 133, is an example of this kind.

[1] *Supra*, §§ 313–318.

infamy, or interest.[2] A slight diversity of practice, in the mode of taking the objection, will alone require a brief notice in this place.

§ 369. **When Objection to be taken.** In proceedings at law, an objection to the competency of a witness may be taken in any stage of the cause, previous to its being committed to the jury, provided it be taken as soon as the ground of it is known to the party objecting.[1] The same rule applies to examinations *viva voce* in equity. But where the testimony is taken by depositions, the practice is somewhat varied. The ancient forms of interrogatories included a question whether the witness was or was not interested in the event of the suit; but the more modern practice, when ground of incompetency is suspected, is to file a cross-interrogatory. And though the modern rule is, that the proper time for examination to *competency* is *before* publication, interrogatories to *credit* alone being allowed *after* publication;[2] yet, where an objection to the competency is discovered by the party *after publication*, it may be taken, even at the hearing, if it be taken as soon as it is discovered, and before the deposition is read.[3] And this is done, not by exhibiting articles, as in the ordinary case of discrediting a witness, but by motion for leave to examine as to the point of competency, upon affidavit of previous ignorance of the fact.[4] If the witness has been cross-examined *after* he was known by the party to be incompetent, this is a waiver of the objection;[5] and the burden of proof seems to be on the objector, to show that, at the time of the examination, he had *not* a knowledge of the existence of the ground of objection to his competency.[6]

[2] See *ante*, Vol. I. §§ 365–430.

[1] *Ante*, Vol. I. § 421.

[2] Callaghan *v.* Rochfort, 3 Atk. 643; Purcell *v.* McNamara, 8 Ves. 324; Mill *v.* Mill, 12 id. 406; Perigal *v.* Nicholson, Wightw. 63; Vaughan *v.* Worrall, 2 Swanst. 395, 398, 399. Where a *party* is examined as a witness between the parties in a suit, subject to all just exceptions, an objection to his testimony may be taken at the hearing: Mohawk Bank *v.* Atwater, 2 Paige 60.

[3] Callaghan *v.* Rochfort, 3 Atk. 643; Needham *v.* Smith, 2 Vern. 463. And see Stokes *v.* M'Kerral, 3 Bro. Ch. C. 228; Rogers *v.* Dibble, 3 Paige 238. So, if the ground of objection appears from the deposition itself, it may be taken at the hearing, before the deposition is read: Perigal *v.* Nicholson, *supra*.

[4] Callaghan *v.* Rochfort, *supra*.

[5] *Ante*, Vol. I. § 421; *supra*, § 350, n.

[6] Vaughan *v.* Worrall, 2 Swanst. 400, per Ld. Eldon. And see Fenton *v.* Hughes, 7 Ves. 290.

CHAPTER IV.

WEIGHT AND EFFECT OF EVIDENCE.

§ 370. 1. **Admissions.** In regard to the effect to be given to an *answer in chancery*, when read in evidence, we have seen that the rule in equity is somewhat different from the rule at law.[1] This diversity arises, not from a difference in the principles recognized in the two kinds of tribunals, but from their different modes of proceeding, and the different circumstances under which the answer is offered in evidence. In chancery, the plaintiff reads the admissions in the answer in the same cause, merely as *admissions in pleadings*, of facts which he therefore is under no necessity to prove. He is consequently only bound to read entire portions of such parts of the answer as he would refer to for that purpose; or, in other words, the principal passage in question, and such others as are explanatory of it, or are essential to a perfect understanding of its meaning.[2] In other respects, and so far only as it is responsive to the bill, it is evidence in the cause. But when an answer in chancery is read in a court of law, it is read in a different cause, between other parties, or between the same individuals in another forum, and in another and different relation; and it is offered and regarded, not as a pleading, but as evidence of declarations and admissions of facts, previously made in another place, by the party against whom it is offered; and in this view, it comes within the principle of the rule respecting declarations and admissions in general; namely, that the whole must be taken together.[3] The distinction here adverted to is observed only in

[1] *Supra*, § 281.

[2] *Supra*, §§ 281, 284, 285.

[3] *Supra*, §§ 281, 290; *ante*, Vol. I. §§ 201, 202; Bartlett *v.* Gillard, 3 Russ. 156; Davis *v.* Spurling, 1 Russ. & My. 64; 2 Poth. Obl. by Evans, App. No. xvi. § 4, p. 137; Hart *v.* Ten Eyck, 2 Johns. Ch. 88–92. And see Mr. Emmett's argument in 1 Cowen 744, n., quoted with approbation by Marcy, J., in Forsyth *v.* Clark, 3 Wend. 643.

the cause in which the answer was given; for even in chancery, when the answer of a party in *another* cause is offered as evidence, the whole of it becomes admissible, like other documents made evidence in the cause.[4] Every part, however, is not legally entitled to equal credit, merely because the whole is admitted to be read; but each part of the statement receives such weight as, under all the circumstances, it may seem to deserve.

§ 371. **Evidence of Parties.** In *taking an account*, before the master, the examination of the parties is entitled to peculiar weight and effect. For though, when one party is examined as a *witness* against another party in the cause, he stands in the situation of any other witness, and may be cross-examined by the adverse party, but his testimony cannot be used in his own favor; yet, when he is examined before a master in relation to his own rights in the cause, the examination is in the nature of a bill of discovery; there can be no cross-examination by the counsel; and he cannot testify in his own favor, except so far as his answers may be responsive to the interrogatories propounded to him by the adverse party. To this extent, his answers are evidence in his own favor, on the same principle that the answer of a defendant, responsive to the bill, is evidence against the complainant. And any explanations, necessary to prevent any improper inference from his answer, will be regarded as responsive to the interrogatory. The same effect is allowed to answers given upon an examination *viva voce*.[1]

§ 372. **Oath of Accounting Party.** Where the *account is of long standing*, the court will sometimes give peculiar effect to the oath of the accounting party, by a special order, allowing him to discharge himself, on oath, of all such matters as he cannot prove by vouchers, by reason of their loss.[1] So, where one of several executors or trustees has divested himself of the assets

[4] Boardman *v.* Jackson, 2 Ball & Beat. 386; Hart *v.* Ten Eyck, *supra*.

[1] Benson *v.* Le Roy, 1 Paige 122. And see Armsby *v.* Wood, 1 Hopk. 229; Hollister *v.* Barkley, 11 N. H. 501. And although it is well settled, that where a book or paper is produced by a party, from which he is charged, the same book or paper may be read by way of discharge: Darston *v.* Lord Oxford, 1 Eq. Cas. Abr. 10; Bayly *v.* Hill, ib.; Boardman *v.* Jackson, 2 Ball & Beat. 382; Blount *v.* Burrow, 4 Bro. Ch. Cas. 75; s. c. 1 Ves. Jr. 546; yet he will not be permitted to discharge himself by a separate affidavit: Ridgeway *v.* Darwin, 7 Ves. 404; nor by a separate and independent statement of fact in his examination, not responsive to any interrogatory: Higbee *v.* Bacon, 8 Pick. 484.

[1] Peyton *v.* Green, 1 Eq. Cas. Abr. 11; Holstcomb *v.* Rivers, 1 Ch. Cas. 127.

of trust funds, by delivering them over to his co-executors or co-trustees, the court will, in a proper case, permit him to discharge himself by his own oath, instead of exhibiting interrogatories for the examination of the others.[2] But this is allowed only under special circumstances, and by special directions; without which the master will not be authorized to permit a party to discharge himself, by his own oath, from the sums proved to have come to his hands.[3] In the case, however, of small sums, under forty shillings, it is an old rule in chancery to permit an accounting party to discharge himself by his own oath, stating the particular circumstances of the payments,[4] and swearing positively to the fact, and not merely to his belief.[5]

§ 373. **Admissions.** In considering the testimony in the cause, greater weight and effect is given to *facts admitted by the parties* than to evidence *aliunde;* and greater regard is due to solemn admissions *in judicio* than to admissions by the parties *en pais.* Admissions in the pleadings, and other solemn admissions *in judicio*, are likened to algebraic *formulæ*, or as substitutes for proof, to be received by the judge in order to facilitate the final decision of the cause; and are deemed more satisfactory than if found by a jury, and equally conclusive upon the parties.[1] The court, in such cases, will only require to be satisfied that the admission was understandingly and advisedly made, either in the pleadings, or in the cause, as a substitute for proof, and without fraud, in order to hold the parties conclusively to it; without permitting it to be retracted, except by

[2] Dines *v.* Scott, 1 Turn. & Russ. 358; 2 Dan. Ch. Pr. 1428, 1429, 5th Am. ed. 1230, 1231.

[3] Ibid. It has been held sufficient for a servant or an apprentice, in answer to a bill for an account, to say, in general, that whatever he received was by him received and laid out again by his master's orders: Potts *v.* Potts, 1 Vern. 207.

[4] 1 Eq. Cas. Abr. 11, pl. 13; Anon., 1 Vern. 283; Marshfield *v.* Weston, 2 id. 176; Remsen *v.* Remsen, 2 Johns. Ch. 501; O'Neill *v.* Hamill, 1 Hogan 183. And see Whicherley *v.* Whicherley, 1 Vern. 470; 2 Dan. Ch. Pr. 1425, 5th Am. ed. 1228. In some of the United States, the same rule is adopted in trials at law, in the proof of charges by books of account, with the suppletory oath of the party: Union Bank *v.* Knapp, 3 Pick. 109; Dunn *v.* Whitney, 1 Fairf. 15; *ante*, Vol. I. § 118, n. In the settlement of administration accounts in the Probate Court, though the executor or administratior is bound to verify the account by his oath, yet he is not therefore a competent witness, upon his own motion, to support the items of account, except as to small charges under forty shillings: Bailey *v.* Blanchard, 12 Pick. 166. In New York, the same doctrine is recognized; but the sum is fixed by statute at twenty dollars: Williams *v.* Purdy, 6 Paige 166.

[5] Robinson *v.* Cumming, 2 Atk. 410. {Books of account kept by a trustee and her agents may be admitted as evidence of disbursements in reference to the trust estate, where the trustee could not produce strict vouchers: Cookes *v.* Cookes, 9 Jur. N. S. 843.}

[1] *Ante*, Vol. I. §§ 186, 205, 527 *d.*

consent, in any subsequent stage of the proceedings, or upon a rehearing of the cause. And whether made by the party in person, or made by his counsel, is immaterial; the remedy of the party being only against his counsel, except upon proof of fraud.[2] From admissions of this conclusive kind, the court will infer any other facts naturally deducible from them; and when the facts thus inferred are so necessarily connected with the facts admitted, that, if disproved, the admissions would thereby be nullified, the evidence offered to disprove them will be rejected. Thus, if it be admitted that a certain woman is a *widow* of an individual named, their marriage and his death are also facts which the court would conclusively infer. And if the admission of fact be made in the defendant's answer, but the fact thus legally to be inferred from it be expressly denied in the answer, the admission will be acted upon by the court, notwithstanding the denial. Thus, where the case, as set forth in the answer, showed that the plaintiff had an interest in the subject of controversy, the defendant was ordered to pay money into court upon the strength of that admission, notwithstanding the denial of such interest in the answer.[3] So where a bill was filed for the specific performance of an agreement to grant a lease, and also for an injunction to restrain an ejectment brought by the defendant against the plaintiff; and the answer admitted that, when the defendant let the plaintiff into possession of the premises, it was his own *expectation*, and probably that of the plaintiff, that the holding would last as long as the alleged term, but that neither party was bound; the court held the defendant bound by this admission of the agreement, and refused to dissolve the injunction.[4] And, on the principle under consideration, if the defendant puts in a plea in bar of the bill, and the plaintiff does not reply, but sets down the plea for argument, the matter of the plea will be conclusively taken for true.[5]

§ 374. **Same Subject.** Though the solemn admissions of par-

[2] Bradish *v.* Gee, Ambl. 229. To a bill to have a jointure made up to a certain sum, according to a parol agreement before marriage, the defendant pleaded in bar that a settlement was made by a deed, subsequent to the parol agreement; and it was held, that the deed was conclusive evidence that in it all the precedent treaties and agreements were merged: Bellasis *v.* Benson, 1 Vern. 369.

[3] Domville *v.* Solly, 2 Russ. 372. And see Thomas *v.* Visitors, etc., 7 G. & J. 369.

[4] Attwood *v.* Barham, 2 Russ. 186. And see Gresley, Eq. Evid. 459, 460.

[5] Gallagher *v.* Roberts, 1 Wash. C. C. 320.

ties are regarded as thus conclusive, and though facts admitted on *belief* only are ordinarily received as true, according to the maxim, that what the parties believe the court will believe; yet whether this rule is applicable to *admissions made by an executor or an administrator*, upon his belief in regard to the liabilities of his testator or intestate, is a point not perfectly clear. In one case, where a bill was filed by a creditor against an administrator, who in his answer stated that he *believed* the debt was due; though the Lord Chancellor was inclined to think this sufficient, yet both Mr. Fonblanque, of counsel with the plaintiff, and Mr. Richards, as *amicus curiæ*, doubted whether it was a sufficient foundation for a decree; and an interrogatory was therefore exhibited.[1] Belief of a party *personally interested in knowing*, seems to be that belief which is intended in the maxim.

§ 375. 2. **Testimony of Witnesses.** In estimating the weight and effect to be given to the *testimony of witnesses*, there are no fixed rules of universal application; each case being determined by the judge, in his discretion, according to its own circumstances. Yet it has been judicially said, that, where a witness against the moral conduct of another is under a necessity of first exculpating himself, no regard ought to be given to his evidence;[1] that the positive testimony of one credible witness to a fact is entitled to more weight than that of several others who testify negatively, or, at most, to collateral circumstances, merely persuasive in their character;[2] and that the testimony of a willing and uncorroborated witness, who merely states his understanding of a conversation between the parties, is entitled to no weight.[3] If a witness swears that he never heard of a certain transaction at or before a certain time, this is regarded as a negative pregnant that he did hear of it after that time.[4] So, an affirmation by a vendor that he did not recollect his having authorized a person to sign his name to a covenant for title, will not be deemed either a denial of such authority, or a disbelief that it was actually given; and further proof of such authority will not be required, if the owner knew of the sale and acquiesced in it.[5]

[1] Hill *v.* Binney, 6 Ves. 738.
[1] Watkyns *v.* Watkyns, 2 Atk. 97.
[2] Kennedy *v.* Kennedy, 2 Ala. 571; Todd *v.* Hardie, 5 id. 698; Littlefield *v.* Clarke, 3 Desaus. 165.
[3] Powell *v.* Swan, 5 Dana 1.
[4] Walker *v.* Walker, 2 Atk. 100.
[5] Talbot *v.* Sibree, 1 Dana 56.

§ 376. **Conversations ; Declarations.** It is a general rule, applicable not only to evidence of *conversations* or *declarations*, but to correspondence on a particular subject, that if a party makes use of a portion of a conversation or correspondence, he thereby gives credit to the whole, and authorizes the adverse party to use at his pleasure any other portion that relates to the same subject. But it does not follow that the court is bound, therefore, to give to every part of such evidence equal credit and weight; nor, on the other hand, will it be treated as an absolute nullity; but if it be not entirely neutralized by opposing evidence, such weight will be attributed to it as on the whole it may deserve.[1]

§ 377. **Witnesses known beforehand.** It is obvious, also, to remark, that frequently a higher degree of credit is due to the testimony of witnesses who have either been *shown to the adverse party* previous to their examination, according to the ancient course in chancery, or *sworn in open court*, in presence of the proctor on the other side, according to the practice in the ecclesiastical courts, than to that of witnesses whose names were unknown to the adverse party until their depositions were published. For in the former case the party had ample opportunity to ascertain the character of the witness, and to impeach it if unworthy of credit, while in the latter this was impossible. Yet here, also, no inflexible rule can be laid down, each case being chiefly governed by its own circumstances.

§ 378. **Falsus in Uno, Falsus in Omnibus.** The maxim, "Falsus in uno, falsus in omnibus," has a juster application to witnesses in chancery than in the courts of common law. For in the latter tribunals the witness is not only examined orally, but is subjected to a severe and rapid cross-examination, without sufficient time for reflection or for deliberate answers, and hence may often misrepresent facts, from infirmity of recollection or mistake; in which case, to apply the maxim *in extenso* to his testimony would be highly unjust. Yet such mistakes must, of necessity, detract something from the credit due to his accuracy,

[1] Gresley, Eq. Evid. 466; Bartlett *v.* Gillard, 3 Russ. 156. This rule is restricted in its application to matters relating to the portion already adduced in evidence. Hence the production of a letter-book, on the call of the plaintiff, in order to prove the sending of certain letters copied therein, does not entitle the defendant to read other letters in the same book, not referred to in those which have been called for: Sturge *v.* Buchanan, 10 Ad. & El. 598. And see Prince *v.* Samo, 7 id. 627; Catt *v.* Howard, 3 Stark. 5; *ante*, Vol. I. § 467.

though he may not be chargeable with moral turpitude. But where, according to the course of chancery, the testimony of the witness is taken upon interrogatories in writing, deliberately propounded to him by the examiner, no other person being present; and where ample time is allowed for calm recollection, and any mistakes in his first answers may be corrected at the close of the examination, when the whole is distinctly read over to him; there is ground to presume that a false statement of fact is the result either of bad design or of gross ignorance of the truth, and culpable recklessness of assertion; in either of which cases all confidence in his testimony must be lost, or at least essentially impaired. If the statement is deliberately and knowingly false in a single particular, the credibility of the whole is destroyed; but if it is erroneous without a fraudulent design, the credibility is impaired only in proportion as the cause of the error may be chargeable to the witness himself.[1]

§ 379. 3. **Affidavits.**[1] The effect of judicial documents having been considered in a former volume, it only remains to take notice of the nature, admissibility, and effect of *affidavits*, in cases peculiar to proceedings in chancery.

§ 380. **Definition.** An affidavit is "a declaration, on oath or affirmation, taken before some person having competent and lawful power to administer the same."[1] It is essential to public justice that an affidavit be so taken as that, if false, the affiant may be indicted and punished for perjury; and to this end the rules of practice respecting the form and requisites of affidavits are constructed. It is therefore generally required in chancery, that a *cause be first pending*, in which the affidavit is to be used; and hence, if it be taken before the bill is actually

[1] The maxim, though variously expressed by the civilians, has reference not only to falsehood deliberately perpetrated in writings, but to mere mistakes in an oral examination. "Qui in uno, imo in pluribus, minus vera *scripserit*, in cæteris credendum ei non est:" Menoch. Concil. I, n. 300. "Falsum præsumatur commisisse, qui semel *falsarius* fuit:" Id. Concl. 422, n. 125. "Falsum dictum, a testibus in uno, et in aliqua parte sui examinis, totum examen reddat falsum, nec probat:" Mascard. De Probationibus; Concl. 744, n. 1; "Etiamsi testis ignoranter in una parte deposuisset falsum; quia tunc totum examen censetur falsum, et non probat. Nam testis non debet deponere, nisi id quod novit, vel vidit; et in hoc non potest prætendere ignorantiam:" Id. n. 7. And see *ante*, Vol. I. § 461.

[1] [See *ante*, Vol. I. §§ 163 *a*, 344, 348, 349, 558.]

[1] 3 Dan. Ch. Pr. 1769, 5th Amer. ed. vol. i. 891; Hind. Ch. Pr. 451. {For the opinion of Mr. Vice-Chancellor Knight Bruce on the relative value of evidence given by affidavit and by depositions taken on written interrogatories, and on the use of cross-examination, see Attorney-General *v.* Carrington, 3 Eng. Law & Eq. 73 (4 De G. & S. 140). A bill cannot be read as an affidavit on a final hearing of a cause: Airs *v.* Billops, 4 Jones Eq. 17.}

filed, it cannot be read, but will be treated as a nullity.[2] It is sufficient that it be *in terms so positive and explicit* as that perjury may be assigned upon it.[3] It must be *properly entitled;* for an an affidavit, made in one cause, cannot be read to obtain an order in another;[4] and an affidavit not properly entitled as of a cause pending, or otherwise appearing to have been legally taken, cannot, if false, be the foundation of an indictment for perjury.[5] But it is sufficient if it was correctly entitled when it was sworn, though the title of the cause may afterwards have been changed by amendment.[6] It is also sufficient, where there are several defendants, if it states the name of the first, adding, "and others," without naming them; if there be no other suit pending between the plaintiff and that defendant with others.[7] It is also proper, though not indispensably necessary, that the affidavit of any person, other than a party in the cause, should state the true place of residence and the addition, as well as the name of the affiant.

§ 381. **Office of an Affidavit.** The office of an affidavit is to bring to the court the knowledge of facts; and therefore it should be confined to *a statement of facts only*, as they *substantially* exist, with all *necessary circumstances* of time, place, manner, and other *material incidents*. It is improper to state conclusions of law, or legal propositions, such as, that a *legal service* was made, or *legal notice* given, without stating the manner; or that the party has a *good defence*, without stating the nature and grounds of it; but the affidavit should state particularly how the service was made or notice given, and what are the grounds and merits of his defence or claim, that the court may judge of the legality, and whether the defence or claim is well founded or merely imaginary; and that the party may be criminally proceeded against, if the statement be false.[1] It must not state arguments, nor draw

[2] Hughes *v.* Ryan, 1 Beat. 327; Anon., 6 Madd. 276; *supra*, § 190.
[3] Coale *v.* Chase, 1 Bland 137; *supra*, § 194.
[4] Lumbrozo *v.* White, Dick. 150.
[5] Hawley *v.* Donelly, 8 Paige 415. And see Stafford *v.* Brown, 4 id. 360; *supra*, § 190.
[6] Hawes *v.* Bamford, 9 Sim. 653.
[7] White *v.* Hess, 8 Paige 544.
[1] Meach *v.* Chappell, 8 Paige 135; Sea Ins. Co. *v.* Stebbins, ib. 565; 3 Dan. Ch. Pr. 1776, 5th Amer. ed. vol. i. 894. And see Rucker *v.* Howard, 2 Bibb, 166; Davis *v.* Gray, 3 Lit. 451; Thayer *v.* Swift, Walk. Ch. (Mich.) 384. {Evidence of belief only is admissible on interlocutory application, though not at the hearing of a cause; and the grounds of such belief are properly stated in the affidavit, even in the case where such grounds consist in great part of conversations with third persons, who might be,

inferences, nor contain other irrelevant, impertinent, or scandalous matter; otherwise such matter will be expunged by the court, with or without reference to a master, and the party or solicitor will be punished in costs.[2]

§ 382. **Affidavit must be properly sworn.** An affidavit must also be *sworn* before some person authorized by law to administer such oaths; and generally speaking, any person, authorized to take depositions or to examine witnesses in the cause, is qualified to take affidavits.[1] Under the laws of the United States, regulating the practice in the national tribunals, this authority is given to any judge of any court of the United States, any chancellor or judge of any superior court of a State, any judge of a county court or court of common pleas, or mayor or chief magistrate of any city in the United States, not being of counsel nor interested in the suit;[2] any of the commissioners appointed by the court to take acknowledgments of bail and affidavits; and any notary-public.[3] And an affidavit, taken out of court, and not thus sworn, will not be permitted to be used.[4] Under the laws of the several States, affidavits to be read in the State courts may generally be taken before any judge of a court of record, or a justice of the peace. Regularly, an affidavit must not be sworn before an attorney or solicitor in the cause;[5] but in some States, this is no valid objection, if he is not the solicitor of record.[6]

§ 383. **Affidavits taken in other States.** An affidavit may also be read in the State tribunals if *taken in another State* before any commissioner appointed to take acknowledgments and administer oaths under the authority of the State in which the court is holden; or before a master in chancery in such other State, though not such commissioner;[1] or taken under a commission issuing out of the court where the cause is pending; it being, in this case, taken under the authority of the court.[2] If it appears

but are not, produced, and where the deponent swears that he disbelieves the statements made to him by such persons: Bird *v.* Lake, 1 H. & M. 111.}

[2] Powell *v.* Kane, 5 Paige 265; 3 Dan. Ch. Pr. 1777, 5th Amer. ed. vol. i. 894, 895; Jobson *v.* Leighton, 1 Dick. 112; Phillips *v.* Muilman, ib. 113. But an affidavit will not be referred for mere impertinence, after an affidavit in answer to it has been filed: Burton, *in re*, 1 Russ. 380; Chimelli *v.* Chauvet, 1 Younge 384.

[1] See on this subject, *ante*, Vol. I. §§ 322–324; *supra*, §§ 251, 319.

[2] Stat. U. S. 1789, c. 20, § 30; Vol. I. p. 88.

[3] Stat. U. S. 1812, c. 25; vol. ii. p. 679; Stat. U. S. 1850, c. 52.

[4] Haight *v.* Prop'rs Morris Aqueduct, 4 Wash. C. C. 601.

[5] Hogan, *in re*, 3 Atk. 813; Smith *v.* Woodroffe, 6 Price 230; 9 id. 478; 3 Dan. Ch. Pr. 1771, 5th Amer. ed. vol. i. 891; Wood *v.* Harpur, 3 Beav. 290.

[6] People *v.* Spalding, 2 Paige 326; McLaren *v.* Charrier, 5 id. 530.

[1] Allen *v.* State Bank, 1 Dev. & Bat. Eq. 7.

[2] Gibson *v.* Tilton, 1 Bland 352.

that an affidavit had been taken at a *place out of the jurisdiction* of the magistrate or other officer, it will not be received; but if the place does not appear, it will be presumed to have been properly taken.[3] Indeed, an affidavit taken out of the jurisdiction of the court will seldom be rejected, if it appears to have been duly sworn before a person authorized to administer such oaths, by the laws of the country of his residence; and it will be sufficient if the person be proved to have been at the time *de facto* in the ordinary exercise of the authority he assumes.[4] In all these cases, the liability of the affiant to an indictment for perjury does not seem to be much relied on, in considering the admissibility of the affidavit; but in many States provision is made by law for the punishment of false swearing in any deposition or affidavit taken under a commission from abroad.

§ 384. **Weight and Effect of Affidavits.** The *weight and effect* given to affidavits is chiefly in admitting them as a sufficient foundation for ulterior proceedings. Thus, where an affidavit, whether of the party, or of another person, is required in support of a motion or a petition or a plea, which is its proper use and office, it is ordinarily received for that purpose as conclusive evidence of the facts which it contains. The like effect is given to affidavits in inquiries before a master, wherever they are received, no affidavit in reply being read, except as to new matter, which may be stated in the affidavits in answer, and no further affidavits being read, unless specially required by the master.[1] They are also received as satisfactory proof of exhibits at the hearing, in cases already mentioned.[2] So, in certain cases of fraudulent abstracting of the plaintiff's property by the defendant, we have seen that the amount of his damages, in the absence of other proof, may be ascertained by the affidavit of the plaintiff himself, to which, *in odium spoliatoris*, full credit will be given.[3] Conclusive effect is also given to the affidavit of the party in certain

[3] Parker *v.* Baker, 8 Paige 428; Lambert *v.* Maris, Halst. Dig. p. 173.

[4] Pinkerton *v.* Barnsley Canal Co., 3 Y. & J. 277, n.; Ellis *v.* Sinclair, id. 273; Lord Kinnaird *v.* Saltoun, 1 Madd. 227; Garvey *v.* Hibbert, 1 J. & W. 180; 3 Dan. Ch. Pr. 1771–1773, 5th Amer. ed. vol. i. 892. But see Ramy *v.* Kirk, 9 Dana 267, *contra*. The certificate of a notary public is not sufficient to prove the official character of the foreign magistrate: Hutcheon *v.* Mannington, 6 Ves. 823.

[1] Orders of April 3, 1818, Ord. 66; Law's Prac. U. S. Courts, p. 645. [On the hearing of a motion, it is open to the counsel for the respondent to avail himself of any affidavit on behalf of his client which is filed at the time when he is called on to address the court: Munro *v.* Wivenhoe & Brightlingsea Railway Co., 12 L. T. N. S. 562.]

[2] *Supra*, § 310.

[3] *Supra*, § 344; *ante*, Vol. I. § 348.

other cases, where it is required in verification of his statement, for the satisfaction of the court. Thus, to a bill of *interpleader*, it is requisite that the plaintiff should make affidavit that the bill is not filed in collusion with either of the defendants, but merely of his own accord, for his own particular relief.[4] So, in a bill for the examination of witnesses *de bene esse*, where, from their age or infirmity, or their intention of leaving the country, there is apprehended danger from the loss of their testimony, positive affidavit is required of the plaintiff, stating the reasons and particular circumstances of the danger, and the material facts to which the witness can testify; lest the bill be used as an instrument to retard the trial; and to this affidavit full credit is given.[5] If the affidavit is to the party's belief only, and does not state the grounds of his believing that the witness will so testify, or does not state that he is the only witness by whom the facts can be proved, it will not be sufficient.[6] So, where an *accidental loss* is the essential fact giving jurisdiction to the court, and on that ground the prayer of the bill is not only for discovery, but also for relief; the court will not assume jurisdiction upon the mere suggestion of the fact, but requires preliminary proof of it by the affidavit of the party, filed with the bill; and to this full credit is given, at least until it be overthrown by proof of the hearing. Such is the case of a bill for discovery and relief in chancery, founded on the alleged *loss*,[7] or the *unlawful possession and concealment by the defendant* of an *instrument* upon which, if in the possession of the plaintiff, an action at law might be maintained by him against the defendant.[8] The reason of requiring such preliminary proof in these cases is, that the tendency of the

[4] 3 Dan. Ch. Pr. 1761, by Perkins, 5th Amer. ed. vol. ii. 1563; Story Eq. Pl. §§ 291, 297; Bignold *v.* Audland, 11 Sim. 23. And See Langston *v.* Boylston, 2 Ves. Jr. 102, 103; Stevenson *v.* Anderson, 2 V. & B. 410. In Connecticut, this is not required: Jerome *v.* Jerome, 5 Conn. 352; Nash *v.* Smith, 6 id. 421, 426.

[5] 1 Dan. Ch. Pr. 452, 5th Amer. ed. 940; Story Eq. Pl. § 309; Rules of Circuit Courts U. S. in Equity, Reg. 70; 2 Dan. Ch. Pr. 1117, 1118, 3d Amer. ed. 956; Oldham *v.* Carleton, 4 Bro. C. C. 88; Laragoity *v.* Att.-Gen., 2 Price 172; Mendizabel *v.* Machado, 2 Sim. & Stu. 483.

[6] Rowe *v.* ——, 13 Ves. 261.

[7] Walmsley *v.* Child, 1 Ves. 341, 344; Campbell *v.* Sheldon, 13 Pick. 8; Thornton *v.* Stewart, 7 Leigh 128. In Virginia, an affidavit does not seem to be required: Cabell *v.* Megginson, 6 Munf. 202. If the proof is clear, both of the loss, and that the instrument, if negotiable, was not negotiated, nor payable to bearer, so that the defendant cannot, by any possibility, be exposed to pay it twice, the plaintiff may now recover at law. See *ante*, Vol. II. § 156.

[8] Anon., 3 Atk. 17. And see Livingston *v.* Livingston, 4 Johns. Ch. 297; Laight *v.* Morgan, 1 Johns. Cas. 429; Le Roy *v.* Veeder, ib. 417; 1 Dan. Ch. Pr. 449, 450, 5th Amer. ed. 392.

bill is to transfer the jurisdiction from a court of law to a court of equity.

§ 385. **Same Subject.** Full weight and credit is also given to the plaintiff's affidavit, where it is required in order to support an *ex parte* application for some immediate relief, in cases which do not admit of delay. The affidavit in such case must be made either by the plaintiff himself, or, in his absence, by some person having certain knowledge of the facts;[1] and it must state the facts on which the application is grounded, positively and with particularity, and not upon information and belief only, nor in a general or a doubtful manner.[2] It must also state either an actual violation of his right by the defendant, or his apprehension and belief of imminent and remediless loss or damage, if the case be such, together with the facts on which his belief is grounded.[3] If the application be for an injunction to stay *waste*, or other irreparable mischief, the affidavit must state the plaintiff's actual and exclusive title to the land or premises, and the conduct of the defendant, actual or apprehended, in violation of his right.[4] If it be to restrain the *infringement of a patent*, he must swear to his present belief, at the time of taking the oath, that he is the original inventor;[5] or, if it be to restrain the infringement of a *copyright*, the bill being filed by an assignee, he must state facts showing the legality of the immediate assignment to himself.[6] In an application for a writ of *ne exeat regno*, the affidavit must be positive and direct, that a debt is due and payable; that it is certain and not contingent; that the plaintiff believes that the defendant actually intends to go out of the jurisdiction, and the reason which he has for believing so; and that the debt will thereby be endangered.[7] Nothing short of such directness and particularity will suffice; except that in matters of pure account the plaintiff's belief as to the amount of the balance due to him is

[1] 3 Dan. Ch. Pr. 1890, 5th Amer. ed. vol. ii. 1669; Campbell *v.* Morrison, 7 Paige 157; Lord Byron *v.* Johnston, 2 Meriv. 29.

[2] Ibid.; Field *v.* Jackson, 2 Dick. 599; Whitelegg *v.* Whitelegg, 1 Bro. C. C. 57, and n. by Perkins; Storm *v.* Mann, 4 Johns. Ch. 21.

[3] 3 Dan. Ch. Pr. 1891.

[4] Hanson *v.* Gardiner, 7 Ves. 305; Jackson *v.* Cator, 5 id. 688; Eastburn *v.* Kirk, 1 Johns. Ch. 444.

[5] Hill *v.* Thompson, 3 Meriv. 624.

[6] 3 Dan. Ch. Pr. 1891, 5th Amer. ed. vol. ii. 1670.

[7] 2 Story Eq. Jur. § 1474; Oldham *v.* Oldham, 7 Ves. 410; Etches *v.* Lance, ib. 417; 3 Dan. Ch. Pr. 1931, 1932, 5th Amer. ed. vol. ii. 1706, 1707; Rice *v.* Hale, 5 Cush. 241.

sufficient.[8] Similar strictness is required in affidavits in support of applications to restrain the transfer of negotiable securities, or of other property, or the payment of money, or the like. In these and all other cases, where the danger of remediless loss or damage is imminent, the court acts at once upon the credit given to the plaintiff's affidavits alone; but in other cases decided upon affidavits, where no such necessity exists, they are ordinarily received on both sides, and weighed, like other evidence, according to their merits.

[8] Rico *v.* Gualtier, 3 Atk. 501; Jackson *v.* Petrie, 10 Ves. 164; Hyde *v.* Whitfield, 19 id. 344.

EVIDENCE IN COURTS OF ADMIRALTY AND MARITIME JURISDICTION.

EVIDENCE IN COURTS OF ADMIRALTY AND MARITIME JURISDICTION.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 386. **Jurisdiction.** The administration of the admiralty and maritime jurisprudence in the United States is confided originally and exclusively to the district courts.[1] From the final judgments and decrees of these courts in admiralty and maritime causes where the value of the subject in dispute, exclusive of costs, exceeds fifty dollars, an appeal lies to the Circuit Court next to be holden in the same district;[2] and where the value exceeds two thousand dollars, an appeal from the final judgment or decree of the Circuit Court, in such causes, lies to the Supreme Court of the United States.[3] And in these appeals, as well as in equity causes, the evidence goes up with the cause, to the appellate tribunal, and therefore must be reduced to writing.[4] The district courts also take jurisdiction of certain causes at common law, the consideration of which is foreign to our present design.

§ 387. **Same Subject.** The general admiralty jurisdiction conferred by the Constitution and laws of the United States is divisible into two great classes of cases; one dependent upon locality,

[1] U. S. Const. art. 3, § 2; Stat. 1789, c. 20, § 9, vol. i. p. 76; Rev. Stat. U. S. 2d ed. § 563. {In The Lottawanna, 21 Wall. (U. S.) 558, the question is considered how far the general maritime law is operative in this country, and it is held that the phrase of the Constitution, "admiralty and maritime jurisdiction," means the general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted.}

[2] U. S. Stat. 1803, c. 40, [93,] § 2, vol. ii. p. 244; Rev. Stat. U. S. 2d ed. § 631. {For the whole subject of admiralty jurisdiction, see Curtis, Jurisdiction of the United States Courts.} [There have been many statutory changes since Greenleaf wrote.]

[3] U. S. Stat. 1803, c. 40, [93,] § 2, vol. ii. p. 244; Rev. Stat. U. S. 2d ed. § 692.

[4] The Boston, 1 Sumn. 332; U. S. Stat. 1789, c. 20, §§ 19, 30; Stat. 1803, c. 93, § 2, vol. ii. p. 244.

the other upon the nature of the contract. The former includes acts and injuries done upon the sea, whether upon the high seas, or upon the coast of the sea, or elsewhere within the ebb and flow of the tide.[1] The latter includes contracts, claims, and services,

[1] {The admiralty jurisdiction of the United States courts now extends over all navigable waters. In the case of The Thomas Jefferson, 10 Wheat. (U. S.) 428, the Supreme Court decided that admiralty jurisdiction extended only to "waters within the ebb and flow of the tide." In subsequent cases it was decided that within this limit were included rivers whose waters rose and fell with the tide, whether the water was salt or fresh, and though they were within the body of a county: Peyroux *v.* Howard, 7 Pet. (U. S.) 324; Waring *v.* Clarke, 5 How. (U. S.) 441; Jackson *v.* Steamboat Magnolia, 20 id. 296. See also Steamboat Orleans *v.* Phœbus, 11 Pet. (U. S.) 175. But by act of Congress of 1845, c. 20 (5 U. S. Stats. at Large, 726), admiralty jurisdiction was given to the District Court over coasting vessels of twenty tons burden and upward upon the lakes and navigable waters connecting the same. In the case of The Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, the question was raised whether Congress had power to pass such an act, and the court decided that it had, on the ground that the admiralty and maritime jurisdiction extended *over all navigable waters*, whether within the ebb and flow of the tide or not; and that Congress consequently had power to confer this new jurisdiction on the District Court under the provision in the Constitution that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction." Under these views of the law on this subject a large admiralty practice has grown up on the great inland lakes and navigable rivers of the United States. Under the act of Congress of 1845, a State court has not concurrent jurisdiction with the admiralty courts of the United States of maritime torts, on navigable rivers, where one of the parties is a steamer or other vessel employed in the commerce or the navigation of such river: The Hine *v.* Trevor, 4 Wallace (U. S.) 555. See also Brightly's Digest, title "Admiralty," and cases cited.} [Inland lakes lying within the limits of a State are not navigable waters of the United States: Stapp *v.* The Clyde, 43 Minn. 192.] But though the jurisdiction of admiralty has been so much extended, by the recent decisions of the Supreme Court, so far as it depends upon place, that tribunal has shown a disposition to restrict it so far as it depends on subject-matter. In Cutler *v.* Rae, 7 How. 729, a libel brought by the owner of a vessel which had been voluntarily stranded, against the owner of the cargo which had been saved and restored to him, for contribution to general average, was dismissed by the Supreme Court on appeal for want of jurisdiction, although the point was not raised in the argument. The court held there was no lien for the general average contribution after the cargo had been given up to the owner, and that the admiralty jurisdiction ceased with the lien.

In the case of People's Ferry Company *v.* Beers, 20 id. 393, the Supreme Court of the United States decided that the builders of a vessel had no lien thereon for labor and materials which could be enforced in admiralty, and took the ground that a contract to build a ship or furnish materials for her construction was not maritime: {Edwards *v.* Elliott, 21 Wall. (U. S.) 532. But a contract to furnish a ship already afloat with propulsive machinery is: The Eliza Ladd, U. S. C. Ct. Dist. Oregon, 2 Cen. L. J. 822.} In The Richard Busteed, 21 Law Reporter 601, decided after the case in 20 How., Judge Sprague held that the latter case decided merely that such a contract gave no lien, and did not overrule the numerous decisions that the contract was maritime in its nature. Accordingly he held that, where a lien was given by the law of the State, where the vessel was built, it might be enforced in the admiralty courts. But in the case of Roach *v.* Chapman, 22 How. 129, involving a question similar to that decided in The Richard Busteed, the Supreme Court held that such a contract was clearly not maritime, and that the lien created by the State law could not be enforced in admiralty. {But see The Lottawanna, 21 Wall. (U. S.) 558, where the subject is again elaborately considered, though perhaps not settled, Clifford, J., dissenting. See also Taylor *v.* Str. Commonwealth, C. Ct. U. S. East. Dist. Mo., Miller, J., 1 Cen. L. J. 502;} [Haritwen *v.* The Louis Olsen, 52 F. 652. A lien given by State laws for labor and material furnished to domestic vessels is a maritime lien, and the State courts have no jurisdiction: The Glide, 167 U. S. 606; Portland, etc. Co. *v.* The Willapa, 25 Or. 71. The question of the existence of the lien claimed is

purely maritime, and rights and duties appertaining to commerce and navigation. The former of these classes is again divided into two branches; the one embracing acts, torts, and injuries strictly of civil cognizance, independent of belligerent operations;[2] the other embracing captures and questions of prize, arising *juri belli*.[3]

not one of jurisdiction, but of merits: The Resolute, 168 U. S. 437.] And see the next note as to the jurisdiction over policies of insurance. See also Taylor *v.* Carryl, 20 How. 583; Grant *v.* Poillon, ib. 162.

[2] {Admiralty courts of the United States have jurisdiction of collisions occurring on the high seas, between vessels owned by foreigners, and of different nationalities: The Belgenland, 9 F. 576.

In cases founded on tort, the admiralty courts have jurisdiction only where the damage is done on tidewater, not where the cause originated on the water, and the injury was substantially done on shore. Thus in The Plymouth, 3 Wall. (U. S.) 20, it is held that where a vessel lying at a wharf on waters subject to admiralty jurisdiction took fire, and the fire spreading itself to certain storehouses on the wharf, consumed these and their stores, it is not a case for admiralty proceeding. Nelson, J., says: "It will be observed that the entire damage complained of by the libellants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on the land. It is admitted by all the authorities that the jurisdiction of the admiralty over marine torts depends upon locality, — the high seas, or other navigable waters within admiralty cognizance; and being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark. . . . But it has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that, as the origin of the wrong was on the water, in other words, as the wrong began on the water (where the admiralty possesses jurisdiction), it should draw after it all the consequences resulting from the act. These mixed cases, however, will be found, not cases of tort, but of contract, which do not depend altogether upon locality as the test of jurisdiction, such as contracts of material-men, for supplies, charter-parties, and the like. These cases depend upon the nature and subject-matter of the contract, whether a maritime contract, and the service a maritime service to be performed upon the sea or other navigable waters, though made upon land. The cases of torts to be found in the admiralty, as belonging to this class, hardly partake of the character of mixed cases, or have at most but a very remote resemblance. They are cases of personal wrongs, which commenced on the land; such as improperly enticing a minor on board a ship, and there exercising unlawful authority over him. The substance and consummation of the wrong were on board the vessel, — on the high seas or navigable waters, — and the injury complete within admiralty cognizance. It was the tortious acts on board the vessel to which the jurisdiction attached. This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts; namely, that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. In other words, the cause of damage, in technical language, whatever else attended it, must have been there complete."} [See also Johnson *v.* Chicago Elevator Co., 119 U. S. 388; *Ex parte* Phenix Ins. Co., 118 id. 610.]

[3] 3 Story on the Constitution, § 1662, 4th ed. § 1663. The subject of admiralty jurisdiction, as it does not directly affect the principles of the law of evidence, is deemed foreign from the plan of this work, and therefore is only incidentally mentioned. It is well known that in the United States this jurisdiction is asserted and actually maintained in practice more broadly than in England. The history and grounds of this difference, and the true nature, extent, and limit of the admiralty jurisdiction, as recognized in the Constitution and laws of the United States, have been expounded with masterly force of reasoning and affluence of learning, by Mr. Justice Story, in 1815, in the leading case of De Lovio *v.* Boit, 2 Gall. 398–476; and by Judge Ware, in The Huntress, Daveis 93–111. Other cases on this subject are mentioned, and a concise summary of the discussion is given, in 1 Kent Comm. 365–380, and notes, to

The cognizance of all these, except the last, belongs to the *instance side* of the court, or what is elsewhere termed the *Instance Court* of Admiralty; and that of the latter, or prize causes, belongs to the *Prize Court*. In England, a distinction is made between these two, they being regarded as separate courts; the former being the ordinary and appropriate court of admiralty, proceeding according to the civil and maritime law, from whose decrees an appeal lies to the delegates; and the latter proceeding according to the course of admiralty and the law of nations, with an appeal to the lords commissioners of appeals in prize causes. But in this country these two jurisdictions are consolidated and vested in the district courts, though the jurisdiction of prize is dormant, until called into activity by the occurrence of war.[4]

§ 388. **Procedure.** In the infancy of this court, under the present national Constitution, it was required by statute[1] that "the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the *civil law*." By a subsequent statute,[2] it was provided, that "the forms and modes of proceeding shall be, in suits of equity, and in those of admiralty and maritime jurisdiction,

which the student is referred. See also Curtis on Merchant Seamen, pp. 342–367; {The Kate Tremaine, 5 Ben. C. C. 60; Banta *v.* McNeil, ib. 74; The Elmira Shepherd, 8 Blatchf. C. C. 341. See as to charter-parties and contracts of affreightment, New Jersey Steamboat Company *v.* Merchants' Bank of Boston, 6 How. (U. S.) 344; and Morewood *v.* Enequist, 23 id. 493;} [Queen of the Pacific, 61 F. 213; Dumois *v.* The Baracoa, 44 id. 102; Haller *v.* Fox, 51 id. 298.] The jurisdiction, as asserted in De Lovio *v.* Boit, includes, among other things, charter-parties and affreightments; marine hypothecations and bottomries; contracts of material-men; seamen's wages: [The Resolute, 168 U. S. 437;] contracts between part-owners; averages, contributions, and jettisons; and policies of insurance. To these may be added salvage; marine torts; damages and trespasses; assaults and batteries on the high seas; seizures under the revenue and navigation laws, and the laws prohibitory of the slave-trade; ransom; pilotage; and surveys. The jurisdiction of the admiralty over policies of insurance was re-affirmed by Mr. Justice Story in 1822, in Peele *v.* Merchants' Ins. Co., 3 Mason 28; and again in 1842, in Hale *v.* Washington Ins. Co., 2 Story 182; and is understood to have been approved by Marshall, C. J., and Mr. Justice Washington, ib. 183; 1 Brock. 380; though denied by Mr. Justice Johnson, in 12 Wheat. 638. {In Gloucester Ins. Co. *v.* Younger, 2 Curtis C. C. 322, Mr. Justice Curtis affirmed the jurisdiction of the court in such cases, as settled by the previous decisions in his circuit, but declined to give his own opinion. See also the remarks of Taney, C. J., in Taylor *v.* Carryl, 20 How. (U. S.) 583. [De Lovio *v.* Boit was approved in Insurance Co. *v.* Dunham, 11 Wall. 1. But a contract to procure insurance is not a maritime contract: Marquardt *v.* French, 53 F. 603.] The court has jurisdiction of all proceedings consequent upon the judgment to obtain satisfaction; Campbell *v.* Hadley, 1 Sprague's Decisions 470.}

[4] 1 Kent Comm. 353–355; Jennings *v.* Carson, 1 Pet. Adm. 1; s. c. 4 Cranch 2; Glass *v.* Sloop Betsey, 3 Dall. 6, 16. The jurisdiction of prize causes was afterwards expressly vested in the District Courts by Stat. 1812, c. 107, § 6, vol. ii. p. 761.

[1] U. S. Stat. 1789, c. 21, § 2, vol. i. p. 93; Rev. Stat. U. S. 2d ed. § 913.

[2] U. S. Stat. 1792, c. 36, § 2, vol. i. p. 276; Rev. Stat. U. S. 2d ed. § 913

according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty, respectively, as contradistinguished from courts of common law." The course of proceeding in the civil law was thus made the basis of the general rule of proceeding in these courts.[3] This last provision was afterwards extended by statute[4] to the courts held in those States which had been admitted into the Union subsequent to the passage of the act first above mentioned; subject, however, to such alterations and additions as the courts themselves, in their discretion, might deem expedient, or as the Supreme Court might, by rules, prescribe. And by a later statute,[5] the Supreme Court is fully empowered, from time to time, to prescribe and regulate and alter the forms of process to be used in the district and circuit courts, and the forms and modes of framing and filing libels, bills, answers, and other proceedings, and pleadings in suits at common law or in admiralty and in equity in those courts, and the modes of obtaining and taking evidence; and generally to regulate the whole practice therein, so as to prevent delays, and to promote brevity and succinctness in the pleadings and proceedings.

§ 389. **Same Subject.** Under this last statute the Supreme Court has made rules, prescribing with some particularity, as hereafter will be seen, the method of pleading and of practice in the district and circuit courts, not only in suits at common law, but also in causes of equity and in admiralty. But as the course of the civil law is still recognized as the basis of the practice in admiralty, it is obvious that this law is still to be resorted to, in all points of proceedings and practice, not otherwise regulated by the rules of the Supreme Court. It is, however, to be remembered that though the practice, in courts of equity and of admiralty, is originally deduced from the common fountain of the civil law, it has acquired, in its progress, a diversity of modes from the different channels through which it has been drawn; the practice in equity having been mainly derived through the medium of the canon law, as administered in the ecclesiastical courts, while the general rules of practice in admiralty have come to us more directly from the Roman civil law, though somewhat modified by the maritime codes subsequently promulgated.[1] It is, therefore, material for

[3] The Adeline, 9 Cranch 284.
[4] U. S. Stat. 1828, c. 68, § 1, vol. iv. p. 28.
[5] U. S. Stat. 1842, c. 188, § 6, vol. v. p. 518.
[1] 3 Bl. Comm. 446; 1 Spence, Eq. Jur. of Chancery, pp. 709–712; 2 Browne,

us to understand the leading rules of practice in the Roman tribunals.

§ 390. **Same Subject; Process.** In the earlier period of the Roman law, the party aggrieved might summon his adversary in person, or if he resisted or hesitated (*struitve pedes*), might seize him (*obtorto collo*) and drag him before the *Prætor;* but afterwards, and prior to the time of Justinian, the practice was settled in nearer conformity to that which has come down to our times, by causing the party to be summoned by the apparitors, or officers of the court.[1] The defendant appearing either voluntarily or by compulsion, the plaintiff proceeded to offer to the *Prætor* his libel, or cause of complaint, in writing, and with it produced such contracts or instruments as were the foundation of his title or complaint. The defendant then gave bail to appear at the third day afterwards, this period being allowed to him to consider whether or not he would contest the demand. If he contested it, for which a *formula* was prescribed, the *contestatio litis* being equivalent to the general issue at common law, he might demand that the plaintiff be sworn that the suit was not commenced out of malice, but that the debt or cause of action was, in his opinion, well founded; and the plaintiff might require the oath of the defendant that his defence was made in good faith, without malice, and in the belief that it was a good defence.[2] These oaths were termed *juramenta calumniæ post litem contestatam;* and were required, not as evidence in the cause, but professedly as a check to vexatious litigation.[3] The *Prætor* then appointed the judges (*dabat judices*), for

Civ. & Adm. Law, pp. 34, 348; Ware 298, 389. I commend to the student's attentive perusal the decisions of Judge Ware in the District Court of Maine, which, for depth of learning and copiousness of legal literature, have not been surpassed by those of any other district judge in the United States.

[1] 2 Browne, Civ. & Adm. L. 350, 351.

[2] Gilbert, Forum Romanum, pp. 21, 22; Ware 396. "Et actor quidem juret, non calumniandi animo litem se movisse, sed existimando bonam causam habere: Reus autem non aliter suis allegationibus utatur, nisi prius et ipse juraverit, quod putans se bona instantia uti, ad reluctandum pervenerit:" Code, lib. 2, tit. 59, l. 2.

[3] Ware 395, 396. The nature of this remedy is thus explained by the learned judge: "In all countries, and under all systems of jurisprudence, it has been found necessary to establish some check to causeless and vexatious litigation. In the jurisprudence of the common law, the principal check is the liability to costs. But in the jurisprudence of ancient Rome, it appears that a party was not liable for the costs of the adverse party, merely because judgment was rendered against him. He was liable only when he instituted an action without probable cause; that is, when the suit was vexatious, or, in the language of the Roman law, calumnious; and then costs were not given against him as part of the judgment, but could be recovered only by a new action, called an action of calumny, corresponding to an action for a malicious suit at common law. By this action, the party could recover ordinarily a tenth, but in some cases a fifth, and even the fourth, of the sum in controversy in the former

trial of the cause, before whom the contested libel was brought, and upon this libel the plaintiff put in his "*positions*," to which the defendant was obliged to answer, in order to ascertain what he would admit, and so to supersede the necessity of proving it. But if he denied any part of the positions, then the part denied was formed into distinct "*articles*," and upon these articles interrogatories were framed to be exhibited to the witnesses, who were examined upon these alone by one of the judges, and the depositions were taken in writing by a notary or one of the judge's clerks. After sentence was pronounced by the judges, it was sent to the *Prætor* to be executed.[4]

§ 391. **Same Subject; Interrogatory Action.** "Another part of the Roman jurisprudence, from which our admiralty practice has been in part derived, is the interrogatory actions of the Roman law. These were derived from the edict of the Prætor, and constituted a part of that large portion of the law of Rome called *Jus prætorium* or *Jus honorarium*. The reason of the introduction of these actions was this: If the actor demanded in his action more than was his due, he failed in his whole demand; judgment was rendered against him, and if he failed for this cause, it was with difficulty that he could be restored to his rights *in integrum*. As he could not, in all cases, know the precise extent of his rights, or rather of the defendant's liability, that is, whether he was liable for his whole demand, *in solido*, or for a part, as if the action was against him in his quality of heir, whether he succeeded to the whole inheritance or to a part, this action was allowed by the Prætor, in the nature of a bill of discovery to compel a disclosure, for the purpose of enabling the actor to make his claim to correspond precisely with his right and with the defendant's liability." [1]

action. This was given as an indemnity for his expenses, in being obliged to defend himself against a vexatious suit (Gaii Comm. lib. 4, §§ 175–178; Inst. 4, 16, 1; Vinn. in loc.).

"In the time of Justinian, and perhaps at an earlier period, the action of calumny had fallen into desuetude, and he, as a substitute, required the oath of calumny." "But the oath of calumny, though not evidence, was an essential part of the proceedings in the cause. It was ordered by Justinian to be officially required by the judge, although not insisted upon by the parties, and, if omitted, it vitiated the whole proceedings (Gail, Pract. Obs. L. 1; Obs. 23, 1, and 90, 1; Huber, Prælect, vol. i. L. 4, 16, 2). The practice of requiring the oath of calumny appears to be preserved generally in the civil-law courts of the continent of Europe. It is not, however, observed in France, and Dupin condemns it as conducing more to perjury than to the prevention of litigation, which, he says, is more effectually checked by a liability for costs (Heinn. Recitationes, ed Dupin, 4, 16, 1)." Ware, pp. 395, 397.

[4] Gilb. For. Rom. pp. 22, 23.

[1] Ware 397.

§ 392. **Same Subject.** "By a constitution of the Emperor Zeno, the law *de pluris petitione*, by which the actor failed, if he demanded too much, was abolished, and by the time of Justinian, if not at an earlier period, these interrogatory actions had fallen into disuse, as we learn from a fragment of Callistratus preserved in the Digest. A new practice arose of putting the interrogatories after contestation of suit, and the answers thus obtained, instead of furnishing the grounds for the commencement of an action, became evidence in the case for the adverse party. This appears from the law referred to above: 'Ad probationes sufficiunt ea, quæ ab adversa parte expressa fuerint.' The general practice of the courts, which have adopted the forms and modes of proceeding of the Roman law, of requiring the parties to answer interrogatories under oath, called positions and articles, or facts and articles, seems to be derived through this law of the Digest, and the later practice of the Roman forum, from the ancient interrogatory action; although Heineccius has expressed a contrary opinion."[1] This form of proceeding "has passed, with various modifications, into the practice of the courts of all nations which have adopted the Roman law as the basis of their jurisprudence. Either party may interrogate the other as to any matter of fact which may be necessary to support the action or maintain the defence, and the party interrogated is bound to answer, unless his answer will implicate him in a crime. The answer is evidence against himself, but not to affect the rights of third persons."[2]

§ 393. **Libel.** "Modern practice has introduced another innovation, and has authorized, for the purpose of expediting causes, the introduction, substantially, of the positions and articles into the libel itself, although regularly they cannot, in the form of positions and articles, be propounded until after contestation of suit, and, of course, not until after the answer is in. A libel in this form is said to be an articulated libel, or a libel in articles. The evidence sought for is then obtained in the answer. It is a special answer to each article in the libel, and the *litis contestatio*, when the pleadings are in this form, is said to be special and particular, in contradistinction to a simple libel, and a general answer amounting to the general issue. An issue is formed on each article.

"From this account it is apparent that the practice of the ad-

[1] Ware 398. [2] Ibid.

miralty, so far as relates to the libel and answer, is in its forms identical with that of the Roman law. As in the Roman law, so in the admiralty, the parties are required to verify the cause of action and the defence by oath; the libel may either be simple or articulated, and the answer must correspond with it; either party, also, may require the other to answer interrogatories on oath, touching any matters which may be necessary to support the libel or the answer."[1]

§ 394. **Answer.** In the Roman practice, the libel having been filed, the defendant answered the charge, either by confessing it, or by a general denial of its truth, which is the original meaning of the *litis contestatio;* or by a defensive exception; either declinatory to the jurisdiction, or dilatory, postponing or delaying the suit, or peremptory, answering in effect to the plea in bar of the common law. The defendant having pleaded, the plaintiff replied; and the defendant might rejoin, termed a *duplicatio*, beyond which the parties were seldom suffered to go.[1] But though the old course of practice in the admiralty permitted new matter to be thus introduced by way of replication and rejoinder, the modern and more approved practice is to present new facts when rendered necessary, in an amendment of the libel and answer.[2]

§ 395. **Modern Rules.** Upon the basis of the Roman forms of proceeding, the outlines of which have been thus briefly sketched, the rules of modern practice have been founded; and upon this basis the Supreme Court of the United States, under the authority given by the statute before cited,[1] has constructed its rules of practice for the courts of the United States, in all causes of admiralty and maritime jurisdiction on the instance side of the court. By these rules it is ordered,[2] that all *libels in*

[1] Ware 399. I have not hesitated to adopt the language of Judge Ware, on this subject, his lucid and succinct account of the forms of proceeding in the Roman tribunals being precisely adapted to my present purpose. The student will find a more extended account of those forms of proceeding in Gilbert's Forum Romanum, c. 2–4. And see Story, Eq. Pl. § 14, n.; Oughton, Ordo Judiciorum, *passim;* Brissonius, De Formulis Pop. Rom. lib. 5, De formulis judiciariis. See also Sherwood *v.* Hall, 3 Sumn. 130.

[1] Browne, Civ. & Adm. L. 362–367, 416.

[2] The Sarah Ann, 2 Sumn. 208; Coffin *v.* Jenkins, 3 Story 108, 121. New matters may also be introduced by way of supplemental libel and answer; as in Waring *v.* Clarke, 5 How. (U. S.) 441. {See Reg. 52; 17 How. 6; Taber *v.* Jenny, 19 Law Rep. 27.}

[1] U. S. Stat. 1842, c. 188, § 6, vol. v. p. 518; *supra*, § 388.

[2] Reg. 23. No summons or other mesne process is to be issued until the libel is filed: Reg. 1.

instance causes, civil or maritime, shall state the *nature of the cause*, as, for example, that it is a cause civil or maritime, of contract, of tort or damage, of salvage, or of possession, or otherwise, as the case may be; and if the libel is *in rem*, that the property is *within the district;* and if *in personam*, the names, occupations, and place of residence of the parties. The libel must also *propound* and *articulate* in *distinct* articles, the various allegations of fact, upon which the libellant relies for the support of his suit, so that the defendant may be enabled to *answer distinctly and separately* the several matters contained in each article;[3] and it must conclude with a *prayer of the process* requisite to enforce the rights of the libellant, and for such *relief and redress* as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him at the close or conclusion of the libel, touching all or any of the allegations it contains.[4] It is not necessary in all cases that the libel be sworn to in the first instance, unless when it is founded on a claim of debt; but the defendant may always demand the oath of the libellant to the libel, if he chooses.[5] In suits *in rem*, however, the party claiming the property is required to verify his claim on oath or affirmation, stating that he, or the person in whose behalf he interposes, and none other, is the true and *bona fide* owner of the property; and also stating his authority, if he is acting for the owner.[6]

[3] The Virgil, 2 W. Rob. 204; The Boston, 1 Sumn. 328; Treadwell *v.* Joseph, ib. 390. In a suit for wages, for a share in a whaling voyage, where a charge of general and habitual misconduct is to be made out in defence, it should be propounded in exact terms for the purpose: and where specific acts of misconduct are to be relied on, they should be specifically alleged, with due certainty of time, place, and other circumstances: Macomber *v.* Thompson, ib. 384; Orne *v.* Townsend, 4 Mason 542. But the libel need not state matters of defence: The Aurora, 7 Cranch 382, 389. {The court may, in any stage of the case, require the parties to supply any defect in the pleadings: The Havre, 1 Ben. 297.}

[4] It is obvious that this rule expresses nothing more nor less than is required in the old Latin couplet, quoted in Conset's Brief Discourse on the Form of a Libel:—

> Quis, quid, coram quo, quo jure petatur, et a quo,
> Recte compositus quique Libellus habet.

See Hall's Am. Pract. p. 124; *infra*, § 413.

[5] Hutson *v.* Jordan, Ware 391; Coffin *v.* Jenkins, 3 Story 121. {And see The L. B. Goldsmith, 1 Newb. 123. A libel filed in another suit is not evidence against the libellant of the facts stated therein: Church *v.* Shelton, 2 Curtis C. C. 271.}

[6] Rules in Admiralty, Reg. 26; U. S. *v.* Casks of Wine, 1 Pet. 547, 549; Houseman *v.* The North Carolina, 15 id. 40. As to the persons entitled to make claim, see The Lively, 1 Gall. 315; The Sally, ib. 401; The Adeline, 9 Cranch 244; The Bello Corrunes, 6 Wheat. 152; The Antelope, 10 id. 66; The London Packet, 1 Mason 14; The Packet, 3 id. 255; The Boston, 1 Sumn. 328, 333.

§ 396. **Informations.** In like manner it is required that *informations* and *libels of information*, for any breach of the revenue or navigation or other laws of the United States, should state the place of seizure, whether it be on land, or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction; and the district within which the property is brought, or where it then is. The information or libel must also propound, in distinct articles, the matters relied on as grounds of forfeiture, averring the same to be contrary to the statute or statutes in such case provided; and concluding with a prayer of process, and notice to all persons in interest, to appear and show cause why the forfeiture should not be decreed.[1]

§ 397. **Amendments.** Informations and libels may be *amended* in matters of form, at any time, on motion as of course; and new counts or articles may be filed and amendments in matters of substance may be made, on motion and upon terms, at any time before the final decree.[1] Where merits clearly appear upon the record, it is the settled practice in admiralty not to dismiss the libel for any defect or mistake in the statement of the libellant's claim or title, but to allow him to assert his rights in a new allegation.[2] But though the most liberal principles prevail in admiralty courts in regard to amendments, the libellant will not be permitted, in the appellate court, to introduce, by way of amendment, a new *res* or subject of controversy, which did not go up by appeal.[3]

[1] Rules in Admiralty, Reg. 22. Technical niceties, unimportant in themselves, and standing only on precedents, the reasons of which cannot be discerned, are not regarded in libels of information in admiralty. It is sufficient if the offence be described in the words of the law, and be so described, that if the allegation be true, the case must be within the statute, the facts being so indicated as to give reasonable notice to the party to enable him to shape his defence: The Hoppet, 7 Cranch 394; The Samuel, 1 Wheat. 15; The Merino, 9 id. 401; The Palmyra, 12 id. 13.

[1] Rules in Admiralty, Reg. 24. And see Orne *v.* Townsend, 4 Mason 541. {A libel *in rem* against a vessel, and personally against her master, may properly, under the present practice established by United States Supreme Court, be joined. And if the libellant have originally proceeded against vessel, master, *owners, and pilot*, the libel may, with leave of the court, be amended so as to apply to the vessel and master only in the way mentioned: Newell *v.* Norton and Ship, 3 Wallace (U. S.) 257.}

[2] The Adeline, 9 Cranch 284; Anon., 1 Gall. 22.

[3] Houseman *v.* The North Carolina, 15 Pet. 40, 50. And see 2 Browne, Civ. & Adm. L. p. 416; The Boston, 1 Sumn. 328; {Kynoch *v.* The S. C. Ives, 1 Newb. 205; Coffin *v.* Jenkins, 3 Story C. C. 108; Udall *v.* Steamship Ohio, 17 How. (U. S.) 17. But see Weaver *v.* Thompson, 1 Wall. (U. S.) Jr. 343. For the rules as to the amendment of answers in admiralty on appeal to the Circuit Court, see Lamb *v.* Parkman, 21 Law Rep. 589. The same principle of amendment applies to the answer. Thus, in The Oder, 13 F. 272, an amended answer was permitted to be filed after the case had been appealed to the Circuit Court. In this case the amendments were sup-

§ 398. **Answer.** In all causes civil and maritime, whether *in rem* or *in personam*, the *answer of the defendant* to the allegations in the libel must be on oath or solemn affirmation. His answer must be full, and explicit and distinct to each separate article and separate allegation in the libel, in the same order as they are there numbered;[1] and he is required to answer, in like manner, each interrogatory propounded at the close of the libel.[2] But he may, in his answer, object to answer any allegation or interrogatory in the libel, which will expose him to any prosecution or punishment for a crime, or to any penalty or forfeiture of his property for a penal offence.[3] If he omits to answer upon the return of the process, or other day assigned by the court, the libel may be taken *pro confesso* against him.[4] And if he answers, but does not answer fully, explicitly, and distinctly, to all the matters in any article in the libel, the court, upon exception taken thereto, may by attachment compel him to make further answer, or may order that the matter of exception be taken *pro confesso* against the defendant to the full purport and effect of the article thus insufficiently answered.[5] It is not, however, bound to proceed to this extent; but in such cases of what is termed *presumptive confession*, it may limit the presumption to that portion of the article to which the exception is well taken.[6]

ported on two grounds. 1. That the facts as they were proved in the case showed that the allegation which was to be amended was inserted by an accidental error. 2. That the other proposed amendments accorded with the facts as proved, and did not introduce new issues.}

[1] [Virginia Ins. Co. *v.* Sundberg, 54 F. 389. A plea to the jurisdiction may be joined with an answer: Inman *v.* The Lindrup, 70 id. 718.]

[2] Rules in Admiralty, Reg. 27. And see The William Harris, Ware 367, 369; Coffin *v.* Jenkins, 3 Story 109; Hutson *v.* Jordan, Ware 385; Dunlap's Adm. Pract. 201, 202; The Boston, 1 Sumn. 328. A similar answer is required of the garnishee in a foreign attachment: Rules in Adm. Reg. 37. {This rule does not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless ordered by the district judge: Additional Rule in Admiralty, 10 How. 5.}

[3] Rules in Admiralty, Reg. 31. And see U. S. *v.* Packages, Gilp. 306, 313; Dunlap's Adm. Pract. 207.

[4] Ibid. Reg. 29. And see Clerke's Praxis, tit. 24; Hall's Adm. Pract. p. 52. If the omission is through ignorance of the practice of the court, and the defendant is absent at the time of hearing, the court is not precluded from receiving any evidence which his counsel, as *amicus curiæ*, may offer: The David Pratt, Ware 495.

[5] Ibid. Reg. 30. Exceptions to any libel or answer may be taken, for surplusage, irrelevancy, impertinence, or scandal; and referred to a master as in equity: ib. Reg. 36. {It has been held that exception cannot be taken to an answer because the respondent in it alleges that he "is ignorant" as to some of the allegations of the libel, though it is said to be better to require him also to state what his belief about the matter contained in the allegation is: The City of Salem, 10 F. 843. And in The Minnehaha, L. R. 3 Ad. & Ec. 148, Sir Robert Phillimore compelled the defendant to answer according to her knowledge, information, and belief, saying that if she had no belief about the matter, a statement to that effect would be a sufficient answer.}

[6] Dunlap's Adm. Pract. 204.

§ 399. **Interrogatories to Libellant, or Defendant.** The *defendant may require the personal answer of the libellant*, upon oath, or solemn affirmation, to any interrogatories which he may propound at the close of his own answer, touching any matters charged in the libel, or any matter of defence set up by himself;[1] not exposing the libellant to criminal prosecution or punishment, nor to a penalty or forfeiture for a penal offence. And in default of due answer, the libel may be dismissed, or the libellant may be compelled by attachment to answer, or the matter of the interrogatory may be taken *pro confesso* in favor of the defendant at the discretion of the court.[2] This right of requiring the answer of the adverse party, upon oath, to interrogatories pertinent to the cause, is a mutual right, and may be claimed at any stage of the cause, even down to the hearing.[3]

[1] [Stoffregan *v.* The Mexican Prince, 70 F. 246.]

[2] Rules in Admiralty, Reg. 32. Each party, on the instance side, may require the oath of the other: Gammell *v.* Skinner, 2 Gall. 45; The David Pratt, Ware 495. A person intervening *pro interesse suo* has the same privilege: Rules in Admiralty, Reg. 34, 43.

[3] 2 Browne, Civ. & Adm. L. p. 416. [The subject of filing interrogatories in admiralty is regulated by the rules of court. Thus, Rule 99 of the U. S. District Court regulated the practice prior to the adoption of the twenty-third rule of the Supreme Court in 1844. The latter covers the same general ground as the former; and in the restrictions interposed, requiring the libellant's interrogatories to be propounded "at the close of the libel," it controls and supersedes the former rule of the District Court. The practice is essentially the same as that in equity, in which the interrogatories are limited to the subjects contained in the bill. If the libellant wishes to file further interrogatories, Rule 51 of the Supreme Court, promulgated in 1854, allows him to amend his libel upon application to the court; and to such an amended libel, when allowed, the desired interrogatories can be regularly added, under Rule 23: The Edwin Baxter, 32 F. 296. The answers to interrogatories propounded at the close of a pleading under admiralty rules 23 and 27, are not strictly evidence in the cause, in any different sense than that in which the pleadings are evidence: Andrews *v.* Wall, 3 How. 568. Though sworn to, they are not a "deposition," but are designed rather as compulsory amplifications of the pleadings on the specific subjects propounded in the interrogatories, so as to dispense with the taking of proofs or evidence proper, on the facts that may be admitted. The replies usually make part of the answer itself; but it is immaterial whether they are answered as a part of a pleading or separately. As evidence they stand like the pleadings only. They are proofs of the record, and may, like the pleadings, be referred to by either party. What is admitted needs no further proof; but as respects matters which still remain at issue, such answers are not affirmative proof in favor of the party making them: Salmon *v.* The Serapis, 37 F. 442. These interrogatories cannot be used to make the opposite party produce documents. An interesting discussion of this point is given in a recent case in the Federal Reports. In this case the libellant propounded interrogatories in the libel under Rule 23, calling for the production of any letters, cablegrams, or correspondence between the respondents and their agents, or the master, relating to the damage to cargo, which forms the subject-matter of litigation. Rule 23 of the Supreme Court, in admiralty, provides that the libellant may require the defendant to answer all interrogatories "touching all and singular the allegations in the libel." The court held that the interrogatories must be confined to the allegations of the libel, — that is, to those matters or particulars that go to make up the item of damage, or that constitute alleged defects, or the particular acts of negligence, or specifications of negligence, that might properly be averred in the libel and are covered by it in at least general terms. Contracts, bills of lading,

§ 400. **Power to refer.** Where the purposes of justice require it, the court has power to refer any matters, arising in the progress of the suit, to one or more *commissioners* to be appointed by the court to hear the parties and make report therein; these commissioners having all the powers of masters in chancery.[1]

§ 401. **Causes, plenary and summary.** It may here be added, that, in the Roman law, causes are either *plenary* or *summary*. *Plenary* causes are those in which the order and solemnity of the law are strictly observed, in the regular *contestation* of the suit, a regular *term to propound*, and a solemn *conclusion* of the acts; the least omission or infringement of which nullifies the proceedings. *Summary* proceedings are those in which this order and solemnity are dispensed with; the suit is deemed *contested* by the next contradictory act concerning the merits, after the libel is put in; there is no assignation to propound, and no express conclusion. And all causes in admiralty are *summary*, or "instantaneous;" it being of primary importance to the interests of commerce and navigation that justice be done with the least possible delay.[1]

or other documents, when directly forming the subject-matter in litigation, may be the subject of interogatories, and perhaps be required to be produced. But letters passing between the defendants and their agents do not stand in any such relation to the subject-matter of this suit. If the fact that certain information was communicated to the defendants was material, that might authorize inquiry as to letters containing such information. But that is not the present case. No averment as respects such letters, or any information they contain, could here be properly pleaded. The libellant has the right to interrogate the defendant as to each and every matter put in issue; but the rule requires the defendant's oath, and his oath only, in response thereto. It does not require him to produce documents, much of which would be hearsay, as mere evidence in the libellant's favor, or as a substitute for his own oath as regards the material facts in issue. That is not within the intent of the rule. The inspection of documents is a different matter, and is obtained, when allowed, by a different procedure, or under different rules: Havermeyers & Elder Sugar Refining Co. *v.* Campania Transatlantica Espanola, 43 F. 90.]

[1] Rules in Admiralty, Reg. 44; *supra*, §§ 332–336.

[1] 2 Browne, Civ. & Adm. L. 413. And see Gaines *v.* Travis, 8 Leg. Obs. 48; Brisonius, De Verb. Significat. verb. *Summatim;* Pratt *v.* Thomas, Ware 435, 436. Hence it is, that courts of admiralty do not require all the technical precision and accuracy in pleading, which is demanded in the courts of common law. It is only requisite that the cause of action should be plainly and explicitly set forth, not in any particular formula, but in clear and intelligible language, so that the adverse party may understand what he is required to answer, and make up an issue upon the charge: Jenks *v.* Lewis, ib. 52. Courts of admiralty, as far as their powers and jurisdiction extend, act upon the enlarged and liberal jurisprudence of courts of equity: Brown *v.* Lull, 2 Sumn. 443. Hence the rule applies here, as in other courts of equity, that the party who asks aid must come with clean hands: The Boston, 1 id. 328. Hence, also, it is, that a condemnation against one defendant who is in contumacy, or makes no answer, does not prevent another defendant from contesting, so far as respects himself, the very fact which is thus admitted by the party in default: The Mary, 9 Cranch 126, 143; that an agreement in court, in respect to the disposition of the cause, if made under a mistake, will be set aside: The Hiram, 1 Wheat. 440; that the

court will, in a case of fraud, or something equivalent to it, or for other strong reasons, suffer a cause to be reopened for the correction of a particular error, after it has been closed: The Fortitudo, 2 Dods. 58; The Monarch, 1 W. Rob. 21; The New England, 3 Sumn. 495, 506; Jacobsen's Sea Laws, pp. 395, 396; that it will not lend its aid to enforce contracts essentially vicious, or tainted with fraud or extortion: The Cognac, 2 Hagg. Adm. 377; and that it will interpret maritime contracts with greater liberality than is found in the stricter doctrines of the common law: Ellison *v.* The Bellona, Bee 106; The Nelson, 6 C. Rob. 227; {The Minerva, 1 Hagg. 347; The Prince Frederic, 2 id. 394; The Cypress, 1 Blatchf. & H. 83; The Triton, ib. 282; The Betsey and Rhoda, Daveis 112; The Heart of Oak, 1 W. Rob. 204. But though courts of admiralty act upon equitable principles, they have no power to administer equitable rights in cases not otherwise within their jurisdiction: Andrews *v.* Essex F. & M. Ins. Co., 3 Mas. C. C. 6; Davis *v.* Child, Dav. 71; Kellum *v.* Emerson, 2 Curt. C. C. 79; Kynoch *v.* The S. C. Ives, 1 Newb. 205. An assignee of a *chose in action* may sue in his own name in the admiralty. And this is so, if the assignment be only of a part of the entire right: at least the respondents cannot object, on that ground, if the whole right be represented by the libellants: Swett *v.* Black, 1 Sprague's Decisions, 574.}

CHAPTER II.

EVIDENCE IN INSTANCE CAUSES.

§ 402. 1. **General Rules.** The rules of evidence in admiralty and maritime causes, as well as in causes in equity, are generally the same as at common law, so far as regards the relevancy of evidence, the proof of the substance of the issue, the burden of proof, the requisition of the best evidence, the competency of witnesses, and some other points; all which have been sufficiently treated in a preceding volume. A few additional particulars only will here be noted, which either distinguish proceedings in admiralty, or illustrate the application of those rules in admiralty courts.[1]

§ 403. **Relevancy.** Thus, as to the *relevancy of evidence*, it is a rule in admiralty, that the proofs and allegations must coincide; evidence of facts not put in contestation by the pleadings, and allegations of facts not established by proofs will alike be rejected.[1] The hearing is upon the pleas and proofs alone;

[1] {The rules of evidence are perhaps more relaxed in the courts of admiralty than in the courts of common law. Thus, such courts will take judicial notice of matters, and admit documents, not strictly proved: The J. F. Spencer, 3 Bened. 337.}

[1] The Sarah Ann, 2 Sumn. 209; Pettingill *v.* Dinsmore, Daveis 211; [White *v.* The Ranier, 45 F. 773; Marshall *v.* The Earnwell, 68 id. 228]. {But the freedom with which amendments in allegations are allowed in admiralty, renders this rule almost without effect, and if the proof offered cannot have surprised the other party, it will be admitted. Thus courts frequently decide collision cases, upon points not alleged in the pleadings, but appearing in the evidence: The Wm. Penn, 3 Wash. C. C. 484; The Lady Ann, 15 Jur. 18; The Clement, 2 Curtis C. C. 363; The Aliwal, 25 Eng. L. & Eq. 602. Cf. Dupont *v.* Vance, 19 How. (U. S.) 162. [In a libel for services rendered at the master's request, evidence of an express contract is admissible under an averment that the sum demanded therefore became due: Young *v.* The Kendal, 56 F. 237.] But an amendment of the libel asked upon the trial will not be allowed if it introduces a new and somewhat inconsistent ground of claim, and no evidence in reference to such claim has been taken, and the witnesses for the defence are gone: The Keystone, 31 id. 416. And so it has been held that if the libel make no reference to a distinct cause of action, the libellant cannot insist upon it, even though he has given evidence to support it: The Pope Catlin, ib. 410. Thus, where damage for coal-dust, as a separate cause of action, was not referred to in either of the libels, and although some reference was made to it by the libellants in dealing with the insurers, and a few questions were asked concerning coal-dust by the claimants in their depositions taken in 1883, yet it was not presented as a separate ground of claim in the action until the trial of the cause, more than three years after the arrival of the ship, and long after the respondent's depositions had been completed, and the goods sold and

secundum allegata et probata; but the appellate court will sometimes permit parties, in that court, *non allegata allegare, et non probata probare*, under proper qualifications.[2]

§ 404. **Burden of Proof.** So as to the *burden of proof*, the general rule is recognized, that the obligation of proving any fact ordinarily is incumbent on him who alleges it. Thus, in cases of *collision*, the court will require preponderating evidence to fix the loss on the party charged, before it will adjudge him to make compensation.[1] So where, in an instance or revenue

beyond the reach of examination, an amendment of the libel to include this cause of action was disallowed at the trial: The Thomas Melville, ib. 488; Hays *v.* Pittsburgh G. & B. Packet Co., 33 id. 552. But generally in admiralty causes, where testimony is taken upon all the merits of the case without objection, and no surprise or injury can result to either party, the pleadings will be deemed conformed to the proofs. See The Maryland, 19 id. 551, 557, and cases there cited. And so, also, where the libel contains only a general charge of negligence, and the parties go to the trial without any other specification of the kind of negligence, assent to proof of any kind of negligence may be inferred. But as the respondent would be entitled, on demand, to have the particulars of negligence specified, so, where the libel in connection with an averment of negligence in general, sets forth the particular kind of negligence for which the claim is made, the issue must be deemed limited to these particulars, as much so as if a bill of particulars had been served on demand. To permit an amendment by averring substantially a new cause of damage at the trial, where seasonable objection appears, cannot be allowed: McKinlay *v.* Morrish, 21 How. 343; The M. M. Caleb, 10 Blatchf. 467, 471, 472; The Keystone, *supra.*]

[2] The Sarah Ann, 2 Sumn. 210; The Marianna Flora, 11 Wheat. 38; The Boston, 1 Sumn. 331.

[1] The Ligo, 2 Hagg. Adm. 356; [The Wolverton, 13 F. 44; The Ralph, 12 id. 794. But see *post*, § 407 and notes.] And see the Columbine, 2 W. Rob. 30. But the burden of proving that a collision with a vessel *at anchor* arose from inevitable accident lies on the party asserting it: The George, 9 Jur. 670. See *infra*, §§ 406, 407. [So when the action is one for damages caused in any way by negligence, the allegations of negligence must be proved by the libellant: The Marpesia, L. R. 4 P. C. 212; The Benmore, L. R. 4 Ad. & Ec. 132; The Heline, Brow. & Lush. 415, 429; The Figlia Maggiore, L. R. 2 Ad. & Ec. 106; The Viscount, 11 F. 168; The Mechanic, 9 id. 526; The Behera, 6 id. 400; [Crawley *v.* The Edwin, 87 id. 540; The Meta, 88 id. 21.] But when it is proved that goods were delivered to a carrier in good condition, and by him delivered damaged, the burden of evidence of non-negligence, or that the damage arose from an excepted cause, is on the carrier: The Peter der Grosse, L. R. 1 Prob. Div. 414; The Emma Johnson, Sprag. 527; The Pharos, 9 F. 912. See *ante*, Vol. II., Carriers. An exception to this general rule exists in cases of a launch. If the libellant proves that the respondent vessel was launched, and in the process of launching, injures the vessel of the libellant, then the burden of proving that every proper precaution was taken to prevent such accidents at the launch, and reasonable notice was given of the intended launch, is on the respondent: The Andalusian, L. R. 2 Prob. Div. 231; The Glengarry, ib. 235; The United States, 12 L. T. N. S. 33; The Blenheim, 2 Wm. Rob. 421; The Vianna, Swa. 405. So, in accordance with the general rule, where a libellant, opposing an intervenor's claim for a lien, asserts that the lien has been abandoned, the proof required of the abandonment of a lien will be strong and clear: The Two Marys, 10 F. 919; The Sirocco, 7 id. 599. So where either party asserts a contract, the burden of proving the existence of the contract lies on him: The James Jackson, 9 id. 614. So in collisions the burden of proof is on a vessel adrift to excuse herself, and *prima facie* she is negligent unless her owners can show due diligence when she collides with one harmlessly and faultlessly at anchor: The Louisiana, 3 Wall. 164; The Jeremiah Godfrey, 17 F. 738; The Chickasaw, 41 id. 638. The burden is upon a vessel claiming a departure from the statutory requirement as to right of way, to prove "(1) that a proposition to depart from the statute was made by

cause, a *prima facie* case of forfeiture is made out on the part of the prosecution, the burden of proof is thrown on the *claimant*, to explain the difficulties of the case, by the production of papers and other evidence, which, if the ship, as he alleges, be innocent, must be in his possession or under his control; on failure of which, condemnation follows, the defect of testimony being deemed presumptive evidence of guilt.[2] So, where a forfeiture of goods is claimed, for importation in a vessel *not neutral*, the burden of proof of the vessel's neutrality is devolved on the claimant, he holding the affirmative, and the facts being particularly within his own knowledge and privity; and this, notwithstanding the negative averment, as to the neutral character of the property, in the libel or information.[3] And generally, where the law presumes the affirmative, the proof of the negative is thrown on the other side; and where any justification is set up, the burden of proof is on the party justifying.[4] In

her by means of signals prescribed by rule of the supervising inspectors, and in due season for the other vessel to receive the proposition, and act upon it with safety; (2) that the other vessel heard and understood the proposition thus made; (3) that the other vessel accepted the proposition." "These facts," says Judge Longyear, "must be made out by clear and satisfactory proofs. They must not be left to inference. The statute in question is one of vital importance for the protection of life and property upon the waters, and it will not do to hold a party blameless for a departure from its plain provisions upon a plea of an agreement or license to do so, except where such agreement or license is admitted, or is made out beyond all reasonable doubt by clear and satisfactory proof. Where the agreement is denied, and the evidence is conflicting and contradictory, and does not clearly preponderate in favor of such agreement, the statute must govern, and the responsibility of parties must be determined accordingly:" The Clarion, 27 F. 130; Hood *v.* The Lehigh, 43 id. 601.} [When the libellant seeks to hold the vessel for money borrowed by the master, on the ground of the necessity of the vessel, the burden is on the libellant to show such necessity: Bush and Sons Co. *v.* Fitzpatrick, 73 id. 501.]

[2] The Luminary, 8 Wheat. 407, 412. The burden of proof is generally on the claimant where a special defence is set up: The Short Staple, 1 Gall. 104; Ten Hds. of Rum, ib. 188. And where the fact is clear, and the explanation doubtful, the court judges by the fact: The Union, 1 Hagg. Adm. 36; The Paul Shearman, 1 Pet. C. C. 98. Where a seizure is made, upon probable cause, pursuant to the Revenue Act, U. S. Stat. 1799, c. 22, § 71, the statute expressly devolves the burden of proof on the claimant.

[3] U. S. *v.* Hayward, 2 Gall. 485.

[4] Ib. p. 498; Treadwell *v.* Joseph, 1 Sumn. 390. {Baker *v.* Smith, Holmes 85. In the admiralty courts the judge decides upon the weight of the testimony and the credibility of the witnesses. It is of course impossible to lay down any fixed rules by which the court will necessarily be guided in this matter, yet there are some tests which have been used so often as to have a certain quasi authority as rules. Thus it has been said that where there is a great conflict of testimony the court must be governed chiefly by undeniable and existing facts if such exist, and the testimony of any particular witness should be compared with these facts, so as to ascertain the inherent probability or improbability of his story: The Great Republic, 23 Wall. (U. S.) 20; The Hope, 4 F. 89; The Mechanic, 9 id. 526.

And so it has been said that if the case made out by the allegations or proof of one side, or the testimony of a witness, is in itself highly improbable, it should require the most convincing proof to support it, or may be disregarded without proof: U. S. *v.*

cases of *appeals*, also, the burden of proof is on the appellant, to demonstrate beyond a reasonable doubt a mistake or error of law or fact in the judgment of the court below, or gross excess in the amount of damage awarded.[5]

Borger, 7 id. 193 ; The Helen R. Cooper, 7 Blatchf. C. C. 378 ; The Leversons, 10 F. 753. So that if a witness has given evidence that has some undoubted and egregious mistakes or errors, the rest of his testimony should be strictly scrutinized : The Leversons, *supra;* The Sandringham, ib. 556. It has been held that in cases of collision, the fact that seamen of one vessel are called as witnesses for the other may disparage their testimony : The Monticello, 1 Low. 184.}

[5] Cushman *v.* Ryan, 1 Story 91, 97. {*Evidence on appeal.* When a case in admiralty is appealed from the District Court to the Circuit Court, if the dispute in the case turns on a question of fact, and there is a conflict of evidence, if the testimony of the witnesses was taken orally in the presence of the District Judge, the Circuit Court will not, as a general rule, disturb the findings of the District Court on a question of fact, but where all the evidence in the cause in the District Court was taken by deposition before a commissioner, so that the same evidence comes before the Circuit Court which was before the District Judge, the Circuit Court may go into questions of fact, and even admit new evidence: Cooper *v.* The Saratoga, 40 F. 511 ; Downs *v.* The Excelsior, ib. 271 ; Brooman *v.* The William H. Vanderbilt, 37 id. 118 ; The Alhambra, 33 id. 77 ; The Oder, 13 id. 271. So when witnesses are examined orally before a commissioner who finds certain facts thereupon, the Circuit Court will not disturb those findings without strong proof of error, as it relies somewhat upon the commissioner's estimate of the credibility of the witnesses, based upon their appearance and demeanor before him : The City of Troy, ib. 47. On the same principle it seems to be a matter within the discretion of the Circuit Court whether it will go into questions of fact in any case, and disturb the findings of the District Court.

On appeal to the Supreme Court, however, it is provided by statute of Feb. 16, 1875 (1 Supp. to Rev. Stat. 135), that the Circuit Court in cases of admiralty and maritime jurisdiction, on the instance side of the court, shall find the facts and the conclusions of law, and state them separately. Such findings of fact are conclusive, and the Supreme Court will not examine into the evidence: The Annie Lindley *v.* Brown, 11 F. 447. As the court in an admiralty case is the arbiter of the facts, its estimate of the credibility of the witnesses may be based upon their appearance and demeanor, as has been suggested above : The Isaac Bell, 9 id. 842. The English courts of admiralty have recognized in their decisions this principle, and have held generally that where the judgment of the court where the oral hearing is had, is based on the various degrees of credibility of the witnesses who appeared before the court, an appellate tribunal, which has not the same means of judging of the credibility of the witnesses, will not ordinarily reverse the finding of the judge on a question of the weight of the evidence only : The Sisters, L. R. 1 Prob. Div. 117 ; The Singapore, L. R. 1 P. C. 378 ; The Julia, 14 Moore P. C. 210 ; The Alice, L. R. 2 P. C. 245. But this is not the case when the decision of the court below does not depend on the credibility of the witnesses, but on the inferences from the evidence drawn by the judge : Baggallay, J. A., in The Glannibanta, L. R. 1 Prob. Div. 283, thus states the principle: "In the course of the argument we were much pressed with the language from time to time made use of by the Judicial Committee of the Privy Council in admiralty cases, to the effect that if, in the Court of Admiralty, there was convicting evidence, and the judge of that court, having had the opportunity of seeing the witnesses and observing their demeanor, had come on the balance of the testimony to a clear and decisive conclusion, the Judicial Committee would not be disposed to reverse such decision except in cases of extreme and overwhelming pressure, and it was urged upon us that in the present case there was no such extreme and overwhelming pressure as should induce us to reverse the decision of the admiralty division as to the question of fact upon which its decision was based. Now we feel, as strongly as did the lords of the Privy Council, in the cases just referred to, the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanor and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal,

§ 405. **Best Evidence.** And so, also, respecting the requirement of the *best evidence*, the principle of the general rule is admitted in courts of admiralty, although, in its application, evidence is sometimes received as the best evidence, which courts of common law and of equity would reject. This arises from the peculiar nature of the subjects and circumstances which admiralty has to deal with, and from the impossibility of otherwise administering justice in particular cases. It is on this ground that the testimony of the persons on board the ship of the salvors, and of the wreck, and of those on board ships coming in collision, is sometimes received, even when objectionable at law on the score of interest, or on other grounds;[1] as will be shown in another place. And accordingly, in a cause of collision, it was held, that the protest of the master of a foreign vessel, in tow by the vessel run foul of, being *res inter alios acta*, was not admissible in evidence, *except* in a case of necessity, where other evidence could not be obtained.[2]

§ 406. **Presumptions.**[1] From the same cause, namely, the peculiar necessity arising out of the nature of transactions on shipboard and at sea, the rules of *presumptive evidence* are applied more familiarly and with a larger freedom in courts of admiralty than in equity or at common law. This is especially the case in revenue causes, and in cases of collision, and of collusive capture. Accordingly, where the *res gestæ* in a *revenue cause*

and that court cannot excuse itself from the task of weighing the conflicting evidence, and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect." Since the enactment of the statute of 1875, Feb. 16 (1 Supp. to Rev. Stat. 135), above referred to, it is evident that such a principle would not apply to appeals from the Circuit to the Supreme Court, as the findings of fact in the Circuit Court are conclusive, but only to appeals from the District to the Circuit Court.] [Final jurisdiction in admiralty cases is now vested in the Circuit Court of Appeals, which will follow the conclusions of the trial judge, unless based on evidence manifestly insufficient: The Brandywine, 87 F. 652, U. S. App. The Supreme Court will follow the decisions of the lower courts on questions of fact, unless such decisions are clearly shown to be erroneous: Compania La Flecha *v.* Brauer, 168 U. S. 104, 123.]

[1] See *infra*, §§ 412, 414. [When any occurrence which took place on board a vessel would naturally come more under the observation of those on board the vessel than of those on board some other vessel, more weight will be given to the testimony of the former than of the latter, especially if the latter is merely negative in effect, *e. g.* that they did not see the occurrence: The William Crane, 11 F. 436.]

[2] The Betsy Caines, 2 Hagg. Adm. 28. [The non-production of a witness who would naturally be supposed to know a fact or facts which are proved in the case, supports an inference unfavorable to the party which should have produced him: The E. A. Baisley, 13 F. 703, The Sandringham, 10 id. 556; The Freddie L. Porter, 8 id. 170; but if the absence is accounted for it does not, as by showing that the witness has since become insane: The Oder, 13 id. 272.]

[1] [See Vol. I. c. VI.]

are incapable of an explanation consistent with the innocence of the party, condemnation follows, though there be no positive testimony that the offence has been committed.[2] And when the question arises whether an act has been committed which is a cause of forfeiture, an apparent *intention* to evade the payment of duties, though not, *per se*, a cause of forfeiture, will justify the court in not putting upon the conduct of the party an interpretation as favorable as, under the circumstances, it would be disposed to do.[3] In cases of *collision*, also, where the evidence on both sides is conflicting and nicely balanced, while the court will be guided by the probabilities of the respective cases which are set up, it will at the same time presume, *a priori*, that the master of a ship does what is right, and follows the regular and correct course of navigation.[4] It will also be presumed, in maritime transactions, that the usual and ordinary course of conducting business was pursued; as, for example, that where goods are shipped under the common bill of lading, they were shipped to be put under deck.[5] So, in cases of collision, where the evidence is nicely balanced, the presumption *a priori* is, that the master would follow the ordinary course.[6]

§ 407. **In Cases of Collision.** In cases of collision, the rules of presumption are deduced from *nautical experience* and the settled *usages of navigation*.[1] Hence, if a ship, sailing with a

[2] The Robert Edwards, 6 Wheat. 187.

[3] Ibid.

[4] The Mary, 2 W. Rob. 244. {In cases of collision, the inferences which may be drawn from the facts proved in regard to the vessels may outweigh the testimony of a witness, if it conflicts with such inferences: The Oder, 13 F. 272; *e. g.* when it is proved that the lights of a vessel were trimmed, filled, and burnished, there is a presumption that they burned brightly, which, especially if corroborated by direct testimony, will outweigh the direct testimony of a witness who swears that the lights burned dimly: The Golden Grove, ib. 674. So, in a case of collision, although the fact that one of the vessels had no proper lookout stationed has no legal effect upon the case, if it is proved that such default had in no way caused the accident; yet if there is an irreconcilable conflict of testimony as to the way in which the accident happened, this fact that on one of the vessels there was no proper lookout will, if the two accounts are nearly evenly balanced, and a portion of the account given by those on that vessel is improbable, discredit that account and turn the balance of evidence in favor of the other vessel: The Excelsior, 12 id. 195.}

[5] Vernard *v.* Hudson, 3 Sumn. 405.

[6] The Mary Stewart, 2 W. Rob. 244.

[1] {The Clement, 2 Curtis C. C. 363, where it appears that if one vessel had neglected an ordinary and proper measure of precaution, the burden of proof will lie on such vessel to show that the collision would have happened without her fault. See also The Virgil, 2 W. Rob. 201; The New York *v.* Rea, 18 How. (U. S.) 223, 224; The H. M. Wright, 1 Newb. 495. [If the vessel has not violated any statutory regulations, the burden is only the ordinary one, to produce a preponderance of evidence: The H. F. Dimock, 33 U. S. App. 647.] In collision cases, courts of admiralty regard the want of a light on board a vessel at night as strong evidence of negligence: [The Glendale,

fair wind, runs down another sailing upon a wind or plying to windward, it is presumed, *prima facie*, to be the fault of the former; and the burden of proof is adjusted accordingly.[2] So, if both ships are sailing large, or going before the wind, in the same direction, and with ample sea-room, and one runs foul of the other, it is presumed to be the fault of the pursuing ship. And where one ship is at anchor, and a ship under sail runs foul of her, the sailing ship is presumed to be in fault.[3] This presumption is stronger in open sea than in rivers; but it has force even in rivers, where due allowance ought to be made for the current or tide bearing the ship out of her apparent course.[4]

42 id. 546.] This is more especially the case with vessels lying at anchor in the path of other vessels. But the omission is only evidence of negligence, and does not constitute it in all cases. See The Osprey, 2 Wall. C. C. 268; Ure *v.* Coffman, 19 How. (U. S.) 56; N. Y. & Va. Co. *v.* Calderwood, ib. 241; The Rose, 2 W. Rob. 4; The Iron Duke, ib. 377; The Victoria, 3 id. 49. By the maritime law, a vessel at anchor, in a thoroughfare, in a dark night, is bound to exhibit a light: Lenox *v.* Winnisimmet Company, 1 Sprague 160.}

[2] [The City of Augusta, 80 F. 297, U. S. App.]

[3] ["Mary" Tug Co. *v.* British, etc. Co., 1897, A. C. 351; The Bulgaria, 74 F. 898; The Oregon, 158 U. S. 186. This presumption does not arise in case of a collision with a derrick anchored in a crowded channel for the purpose of raising a vessel: The Chauncey M. Depew, 59 F. 791.]

[4] Van Heythuysen, Mar. Evid. pp. 20, 21; The Woodrop Sims, 2 Dods. 87; The Chester, 3 Hagg. 318; The Baron Holberg, ib. 244; Sills *v.* Brown, 9 C. & P. 601; The Speed, 2 W. Rob. 225; The Thames, 5 C. Rob. 345; The Girolamo, 3 Hagg. Adm. 173; The Batavier, 10 Jur. 19; {The Lady Franklin, 2 Low. 221; Pierce *v.* Lang, 1 id. 65. So when one ship is at anchor, and another, also at anchor, drags down upon her, the presumption is that the moving vessel is at fault: The Lincoln, ib. 46; The City of Augusta, 30 F. 845. So, if a vessel is lying in a dock, and another comes into the dock, and a collision occurs, the presumption is that the moving vessel was in fault: The John W. Hall, 13 id. 394; The City of Lynn, 11 id. 339. This presumption, however, is overcome by proof that the vessel in the dock was improperly moored. Thus where a vessel was moored at the end of a wharf, in such a manner that her bow was near the fender-piling of a ferry slip, and the ferry-boat, entering the slip, struck the fender-piling, causing it to swing back so far that the ferry-boat struck the bow of the moored vessel and injured it, the court, on a libel by the injured vessel, made this decision: "The Secret (the moored vessel) was improperly moored. The space over which the piling swayed was a part of the company's slip, and the libellants had no right to place their vessel in front of it, so as to obstruct the entrance of the ferry-boat. The dangerous position of the moored vessel was noticed by those employed on the ferry, early in the morning, and they called the attention of those on the steamship to it several times during the day, and requested them to haul further astern. This they did not do, and their neglect was the sole cause of the accident. I find no evidence of neglect or misconduct on the part of the ferry-boat. She seems to have exercised all due care to avoid the collision. The libellants contend that she was bound at all events to avoid the collision and that she should either have discontinued her trips, or else have applied to the harbor master to compel a change of position by the Secret. She was obviously bound to do neither. She performed her entire duty in giving notice to the Secret of her dangerous position as soon as discovered, and in doing what she could to avoid collision. If, after notice, the Secret saw fit to retain her position, she did so at her own risk." And the law of the presumptions on this point is stated thus: "If a ship in motion comes into collision with one at anchor or moored to a wharf, the presumption is that it is the fault of the ship in motion, unless the anchored or moored vessel was where she should not have been. If a vessel is anchored or moored in an improper place, she must take the consequences which fairly

It may be added, in this connection, that it is a well-established rule, where two vessels are approaching each other on opposite tacks, that the vessel on the larboard tack must "give way," and the vessel on the starboard tack must keep her course;[5] though the former may be close-hauled, and the latter may have the wind several points free.[6] If the former should endeavor to avoid the collision by passing to windward, instead of giving way, she is responsible for the damage, if a collision should ensue.[7] So, if the latter, with the like endeavor, should bear up, instead of keeping her course.[8] But though these rules are not lightly to be disregarded, yet no vessel, especially a steamer, should unnecessarily incur the probability of a collision, by a pertinacious adherence to them; but where there is imminent danger of collision, shipmasters are bound to use whatever prudential measures the crisis may require, in order to avoid it.[9] A steamer is always to be treated as a vessel sailing with a fair wind; and is, in all cases, bound to give way to a vessel moved by sails.[10]

result from her improper conduct: [La Bourgogne, 86 id. 475, U. S. App.] But whether she is in an improper place or not, or whether properly or improperly anchored or moored, the other vessel must avoid her, if it be reasonably practicable and consistent with her own safety:" The City of Lynn, 11 F. 339. In another case it was held that the court cannot hold vessels lying at a dock with their bows projecting across the entrance of slips, or the entrance of narrow canals frequented by other craft, free from fault. Such projections are obstructions to rightful navigation in thoroughfares designed to be kept open, where, without any obstructions, there is none too much room for reasonable navigation. The interests of navigation require that such entrance should be kept open, and that encroachments that make the passage dangerous should be held wrongful on the part of projecting vessels as respects other vessels bound in or out: The Margaret J. Sanford, 30 id. 716. In the case of The Canima, 17 id. 271, the projecting vessel was held, on appeal, not chargeable with damages, on the sole ground that the other vessel had no business to be in the place where the collision occurred; otherwise it is intimated the damages would have been divided.}

[5] The Ann and Mary, 2 W. Rob. 189, 196; The Jupiter, 3 Hagg. Adm. 320; The Alexander Wise, 2 W. Rob. 65; The Harriett, 1 id. 182; The John Brotherick, 8 Jur. 276; The Leopard, Daveis 193. The expression "giving way," in the Trinity House regulations, means getting out of the way by whatever may be the proper measures, whether it be by porting or starboarding the helm: The Gazelle, 10 Jur. 1065; The Lady Anne, 15 id. 18; 1 Eng. Law & Eq. 670.

[6] The Traveller, 2 W. Rob. 197; The Speed, ib. 225; The Jupiter, 3 Hagg. Adm. 320.

[7] The Mary, 2 W. Rob. 244.

[8] The Jupiter, 3 Hagg. Adm. 320; The Carolus, ib. 343, n.

[9] The Hope, 1 W. Rob. 157; The Virgil, 2 id. 201; The Itinerant, ib. 240; The Blenheim, 10 Jur. 79; The Lady Anne, 1 Eng. Law & Eq. 670; s. c. 15 Jur. 18; {The Ann Caroline, 2 Wall. (U. S.) 538.}

[10] The Leopard, Daveis 193, 197; The Shannon, 2 Hagg. 173; 3 Kent Comm. 231; {The Eastern State, 2 Curtis C. C. 141.

So, if, in a case of collision, the libellant, a sailing-vessel, proves that a steamer ran her down, and in proving this no evidence appears of negligence on the part of the libellant, *e. g.* that her lights were improperly placed and cared for, or that her course was improper, or that she failed to signal properly, a presumption arises against the

§ 408. **From Suppression and Spoliation of Papers;[1] Production of Documents.** In regard to the presumption arising from

respondent vessel that she was the vessel in default: The Golden Grove, 13 F. 700; The Pennsylvania, 12 id. 914; The Pottsville, ib. 631; The Badger State, 8 id. 526; The Oregon, 27 id. 753; Mazeas *v.* The J. D. Peters, 42 id. 269; The Normandie, 43 id. 154.

If the two colliding vessels are both steamers or both sailing-vessels, they are on equal terms, and the burden of proof lies on the libellant to prove all the allegations in his libel, showing the default to be in the other vessel: The Wolverton, 13 id. 44; The Ralph M. Hayward, 12 id. 794. See *ante*, § 404, note.

So, if the libellant vessel has the right of way, the burden of proof is on the respondent vessel to show that she was not in fault: The Bessie Morris, 13 id. 397; [Bigelow *v.* Anderson, 34 U. S. App. 261.] In England the rule is that when a sailing-vessel going free meets a steamer, both must turn to the right, the steamer being regarded as a vessel going free: The City of London, 4 Notes of Cases, 40; Merchant Shipping Act, 17 & 18 Vict. § 296. But in the United States the rule has been declared to be as laid down in the text, and the steamer must give way in all cases: The Osprey, 17 Law Rep. 384; The Steamer Oregon, 18 How. (U. S.) 570. [The fact that the steamer has a barge in tow is no excuse: American Mfg. Co. *v.* The Maverick, 84 F. 906, U. S. App.] In Pearce *v.* Page, 24 How. (U. S.) 228, which was the case of a collision between a flat-boat descending, and a steamer ascending, the Ohio River; McLean, J., says: "The self-moving power must take the responsible action. . . . When a floating boat follows the course of the current, the steamer must judge of its course so as to avoid it. This may be done by a proper exercise of skill, which the steamer is bound to use." [Where an unincumbered steamer meets a tug with a heavy tow in a narrow channel, and has the choice of sides in passing, she has the burden of showing that the side chosen was the only safe side, and that she took every precaution to avoid collision: The Lucy, 42 U. S. App. 100.]

There have been numerous decisions which establish certain facts as *prima facie* proof of negligence on the part of either of the colliding vessels.

Fog. — Vessels in a fog are required to reduce their speed to a moderate rate. This rule has been asserted in numerous cases both as to steam-vessels and sailing-vessels. Thus, in a recent case, it is said, "The Umbria went at full speed, not in order to lessen or remove danger of collision, but because the master supposed there was no danger of collision. The illegality of the order is not affected by the fact that when the master of the Umbria, in violation of law, put his vessel at full speed in a dense fog, he was aware that in the fog somewhere ahead there was a vessel, conjectured by him to be on a course opposite his own:" The Iberia, 40 F. 897. In another case, where a schooner collided with a steamer, it was held that both vessels must be held to blame for non-observance of the rules of navigation: — the schooner, for having no mechanical means for sounding her fog-horn and for going at the immoderate speed of six knots, having nearly all her canvas set, and being therefore at nearly full speed in a dense fog; the steamer, for going at too great speed, — nearly seven knots, — for ringing up "full speed" very soon after voices had been heard nearly ahead, without any reasonable assurance that the danger was past, for not reversing, as well as stopping, her engines when voices were heard nearly ahead, until the location and direction of the other vessel were ascertained with certainty, and for changing her helm, by porting, under such circumstances, without at the same time reversing, as required by article 18 of the rules of navigation: Buck *v.* The Wyanoke, ib. 704; The Brittanic, 39 id. 399. In one case it is stated that a rule to determine whether the rate of speed of a steamer in a fog is excessive, is, that such speed only is moderate as will permit the steamer seasonably and effectually to avoid the collision by slackening speed, or by stopping and reversing, within the distance at which an approaching vessel can be seen: Macham *v.* The City of New York, 35 id. 607. Not only must a steamer proceed under moderate speed in a fog, but whenever in a dense fog she hears a whistle on either bow and approaching and in the vicinity, she must stop and reverse: The Brittanic, *supra;* The North Star, 43 id. 809. [It is the duty of a vessel hearing a fog-horn to stop till the position or course of the other vessel is ascertained: The Martello, 153 U. S. 64.] And when a steamer runs into an abrupt fog bank, she must slow down previously,

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[1] [See Vol. I. §§ 37, 195 *a*, 566, 568.]

the non-production or the spoliation of papers, as the title to ships and their cargoes is to be proved chiefly by documents, and

so as to be at moderate speed on entering it: The City of Alexandria, 31 F. 429. In the case of The Normandie, 43 id. 156, an interesting discussion is given of the theory that a rate of speed nearly full is safer in a fog for a steamer because it enables her to turn more readily as occasion may require. The court says, "For the Normandie, it is contended that her speed in this case, considering all the circumstances, was moderate speed, because her speed was reduced, and was such as, considering the utility and necessity of rapid evolutions, was most effective to enable her successfully to avoid collision with other vessels that observe the rules of navigation. The recent case of The Champagne and The City of Rio Janeiro in the French courts has been cited in support of this contention. There the Champagne was running in foggy weather at a speed of 14½ knots an hour. She heard the whistle of the Rio Janeiro ahead, or a little on her port bow, and thereupon ported, and reduced her speed to 10 knots. The Rio Janeiro heard, and erroneously located the whistles of the Champagne on her starboard bow, and accordingly veered to port, which brought the two vessels into collision. The vessels had, in fact, been approaching very nearly head and head. The erroneous location of the Champagne's whistle by the Rio Janeiro was ascribed to inexplicable fatality, or the reverberations of the sound of the whistles from strata of fog of different density. The court of appeal at Rouen adopted the finding of the tribunal of Havre, that the reduction of speed from 14½ to 10 knots was in keeping with the circumstances, and proper for making the necessary evolutions that are required to execute manœuvres as quickly as possible in order to avoid collisions. Both courts, however, found the further fact that the speed of the Champagne did not contribute to the collision in that case, nor have any direct relation to it, and therefore released the Champagne: International Mar. Rev. 1887 88, pp. 500–543. The Court of Cassation, in affirming the judgment, did not consider the question whether her speed was moderate within the rule, but affirmed the judgment on the finding of fact below that the rate of speed was in that instance immaterial, having no direct connection with the collision: ib. 1889–90, p. 7. In a still later case the court of appeals at Montpelier held the steamer Tonquin in fault for going in fog at a speed of 10 knots instead of 5: ib. 1889–90, pp. 204–207. Very similar arguments in favor of higher speed were addressed to the Supreme Court in the case of The Pennsylvania, 19 Wall. 125, and overruled; and I am not at liberty to try the question as an open one in this court. The maximum speed of the steamer in that case was 13½ knots; and, under circumstances very similar to the present, a speed of 7 knots was held excessive. With improvements in steam-engines, and increased facilities for handling, it is not impossible that one-half the maximum speed, when full power is held in reserve for immediate use in emergencies, may come to be held a moderate speed, even in dense fog, in those parts of the high seas where other vessels are not liable to be met. But the speed of the Normandie in this case was more than half of her maximum speed. There is no case in the courts of this country where a speed of two-thirds of the maximum speed, under such circumstances as the present, has been held to be moderate speed within article 13. No doubt certain evolutions could be effected more rapidly with a speed of 10 to 12 knots than with a speed of 6. But a speed of 10 or 12 knots was not more necessary to the Normandie's safe navigation in this case than was 7 knots in the case of the Pennsylvania. Besides, the question is not whether certain evolutions can be executed in less time, but whether the Normandie, when meeting a vessel suddenly in a fog, could, as a rule, more effectually avoid her under a speed of 10 or 12 knots than when under a speed of only 6 or 7 knots. The experiments with the Normandie testified to by Lieut. Chambers, do not favor the higher rate of speed, because they show that the ship stops in less space, and turns more within a given area, under a speed of 8 knots than under a speed of 12 knots." [A vessel going at greater than lawful speed has the burden of showing that a collision was not due to her negligence: The Saale, 59 F. 716.] So, also, a vessel entering a fog is obliged to make fog signals before entering, so as to avoid danger of collision with vessels on the edge of the bank: The Perkiomen, 27 id. 574. In cases of sailing-vessels, it is a fault not to have a regulation mechanical fog-horn sounded in a fog; a fog-horn blown by man is not sufficient: The Catalonia, 43 id. 397; Buck *v.* The Wyanoke, 49 id. 704; Adams *v.* The Bolivia, 43 id. 174; [Stahl *v.* The Niagara, 84 id. 902, U. S. App.] In case of sudden shutting in of fog, in a narrow channel, with a strong tide, the case may be one of inevitable accident: Van Dyke *v.* The Bridgeport, 35 F. 159. When a tow is separated from its

these it is generally in the power of the true owner either to produce, or satisfactorily to account for their absence; their

tug by a long hawser, there must be fog signals from the tow as well as the tug: Hardy *v.* The Raleigh, 41 id. 528. *Risk of collision.* — such as calls for action on the part of either vessel — means not only certainty of collision if no efforts are made to prevent it, but danger of collision. Thus, large vessels in close proximity, going at high speed on courses that converge, even if only by one point, are in danger of collision, and in this case even the vessel having the right of way must slacken or stop if the other does not: The Aurania & The Republic, 29 id. 123. But if the vessel having the right of way has no reason to suppose that the other vessel means to keep on in disregard of her duty, it is not negligence in the former to keep on her right of way, and it may be negligence if she does not do so: Brown *v.* The West Brooklyn, 45 id. 61; Meyers Excursion, etc. Co. *v.* The Emma Kate Ross, 41 id. 828. *Beating out Tacks.* — When there are no other vessels in the way, nor other circumstances calling for a change of course, it is fault if a sailing-vessel in the near presence of other vessels bound to keep out of the way, does not beat out her tacks: The A. W. Thompson, 39 id. 116. See also The Allianca, ib. 478; The Coe F. Young, 45 id. 506. *Pilot Boats.* — The special rules governing the approach of pilot boats to vessels for the purpose of putting a pilot on board are discussed in the Columbia, 27 id. 718; The Normandie, 43 id. 154; The Cambusdoon, 30 id. 710; The Alaska, 33 id. 111. *Flash Lights.* — It is fault in a sailing-vessel, being overtaken by a steamer or other vessel at night, not to show a flash light as required by the rules of navigation: Cooper *v.* The Saratoga, 37 id. 121; Fitzpatrick *v.* The Stranger, 44 id. 818. *Tug and Tow.* — Special rules govern the course of tugs with tow in danger of collision. A tug in charge of a licensed pilot is relieved from responsibility of avoiding a collision if she follows his direction: The Shubert *v.* The Einar, 45 id. 499. For a case turning on particular circumstances, see Marine Steamship Co. *v.* The Cyclops, ib. 123. [A tow, however long, is permissible, but the increased risk requires increased care on the part of the tug and tows: The H. M. Whitney, 86 id. 697, U. S. App.] *Lookout.* — The lack of a proper lookout always is held to be negligence, unless it is shown that it could not have affected the result: Aldrich *v.* The W. H. Beaman, 45 F. 127; The Coe F. Young, ib. 506; McCabe *v.* Old Dominion Steamship Co., 31 id. 239; Larsen *v.* The Myrtle, 44 id. 781. [Where the absence of a lookout does not contribute to the accident, such absence is immaterial: The Blue Jacket, 144 U. S. 371; The Nacoochee, 137 id. 330.] *Weight of Evidence.* — This in admiralty cases is for the judge on all the facts, but certain species of evidence have been so frequently commented upon as to have a certain special probative force. Thus if one side is shown to have grossly misstated any circumstances, and the weight of evidence is doubtful, this will turn it against him: Nicole *v.* The Grand Isle, 34 F. 768. Proof that the witnesses on one side have out of court made statements conflicting with their evidence, has not much weight unless clear and strong: Perry *v.* The Nessmore, 41 id. 444. Nice mathematical calculations, based on facts not clearly proved, have not much weight against positive testimony: The Newport, 36 id. 911; Balmer *v.* The City of Truro, 35 id. 317. When the primary cause of the accident is shown to have been a peril of the sea, the proof that it might have been prevented by the exercise of reasonable skill and diligence should be clear: The Carl Frederick, 33 id. 590. If the theory of one side, examined by the circumstances of the case, is improbable, and that of the other is accordant with the circumstances, the latter will prevail: Thames Tow Boat Co. *v.* The Sarah Thorp, 44 id. 640. If a deposition shows great ignorance or untruthfulness, its weight will not be great: The Martin Brower, 27 id. 515. The testimony of those on board of a vessel which is rapidly changing her position or direction should be preferred to that of persons on board another vessel, unless circumstances show their testimony to be untrustworthy: The Columbia, 29 id. 718. The omission of a known legal duty is such strong evidence of negligence that in any case of collision happening under such circumstances, the offending vessel should be held in fault unless clear and indisputable evidence establishes the contrary: Meyers Excursion, etc. Co. *v.* The Emma Kate Ross, 41 id. 828; [The Britannia, 153 U. S. 130; The Martello, ib. 64; The Trave, 55 F. 117.]

Accessory Negligence. — It being established that the negligence of the libellant was the inducing cause of the collision and loss, the charge of accessory negligence on the part of the respondent as the foundation for compelling it to share the damages must be clearly made out: The E. B. Ward, Jr., 20 id. 702; [The Oregon, 158 U. S

non-production always leads to inferences unfavorable to title of the claimant.[2] Hence the rule of *omnia præsumuntur contra spoliatorem* is administered in the courts of admiralty with more frequency and a more stringent application than in any other tribunals.[3] Thus, though the spoliation of papers is not, *per se*, a cause of condemnation, yet if it is attended with other circumstances of suspicion, the guilty party will not have the aid of the court, or be admitted to further proof;[4] but, on the other hand, if such spoliation appears, in a case otherwise favorably circumstanced for the party, the court, for its own satisfaction, will order further proof at his expense.[5] The mere suppression or non-production of papers, not destroyed, leads to a similar unfavorable inference. Thus, in a cause of damage, where the master of the aggressive ship addressed a letter to his owners, and gave it to the master of the damaged vessel to be delivered to them, but the owners did not produce the letter; it was presumed that the letter contained an admission of the damage.[6] And we may here add, that the production of documents in admiralty is governed by rules substantially like those in similar cases in equity, which have already been considered.[7]

186.] The damages are not divided if the fault of one be slight, bearing but little proportion to the fault of the other: The Great Republic, 23 Wall. 20; Reid Towing & Wrecking Co. *v.* The Athabasca, 45 F. 655. Large allowance must be made to a respondent who has been obliged to act in a moment of impending peril of collision, produced by the fault of another, and a mere mistake does not make the vessel liable: The Jupiter, 1 Ben. 536; The Belle, ib. 317; The Santiago de Cuba, 10 Blatchf. 444.]

Respecting steamers generally, it was remarked, by Sir John Nicholl, that "they are a new species of vessels, and call forth new rules and considerations; they are of vast power, liable to inflict great injury, and particularly dangerous to coasters, if not most carefully managed; yet they may, at the same time, with due vigilance, easily avoid doing damage, for they are much under command, both by altering the helm and by stopping the engines; they usually belong to great and opulent companies, and are fitted out at great cost; and on these considerations, when they afford assistance, they obtain a large remuneration. The owners of sailing-vessels have, I think," added he, "a right to expect that steamers will take every possible precaution:" The Perth, 3 Hagg. Adm. 415, 416. Hence the general rule in the text has been adopted; and accordingly it has been held, that a steamer, descending a river in the night, and meeting a sailing-vessel ascending, is bound to ease her engine and slacken her speed, until she ascertains the course of the sailing-vessel: The James Watt, 2 W. Rob. 270. The usage on the river Ohio, at all times, is, that when steamers are approaching each other in opposite directions, and a collision is apprehended, the descending boat must stop her engine, ring her bell, and float; leaving to the ascending boat the option how to pass: Williamson *v.* Barrett, 13 How. (U. S.) 101.

[2] See *ante*, Vol. I. § 37; Owen *v.* Flack, 2 Sim. & Stu. 606.

[3] The Hunter, 1 Dods. 480; The Liverpool Packet, 1 Gall. 518. And see *infra*, § 452.

[4] The Rising Sun, 2 C. Rob. 104, 106; The Pizarro, 2 Wheat. 227, 241; The Juffrouw Anna, 1 C. Rob. 125; The Welvaart, ib. 122, 124; The Eenrom, 2 id. 1, 15.

[5] The Polly, 2 C. Rob. 361.

[6] The Neptune 2d, 1 Dods. 469.

[7] *Supra*, §§ 295–307.

§ 409. 2. **Competency of Witnesses.** In the Roman law, evidence was distinguished into two classes; namely, *plena probatio*, or full proof, and *semiplena probatio*, or half proof. The former consisted of admissions and confessions, the testimony of witnesses, public written instruments and deeds, judicial oaths and presumptions *juris et de jure*. The latter consisted of the testimony of a single witness, private books of account, common fame, and comparison of handwriting. And the conjunction of two half proofs amounted to full proof.[1] But though a single witness ordinarily made but half proof, yet exceptions were admitted to this rule, where, in cases of great difficulty, no other evidence could possibly be had, and in cases of minor importance, or where the witness was of extraordinary rank or character;[2] and, on the other hand, common fame, in some cases, was received as equivalent to full proof.[3] But this distinction of proofs is scarcely known in most of the American courts, and is seldom admitted in any of them as a rule of decision; but is recognized chiefly as the original source of the rule by which, in certain cases, the oath of the party may be received.[4]

§ 410. **Parties.** In regard to the *competency of the parties as witnesses*, there are three cases in which their oaths are admitted at hearings upon the merits, in courts of admiralty.[1] The *first* of these is where the *suppletory oath* is required. This oath, as its name imports, was not admissible by the Roman law, unless in aid of other testimony and to supply its deficiencies. If nothing was proved, or if full proof was made, there was no place for a suppletory oath. It was only where half proof was

[1] 2 Browne, Civ. & Adm. L. 370, 385.

[2] Ib. 385. These exceptions are thus enumerated by Mascardus: "Quando unius testis depositio nemini nocet, et alteri prodest; — quando esset arduum, vel nullo modo fieri posset, ut plures possint haberi testes; — quando sumus in causis possessorii quæque nullius propemodum sint ponderie; — in causis quæ breviter et summarie absolvuntur et dirimuntur, teste valde digno:" Mascard. De Prob. Quæst. 11, n. 14, 17, 18, 19.

[3] Mascard. De Prob. Concl. 236, n. 1, 2; ib. Concl. 396, n. 2; ib. Concl. 750, n. 1. Common fame, among the civilians, was distinguished from notoriety, which they defined as a species of proof, "se oculis hominum, aut majoris partis exhibentem, ut nulla possit tergiversatione celari aut negari, utpote cujus universus populus, aut major pars ejus testis esse possit:" Mascard. De Prob. Con. 1107, n. 4. And see 2 Browne, Civ. & Adm. L. p. 370.

[4] See *ante*, Vol. I. § 119.

[1] {In the United States the rules of evidence in admiralty cannot be changed by a State statute: The Ship William Jarvis, Sprague's Decisions 485. By statute (U. S. Rev. Stat. 2d ed. § 858), parties and persons interested in the suit are competent witnesses in the United States courts.} [See Vol. I. § 328 *c*.]

exhibited, and in the absence of any other means of making full proof, that the party's own oath was received, as the complement of the measure of testimony required; and this might be administered in all cases.[2] But in the practice of our own admiralty courts, though the right of resorting to the suppletory oath in all cases of partial proof is still insisted on,[3] yet it is not ordinarily administered, except in support of the party's books of account, or other original charges of the like nature, as, for example, charges made by the master, on the back of the shipping paper, of advances made to the seamen in the course of the voyage.[4]

§ 411. **Decisory Oath.** In the *second* place, parties may be admitted to what is termed the *oath decisory*. This oath was of familiar use in the Roman tribunals. It might be administered by the judge to either party, for the more perfect satisfaction of his own conscience in cases rendered doubtful by the weakness or contradictions of the testimony already in the cause; or it might be tendered by one of the parties to the other, submitting to have the cause decided by the oath of his adversary; which the adverse party must either accept or tender back a similar offer; failing to do which, he must be condemned, as confessing the allegations against him.[1] This mode of proof is known to have been resorted

[2] Hall's Adm. Pract. p. 93; Benedict's Adm. Pract. § 536; Dunl. Adm. Pract. p. 286; 2 Browne's Civ. & Adm. L. p. 384. The practice in such cases is thus stated by Mr. Hall, from Oughton's Eccl. Pract. tit. 186. "If the plaintiff has not fully proved his allegation, but has only given a half proof thereof (*semiplena probatio*), he may appear before the judge and propound as follows: —

"'I, N., do allege that I have proved the allegations contained in my libel, etc. I say that I have proved them fully, or at least, half fully; I refer myself to the acts of court and to the law, and therefore pray that the suppletory oath may be administered to me, for so the law and justice require.'

"Then the proctor of the adverse party will say: —

"'I deny that those allegations are true. I protest of their nullity, and I allege that the said oath ought not to be administered, referring myself to law.'

"Then the judge shall assign a time to hear the parties and decree thereon. And if he shall be satisfied that the party who prays to have the oath administered to him has made more than half proof, or at least half proof of his allegation, he is bound to administer the oath to him in those cases in which the law permits it; consult, however, with experienced practitioners, as to what those cases are. Then the party shall make oath, '*that of his own certain knowledge the facts stated in his allegation are true.*'

"If, however, the party against whom the oath is prayed should be proved by his adversary to be a person of infamous or bad character, the oath is then in no case to be administered to him:" Hall's Adm. Pract. *ubi supra*.

[3] Dunl. Adm. Pract. p. 288; Benedict, Adm. Pract. § 536.

[4] Ibid.; The David Pratt, Ware 496, 505. And see *ante*, Vol. I. §§ 117–119, as to the admissibility of books of account.

[1] The use of this oath is founded upon several texts of the civil law. "Maximum remedium expediendarum litium in usum venit jurisjurandi religio; qua, vel ex pactione ipsorum litigatorum, vel ex auctoritate judicis, deciduntur controversiæ:" Dig. lib. 12, tit. 2, l. 1. Pothier derives its authority from the texts, — "Solent enim

to in some cases in the American courts, so far at least as a tender of the oath by one party, and its acceptance by the other;[2] but the freedom with which parties may interrogate each other *in limine*, and the infrequency of any occasion to advert to the dis-

sæpe judices, in dubiis causis, exacto jurejurando, secundum eum judicare qui juraverit:" Dig. lib. 12, tit. 2, l. 31; and, "in bonæ fidei contractibus, necnon [etiam] in cæteris causis, inopia probationum, per judicem, jurejurando causa cognita res decidi oportet:" Cod. lib. tit. 1, l. 3. Upon these he comments as follows: —

"From these texts it follows, that to warrant the application of this oath, three things must concur: —

"1. The demand or the exceptions must not be fully proved, as appears by the terms of L. 3, Cod. — Inopia Probationum. When the demand is fully proved, the judge condemns the defendant without having recourse to the oath; and on the other hand, when the exceptions are fully proved, the defendant must be discharged from the demand.

"2. The demand, or exceptions, although not fully proved, must not be wholly destitute of proof; this is the sense of the terms, *in rebus dubiis*, made use of in the Law 31; this expression is applied to cases in which the demand, or exceptions, are neither evidently just, the proof being not full and complete, nor evidently unjust, there being a sufficient commencement of proof. 'In quibus,' says Vinnius, Sel. Quæst. 1, 44, 'judex dubius est, ob minus plenas probationes allatas.'

"3. The judge must have entered upon the cognizance of the cause, to determine whether the oath ought to be deferred, and to which of the parties. This results from the terms *causa cognita*, in L. 31.

"This cognizance of the cause consists in the examination of the merits of the proof of the nature of the fact, and the qualities of the parties. When the proof of the fact which is the subject of the demand, or the exceptions, and upon which the decision of the cause depends, is full and complete, the judge ought not to defer the oath, but to decide the cause according to the proof.

"Nevertheless, if the judge, for the more perfect satisfaction of his conscience, defers the oath to the party in whose favor the decision ought to be, and the fact upon which it is deferred is the proper act of the party himself, and of which he cannot be ignorant, he cannot refuse to take it, or appeal from the sentence; for although the judge might, and even ought, to have decided the cause in his favor, without requiring this oath, the proof being complete, he has still done no injury by requiring it, since it costs the party nothing to affirm what is true, and his refusal weakens and destroys the proof which he has made.

"When the plaintiff has no proof of his demand, or the proof which he offers only raises a slight presumption, the judge ought not to defer the oath to him, however worthy of credit he may be. Nevertheless, if the circumstances raise some doubt in the mind of the judge, he may, to satisfy his conscience, defer the oath to the defendant.

"So, when the demand being made out, the exceptions against it are only supported by circumstances, which are too slight to warrant deferring the oath to the defendant, the judge may, if he thinks proper, defer the oath to the plaintiff, before he decides in his favor.

"I would, however, advise the judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath, to prevent his demanding what is not due to him, or disputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred; and I have not more than twice known a party restrained by the sanctity of the oath from persisting in what he had before asserted.

"It remains to observe the following difference between an oath deferred by the judge, and that deferred by the party: the latter may be referred back; whereas, when the oath is deferred by the judge, the party must either take it or lose his cause; such is the practice of the bar, which is without reason charged by Faber with error; in support of it, it is sufficient to advert to the term *refer;* for I cannot be properly said to refer the oath to my adversary, unless he has previously deferred it to me. See Vinn. Sel. Quæst. 143:" Poth. Obl. Nos. 829–835.

[2] Dunl. Adm. Pract. p. 290.

tinction between full and half proof, restricted, as we have just seen it to be, to cases of book accounts and the like, have rendered the oath decisory nearly obsolete in modern practice.

§ 412. **Parties Witnesses from Necessity.** In the *third place*, parties are sometimes admitted as *witnesses from necessity*. We have shown, in a preceding volume,[1] that in some of the courts of common law, parties have on this ground been held competent witnesses, while in some others this has been doubted or denied. But however this point may be held in the common-law tribunals, the course of the courts of admiralty, and the nature of the causes before them, frequently requires the admission of this kind of evidence, without which there would often be a failure of justice. Thus salvors, though parties to a suit for salvage, are admitted *ex necessitate* as witnesses to all facts which are deemed peculiarly or exclusively within their knowledge; but to other facts they are incompetent, on the general ground that they are both parties and interested. The exception arises from the necessity of trusting to their testimony or being left without proof; and it is admitted no further than this necessity exists.[2] Parties in prize causes are also admitted as witnesses, on the same principle, as hereafter will be seen. And, generally, where the cause of action is established *aliunde*, and the loss is proved to have been occasioned by the fraud or tortious act of the defendant, nothing remaining to be shown except the value of the property lost, taken away, or destroyed, and this being incapable of proof by any other means, it may be ascertained by the oath of the plaintiff.[3]

§ 413. **Answer how far Evidence.** The *answer of the defendant*, though sworn to, and responsive to the libel, has not the same weight in courts of admiralty as in chancery, nor is it regarded strictly as testimony, to all intents, or as full proof, of any fact it may contain; and yet it is not wholly to be disregarded by the

[1] *Ante*, Vol. I. § 348.

[2] The Henry Ewbank, 1 Sumn. 400, 432. And see The Sara Barnardina, 2 Hagg. Adm. 151; The Pitt, ib. 149, n.; The Elizabeth and Jane, Ware 35; The Boston, 1 Sumn. 328, 345. The testimony of parties in admiralty, it is said, ought never to be taken except under a special order of court, and for cause shown, as in equity: ibid. See Swett *v.* Black, Sprague's Decisions, 574.

[3] 2 Browne, Civ. & Adm. Law, p. 384; Dunl. Admr. Pract. p. 287; *ante*, Vol. I. § 348, n. The Roman law distinguished between losses by the mere *fault* of the defendant, and losses occasioned by his *fraud*. In the former case the property was estimated at its intrinsic value, by the *juramentum veritatis*, or *oath of truth;* in the latter, by the *juramentum affectionis*, at its peculiar value to the owner, as a matter of personal attachment: Poth. Obl. No. 836; 2 Browne, Civ. & Adm. Law, *supra*. But this distinction is not recognized in modern practice.

judge, or treated as a merely formal statement of the ground of defence. When it is carefully drawn, and it appears, from comparing it with the facts proved in the case by disinterested witnesses, that the defendant has stated his case fairly, or with no more than that bias which one naturally feels towards his own cause, and with no more coloring than an upright man might insensibly give to facts in which his interest and feelings are involved, it may justly have a material influence on the mind of the judge in coming to a final result. But there is no technical rule in the admiralty, like that in chancery, which binds the conscience of the court, or determines the precise degree of credit to which the answer is in all cases entitled, or the quantity of evidence by which it may be overborne; but it receives such weight as, in the particular state of the proofs, and under all the circumstances, the judge may deem it to deserve.[1] A *claim* to a vessel or cargo, interposed in a suit for forfeiture, though sworn to, has not in any sense the dignity of testimony, and is not received in evidence; but is said to amount at most, to "the exclusion of a conclusion."[2] But where the libellant specially requires the answers of the defendant, under oath, to interrogatories distinctly propounded to him, touching the matters in issue, which by the course of the court he has a right to do, these answers are treated as evidence in the cause for either party, as in chancery. But here, also, as in the case of the answer to the libel itself, no particular quantity of proof is required to overcome the answers to the interrogatories; but they are weighed like other testimony.[3]

§ 414. **Interested Witnesses.**[1] In regard to *persons not parties to the suit,* the general rule as to their incompetency as witnesses, *when interested in the cause,* is adopted in the admiralty, as an

[1] Hutson *v.* Jordan, Ware 385, 387–389, 394; The Crusader, ib. 443; Sherwood *v.* Hall, 3 Sumn. 127, 131. And see The Matilda, 4 Hall, Law Journ. 487; The Thomas and Henry, 1 Brock. 367; Cushman *v.* Ryan, 1 Story 91, 103; Jay *v.* Almy, 1 Woodb. & M. 262, 267. {Thus, in The Oder, 13 F. 272, a case of collision, in which the testimony was all taken by deposition, the judge allowed an almost conclusive force to the averments and admissions in the answer, they corresponding to the testimony of the other witnesses. Cf. Andrews *v.* Wall, 3 How. (U. S.) 567, 572; The H. D. Bacon, 1 Newb. 276; The Napoleon, Olcott 208.}

[2] The Thomas and Henry, 1 Brock. 367.

[3] The David Pratt, Ware 495; Jay *v.* Almy, 1 W. & M. 262. And see rules in Admiralty, Reg. 23, 27–30; 2 Browne, Civ. & Adm. Law 416; Clerke's Praxis, tit. 14; Gammell *v.* Skinner, 2 Gall. 45; *supra,* §§ 395, 398. {A foreigner is not chargeable upon his declarations or admissions in English, without clear proof that he thoroughly understood what he said and what was said to him: The Lotty Olcott, 329.}

[1] [See Vol. I. § 328 *b.*]

instance court,[2] in like manner as at common law.[3] But the exceptions to this rule, on the ground of necessity, are of much more frequent occurrence in the admiralty, arising from the nature of maritime affairs. Thus, in a cause of collision, the crew of the vessel proceeded against are held *competent witnesses from necessity*, notwithstanding they may be sharers in the profits and losses of the vessel, and do not deny their interest in the suit.[4] Sometimes parties, thus interested, are not admitted as witnesses until they have released their interest and are thereupon dismissed from the suit;[5] but the testimony of mere releasing witnesses, it is said, ought not to be relied on to prove a fundamental fact in a cause.[6]

§ 414 *a*. **Shipmaster.** The admissibility of a *shipmaster as a witness for the owners*, in a *seaman's libel against them for wages*, may seem to fall under the operation of the same principle, so far as he may be deemed interested to defeat the claim. But, in truth, there seems to be no general objection to his competency in such cases, though, as Lord Stowell remarked, it certainly may be necessary to watch his testimony with jealousy, as his conduct may constitute a material part of the adverse case.[1]

§ 415. **Seamen.** The case of *seamen, joint libellants for wages* in a court of admiralty, properly falls under this head. For, though by the admiralty law they all may join in the same libel,

[2] The Boston, 1 Sumn. 328, 343.

[3] {The State statutes admitting the testimony of parties and interested witnesses, though adopted in the United States courts in the trial of civil cases at the common law, have no effect upon the practice of those courts in admiralty: The Independence, 2 Curtis C. C. 350. And see The Neptune, Olcott 483. But cf. *ante*, § 410, note *a*.}

[4] The Catherine of Dover, 2 Hagg. 145. In a cause of damage by collision, the respondent pleaded as an exhibit a paper signed by the master and crew of the ship of the libellant, and a declaration of the mate of the same ship. The mate and crew were interested in the suit, in respect of their clothes, which had gone down in the ship. It was held that the admissions and declarations of the mate and crew were not competent to be received; but that those of the master were admisssible: The Midlothian, 15 Jur. 806; 5 Eng. Law & Eq. 556; {The Osceola, Olcott 450; The Hudson, ib. 396. In a suit by the holder of a bottomry bond given by the master of a vessel, in a foreign port, for necessary supplies, the master is a competent witness to prove that the supplies were furnished, and that they were necessary: The Medora, 1 Sprague 138.}

[5] The Pitt, 2 Hagg. Adm. 149, n. And see The Celt, 3 id. 323.

[6] La Belle Coquette, 1 Dods. 19. But in cases of slave capture, the evidence of releasing witnesses has been held good: The Sociedade Feliz, 2 W. Rob. 160. {The master who hypothecated the vessel on a bottomry bond is a competent witness for the bondholder, especially if released by him: The Brig Magoun, Olcott 55.} An informer, who is entitled to a portion of a fine, forfeiture, or penalty, is ordinarily not admissible as a witness for the prosecution. The statute only renders him competent when "he shall be necessary as a witness on the trial;" of which necessity the court must judge, after hearing the other testimony: The Thomas and Henry, 1 Brock. 367; U. S. Stat. 1799, c. 22, § 91, vol. i. p. 697.

[1] The Lady Ann, 1 Edw. Adm. 235.

as a matter of favor and privilege, on the general ground of the nature of their employment, and by our statute,[1] in proceedings *in rem* for wages they are bound so to do, the general privilege of admiralty law being thus converted into a positive obligation; yet they are not therefore regarded as joint parties in one suit. The contract is treated as a several and distinct contract with each seaman. Their rights, respectively, are separate, and the defences that may be set up by the owners of the ship, against the claim of one seaman, may be wholly inapplicable to that of another. The answer, therefore, when not equally applicable to all the crew, contains in separate allegations what is specially appropriate to each in particular; and the decree pursues the same course, assigning to each seaman the amount of wages to which he is entitled, and dismissing the libel as to those who are not entitled to any. And no one can appeal from a decree, made in regard to the claim of another. Their only interest, then, in respect to the claims of each other, arises from their joint liability to costs; and as the costs are within the discretion of the court, this interest is not deemed sufficient to render them incompetent as witnesses for each other.[2] At all events, it is in the power of the court, on motion, to discharge from the libel, with their own consent, those whose testimony may be required.[3] But it has been held, that ordinarily one seaman cannot be a witness for another, in a libel for wages, if the witness and the party have a common interest in the matter in controversy; as, for example, where the question is as to the loss of the ship, or an embezzlement equally affecting the whole crew, or negligence, misfeasance, or malfeasance, to which all must contribute, or the like. But where their cases are distinguished by special circumstances, as where, notwithstanding their contracts are similar, the breach or performance of one may happen without affecting the other, one seaman may be a witness for another; although, where they are involved in similar breaches of contract, they are to be heard with caution.[4]

[1] U. S. Stat. 1790, c. 29, § 6, vol. i. p. 133.

[2] Oliver *v.* Alexander, 6 Pet. 145–147; {Ship Elizabeth *v.* Rickers, 2 Paine C. C. 291. But their testimony is received with great caution, and the court will be inclined rather to believe the master when he has no interest: The Swallow, Olcott 4; Graham *v.* Hoskins, ib. 224.}

[3] Dunl. Adm. Pract. p. 239; *supra*, § 414. This, however, seems to have been deemed objectionable: Dunl. *supra;* The Betsey, 2 Bro. (Pa.) 350.

[4] Thompson *v.* The Philadelphia, 1 Pet. Adm. 210. Whether the master is a competent witness for the owner, in a libel against the ship for wages, has been doubted: The William Harris, Ware 367. But see The Lady Ann, 1 Edw. Adm. 235, that he is

§ 416. **Experts.**[1] Courts of admiralty, also, like courts of common law,[2] recognize the admissibility of *experts*, or men of science, to testify their opinions upon matters in controversy, pertaining to the art or science in which they are peculiarly skilled. Thus, in a question of forfeiture for the illegal importation of certain hogsheads of rum, it was held competent for the prosecution to prove the place of origin of the rum by its particular flavor, ascertained, in the absence of other evidence, by the taste of persons skilled in judging of the article; the sense of tasting being capable of acquiring, in many instances, as great a degree of accuracy and precision as the eye.[3] So, on questions of seamanship, the opinions of nautical men, having before them a clear statement of all the facts, are admissible evidence in courts of admiralty, as well as those of men of science on points of science, in other courts.[4] And accordingly, in a case of collision, it was held, that a nautical person was a competent witness to say whether, upon the plaintiff's evidence and admitting it to be true, he was of opinion that by proper care on the part of the defendant's servants the collision could have been avoided.[5]

admissible. He is not admissible to prove any matter of defence which originated in his own acts, and for which he is responsible: ibid. He is not admissible for the claimant, in a libel against the ship for forfeiture, by reason of an illegal act done under him: Fuller *v.* Jackson, Bunb. 140; The Nymph, Ware 257; The Hope, 2 Gall. 48. Neither is he competent to prove that a sufficient medicine-chest was on board, for the purpose of throwing the expense of medical advice on the seamen: The William Harris, *supra*. The proper evidence of that fact is the testimony of a respectable physician, who has examined the medicine-chest: ibid. {And see also The Boston, 1 Sumn. 343; The Peytona, 2 Curt. C. C. 21. In the latter case, it was held that a release by one of the part owners of the ship would make him a competent witness. The admissions of the master are admissible in a suit for wages against the owners: The Enterprise, ib. 317.}

[1] [See Vol. I. §§ 280, 310, 430 *a*, 441 *b*, 441 *k*, 579, 581 *a*.]

[2] See *ante*, Vol. I. § 440.

[3] U. S. *v.* Ten Hhds. of Rum, 1 Gall. 188; The Rose, ib. 211.

[4] The Ann and Mary, 7 Jur. 1001.

[5] Fenwick *v.* Bell, 1 C. & K. 312. The previous decision in Sills *v.* Brown, 9 C. & P. 601, *contra*, seems to be regarded as hasty and unsound.

The crews of large ships are distributed into classes, according to their different capacities; and thus the grade of one's seamanship may be ascertained by the station he may have held. The classification is stated in Van Heythuysen's Marine Evidence, p. 9, as follows: —

Boatswain's mates Quartermasters Gunners and gunner's mates Forecastle-men	Best men in the ship.
Foretop-men Mizzentop-men	Active young seamen.
Maintop-men	Young lads and indifferent seamen.
After-guards-men Waisters	Landsmen, etc.

{The rules governing the examination of experts at common law obtain also in the admiralty courts. The witness may be asked his opinion as to the proper mode of

§ 417. 3. **Documents.** The general rules of evidence in courts of admiralty, respecting the admissibility, proof, and effect of *documents*, whether public or private, are the same with those which are recognized in courts of common law, and which have already been considered.[1] But in the former courts there are some further exceptions, and some peculiar illustrations and applications of these rules, which will now be mentioned.

§ 418. **Various Kinds of Documents.** Documents peculiar to maritime transactions are those which concern either the ownership and national character of ships and vessels, and the property on board; the contract for seamen's wages and service; the contract for the conveyance of goods by sea; and the log-book, or journal of occurrences on board the ship, relating to her navigation and employment, and the behavior of the seamen.

§ 419. **Bill of Sale;**[1] **Register;**[2] **Title.** By the law of the United States,[3] the *title to vessels*, whether by absolute bill of sale, mortgage, hypothecation, or other conveyance (except the lien by bottomry created during the voyage), is not valid against any person other than the vendor, his heirs and devisees, or other persons having actual notice thereof, unless the instrument of conveyance is recorded in the office of the collector of customs where the vessel is enrolled or registered. But though the *bill of sale* is the proper muniment of title, and is essential to the *complete transfer* of the ownership and of the *national character* of any vessel, and in the ordinary practice in admiralty is always required, as the regular commercial instrument of title;[4] yet, as between the parties themselves, the title may be sustained, at least by way of estoppel, by any evidence competent to prove

navigating upon a hypothetical state of facts: The Golden Grove, 13 F. 674. The Bessie Morris, ib. 397. In England, it is usual in cases of collision for the judge to be assisted by some of the masters of the Trinity House as nautical experts, to whom he refers the question of blame under proper instructions as to the law. Though their decision is not binding upon the court, it is usually followed. This practice does not prevail in the United States. It seems, however, to be not unusual to refer the cause to nautical experts to report upon facts within their peculiar knowledge: Peele *v.* Merch. Ins. Co., 3 Mas. 27, 36; The Isaac Newton, 1 Abb. Adm. 588. But in The Clement, 2 Curtis C. C. 363, it was held that the proper course was to get the opinion of the experts upon a hypothetical case.]

[1] *Ante*, Vol. I. §§ 471–498, 557–582.

[1] [See Vol. I. § 261.]

[2] [See Vol. I. §§ 493, 494.]

[3] U. S. Stat. 1850, c. 27, § 1.

[4] *Ante*, Vol. I. § 261; 3 Kent Comm. 130–133; Weston *v.* Penniman, 1 Mason 306; The Sisters, 5 C. Rob. 155; Abbott on Shipping, by Story, pp. 1, 19, 60–66, and notes, 12th (Eng.) ed. pp. 1, 47–55. In prize courts it is indispensable in proof of title: The San Jose Indiano, 2 Gall. 284.

title to any other personal chattel, under similar circumstances.[5] The *register* is not, *of itself*, evidence of title in the person in whose name it stands, when offered in a suit *against him*, in order to establish his liability as owner;[6] though it would be otherwise, if it were shown that the registry in his name had been procured, or adopted and sanctioned, by himself.[7] Nor is it evidence to *disprove* the title of a party claiming as owner, because his name is not found in it; for a legal title may exist, independent of the register.[8] Whether it would be evidence *in his favor*, is not known to have been directly decided; but in one case, where a *copy* of the register was rejected, because not made by a certifying officer, no question was raised as to the admissibility of the original, either by the learned counsel, or by the eminent judge who delivered the opinion of the court.[9] In collateral issues, such as in trover, for the materials of a wrecked ship[10] the title may be proved, *prima facie*, by possession;[11] and in an indictment for a revolt, the register is sufficient evidence of title to sustain that allegation in the indictment.[12] No vessel, however, can be deemed a *vessel of the United States*, or entitled to the privileges of one unless she is *registered*, and the owners and masters are citizens of the United States.[13] But it is only by virtue of statutes that a register becomes necessary, it being a document not required by the law of nations as evidence of a ship's national

[5] Note 4, *supra;* Bixby *v.* Franklin Ins. Co., 8 Pick. 86; Taggard *v.* Loring, 16 Mass. 336; Vinal *v.* Burrill, 16 Pick. 401; Wendover *v.* Hogeboom, 7 Johns. 308.

[6] Leonard *v.* Huntington, 15 Johns. 298.

[7] Sharp *v.* United Ins. Co., 14 Johns. 201; Jones *v.* Pitcher, 3 Stew. & Port. 135; Tucker *v.* Buffington, 15 Mass. 477; Dunl. Adm. Pract. 283; 3 Kent Comm. 150; {Flower *v.* Young, 3 Campb. 240; Hacker *v.* Young, 6 N. H. 95. It is not, however, conclusive: Weston *v.* Penniman, 1 Mason (C. Ct.) 306; Leonard *v.* Huntington, *supra;* Bixby *v.* Franklin Ins. Co., *supra;* Colson *v.* Bonzey, 6 Greenl. (Me.) 474; Lord *v.* Ferguson, 9 N. H. 380; Ring *v.* Franklin, 2 Hall 1; Plymouth Cordage Co. *v.* Sprague, 2 Law Rep. 365. Possession seems to be stronger evidence of title than registry: Bas *v.* Steele, 3 Wash. C. C. 381, 390; Weaver *v.* The S. G. Owens, 1 Wall. Jr. 366. See further, on the effect of the register as evidence of ownership, Myers *v.* Willis, 33 Eng. Law & Eq. 204, 209, 219; 17 C. B. 77; Mitcheson *v.* Oliver, 32 Eng. Law & Eq. 219; 5 El. & Bl. 419; Mackenzie *v.* Pooley, 34 Eng. Law & Eq. 486; 11 Exch. 638.}

[8] Ibid. And see Lord *v.* Ferguson, 9 N. H. 380; Abbott on Shipping, p. 60, n. by Story, 12th (Eng.) ed. p. 47. The register is not necessary to the proof of the national character of an American vessel, even in an indictment for piracy: U. S. *v.* Furlong, 5 Wheat. 184, 199.

[9] Coolidge *v.* New York Ins. Co., 14 Johns. 308; Abbott on Shipping, p. 63, n. by Story. Cf. 12th (Eng.) ed. 55. {See Flower *v.* Young, *supra;* Lincoln *v.* Wright, 23 Pa. 76; Weaver *v.* The S. G. Owens, 1 Wall. Jr. 366.}

[10] Sutton *v.* Buck, 2 Taunt. 302. And see *ante*, Vol. II. § 378.

[11] Ibid.

[12] U. S. *v.* Jenkins, 3 Kent Comm. 130, n.

[13] United States Stat. Dec. 31, 1792, §§ 1–5, vol. i. pp. 287–290. And see Abbott on Shipping, pp. 31–38, notes by Story; 3 Kent Comm. 141–150.

character.[14] Nor is the register, or the bill of sale, in any case, *conclusive* evidence of ownership.[15]

§ 420. **Title under Judicial Sales.** But to this general rule, that the bill of sale is indispensable to a valid title by the admiralty law, an *exception* is allowed, in cases of *judicial sales* by order of a court of admiralty, whether for *wages or salvage*, or upon a forfeiture, or for payment of a loan on *bottomry*. Whether such sale, ordered upon a survey and condemnation as a vessel *unfit for service*, is valid, is a point not perfectly settled; but it has been said that courts of admiralty, feeling the expediency of the power to order sales in such cases, would go far to support the title of the purchaser; and in this country the power has been held to be strictly within the admiralty jurisdiction.[1] A further exception is admitted in cases of condemnation as *prize of war*. In all such cases, the title passes to the purchaser or captor by virtue of the judicial order or sentence and the proceedings thereon, irrespective of any bill of sale or other documentary evidence of ownership.

§ 421. **Charter-party.** The contract for the conveyance of goods by sea is regularly made by a *charter-party* or agreement in writing, whereby the whole or part of a ship is leased to another, for that purpose, on payment of freight. If the charterer hires the entire ship for the voyage, and has the exclusive possession, command, and navigation of the vessel, he takes the character and responsibilities of a general owner; but if the general owner retains the possession of a part of the ship, with the command and navigation, and contracts to carry a cargo on freight for the voyage, the charter-party is considered a mere contract of affreightment, sounding in covenant, and the freighter does not take the character or legal responsibilities of ownership. But the contract, in either case, is termed a charter-

[14] *Ante*, Vol. I. § 494; Le Cheminant *v.* Pearson, 4 Taunt. 367.

[15] Bixby *v.* Franklin Ins. Co., 8 Pick. 86; Colson *v.* Bonzey, 6 Greenl. 474; Hozey *v.* Buchanan, 16 Peters 215.

[1] The Tilton, 5 Mason 465, 474; 3 Kent Comm. 131. A party who claims property in a vessel, derived from a sentence of condemnation by a foreign tribunal, is bound to prove that the tribunal was lawfully constituted. Ordinarily, foreign courts, whose origin is unknown, will be presumed legitimate, until the contrary is proved; but if the court appears to have been constituted by a different authority from what is usual among civilized nations, as, for example, by a military commander, the party claiming under its decree must show that the court was constituted by competent authority: Snell *v.* Foussatt, 1 Wash. C. C. 271; s. c. 3 Binn. 239, n.; Cheriot *v.* Foussat, ib. 220.

party.[1] By the codes of all the maritime States of Europe, except Great Britain and Malta, it is requisite that this contract should be in writing;[2] and the same rule is understood to prevail in Mexico, and in the States of Central and South America, in which the Ordonanza de Bilbao is recognized as an authority.[3] But in the English law, and that of the United States, the hiring of ships without writing is undoubtedly valid, though disapproved as a loose and dangerous practice.[4]

§ 422. **Bill of Lading.** The proper evidence of the shipment of the particular goods to be conveyed, pursuant to the charter-party or contract of affreightment, is the *bill of lading*. This document, though not necessary to the validity of the contract by any express English or American statute, is required by immemorial maritime usage; and is made essential by the codes of most of the maritime States of continental Europe.[1] By the commercial code of France, it is requisite that the bill of lading should express the nature, quantity, and species or qualities of the goods, the name of the shipper, the name and address of the consignee, the name and domicile of the captain, the name and tonnage of the vessel, the place of departure and of destination, the price of the freight; and in the margin, the marks and numbers of the articles or packages shipped; and it is required to be executed in four originals, one each for the shipper, the consignee, the master, and the owner. When thus drawn up, it is legal evidence between all the parties interested in the shipment, and between them and the insurers.[2] A regulation pre-

[1] Marcardier *v.* The Chesapeake Ins. Co., 8 Cranch 39, 40 ; The Volunteer, 1 Sumn. 551, 555, 568 ; Drinkwater *v.* The Spartan, Ware 156. In cases of doubt upon the face of the charter-party, the general owner is deemed owner for the voyage : Certain Logs of Mahogany, 2 Sumn. 589, 597.

[2] St. Joseph, Concordance entre les Codes, etc., pp. 69, 70, 265, 287, 307, 333, 366, 405.

[3] Ib. p. 70.

[4] 3 Kent Comm. 204.

[1] St. Joseph, Concord. pp. 70, 72, 74, 75. Such, by this author, appears to be the law of France, Spain, Portugal, Holland, Prussia, Russia, Hamburg, Sweden, Wallachia, Sardinia, and the Ionian Isles.

[2] Code de Commerce, art. 281, 282, 283. And see Abbott on Shipping, pp. 216, 217, and notes by Story, 12th (Eng.) ed. 259, 260; {The Peter der Grosse, L. R. 1 Prob. Div. 414 ; The Sally Magee, 3 Wall. (U. S.) 451. The bill of lading is, however, only *prima facie* evidence of the fact that the articles named in it were actually shipped on the vessel, and may be rebutted by other evidence. Thus on a libel by the consignees against a vessel for damages for non-performance of a contract of affreightment, in not carrying certain bales of tobacco to their destination, it appeared by the testimony of the libellants, that if the number of bales which appeared by the bill of lading to have been shipped, had actually been shipped, in addition to the rest of the articles mentioned in the bill of lading, the whole cargo would have exceeded in bulk

cisely similar in its terms is contained in the codes of Portugal, Prussia, and Holland.[3] In the other continental States the substance only is the same. And by the general maritime law, this document is the proper evidence of title to the goods shipped; if it be made to order, or assigns, it is transferable in the market as other commercial paper, and the indorsement and

the capacity of the vessel's hold, and that the only tobacco delivered was a smaller number of bales, and that the captain of the vessel had been approached by the shipper with a proposition to scuttle the vessel. Upon the whole testimony, the court held that the effect of the bill of lading as *prima facie* evidence was overcome, and in the absence of any positive evidence as to the number of bales shipped, the case was only supported to the number of bales delivered: The Alice, 12 F. 496. As to the introduction of secondary evidence of the contents of the bill of lading, the rules of the common law are in force in the admiralty courts, with certain exceptions. Thus where the libellants, on a suit for possession of cargo, presented by their proctor at the hearing a paper certified by the United States Consul at Antwerp to be a correct copy of an original bill of lading which was in the possession of the libellants, and asked that it be accepted as evidence in lieu of the original, upon the grounds that the libellants had the original bill of lading, but deemed it best not to expose it to the risk of long sea voyages, before they could judge where their principal claim must be enforced, the court held that such evidence was not admissible, saying, "It is much better that private interests and individual cases should suffer than that the rules of practice and evidence, established by the wisdom of successive generations, in successive decisions, should be broken down or ignored; and if the libellants have the originals, the production of them can be but a question of time. The general rule which requires the best evidence, namely, the introduction of the original documents embodying contracts, has, it is true, certain exceptions; but in every case such exception is based upon the inability of the party to procure the original, and this has been so repeatedly affirmed and so conclusively established that it can but be recognized as binding. The certificate attached to the copy states, and the libellants acknowledge, that the original is in their possession, and this takes the case from the rule of exceptions. I have been referred to no case, nor have I been able to find one, where the inconvenience of parties or prospect of an original being required in another suit has been considered sufficient reason for the acceptance of a copy in evidence." The case also contains another point, that a consular certificate cannot be accepted as evidence, except when it has been made such by statute: The Alice, ib. 923. But the certificate of a consul, duly authenticated, of the discharge of a sailor upon his own application, and with the master's consent, is conclusive evidence of such discharge: The Paul Revere, 10 id. 156. On the effect of judgments as evidence, see The Tubal Cain, 9 id. 834, and the valuable note of M. M. Bigelow, Esq., in that place. The common-law rule that parol evidence is inadmissible to vary a written contract applies generally to courts of admiralty. Thus a bill of lading, so far as it is a contract, cannot be varied by parol evidence: The Delaware, 14 Wall. 579; Slocum *v.* Swift, 2 Low. 212. Cf. The Golden Rule, 9 F. 334. Lowell, J., in The Quintero, 1 Low. 38, says on this point: "Whatever may be the strict rule of the common law, I am by no means prepared to say that in this court, a sailor, unable from any cause to read the contract which he has subscribed, might not be permitted to show that it differed from his oral engagement upon clear proof that the written contract had not been read or explained to him, even without the element of positive fraud, which probably induced the admission of such evidence in Wope *v.* Hemmenway, 1 Sprague 300." Although this case went off on another point, the intimation that parol evidence might be admitted to vary the written contract of seamen, if the contract was not read to them and which differs from the oral agreement, although there is no proof of legal fraud, is in accordance with the practice of the admiralty court, as a court of equity, and was followed by the same judge by a decision to that effect: The Tarquin, 2 Low. 358. So it has been held that oral evidence may be given of a clause in a contract, agreed upon but accidentally left out in the written agreement: The Antelope, 1 id. 130.]

[3] St. Joseph, Concord. pp. 72, 75.

delivery of it transfers the property in the goods from the time of delivery.[4]

§ 423. **Shipping Articles.** Another essential document is the *shipping articles*, or contract for the service and wages of the seamen. The statute of the United States, for the government and regulation of seamen in the merchant service, requires every master of a vessel bound from the United States to a foreign port, and every master of a vessel of more than fifty tons' burden, bound from a port in one State to a port in any other than an adjoining State, before proceeding on the voyage, to make a written agreement with every seaman on board his vessel, except apprentices and servants of himself or the owners, declaring the voyage or voyages, term or terms of time, for which such seamen shall be shipped. And, at the foot of such contract, there must be a memorandum of the day and hour on which each seaman renders himself on board, to begin the voyage agreed on.[1] Though these shipping articles are signed by all the seamen, no one is understood to contract jointly with or to incur responsibility for any of the others; but the document constitutes a several contract with each seaman, to all intents and purposes.[2] It is part of the necessary documents of the ship for the voyage, and is *prima facie* evidence in respect to all persons named therein. It is presumed to import verity until impeached by proof of fraud, mistake, or interpolation; and is in no just sense the private paper of the master, but is properly the document of the owner, as well as of the other parties, to which he must be presumed to have access, and of the contents of which he cannot ordinarily be supposed to be ignorant.[3] If it contains any agreement with the seaman contrary to the general maritime law, or to the policy of a statute; as, for example, that the seaman shall pay for medical advice and medicines, without any condition that the ship shall be provided with a suitable medicine-chest; or that the wages shall cease in

[4] 3 Kent Comm. 207; Abbott on Shipping, p. 389 (Story's ed.), 12th (Eng.) ed. 275.

[1] U. S. Stat. 1790, c. 29, §§ 1, 2, vol. i. p. 131. {Section 13 of the Shipping Act of 1872, 17 Stat. 262, requiring agreements of seamen in the presence of a shipping commissioner, refers only to the agreements mentioned in sect. 12 of the same act: The Grace Lathrop, C. Ct. U. S., Dist. Mass., Lowell, J., 1 Cen. L. J. 189. But see *contra*, that it refers to all agreements, U. S. *v.* St. Ship City of Mexico, C. Ct. U. S., East. Dist. N. Y., Woodruff, J., 1 Cen. L. J. 191.}

[2] Oliver *v.* Alexander, 6 Pet. 145.

[3] Willard *v.* Dorr, 3 Mason 161.

case of capture, or during the restraint of the ship, — the stipulation will not be allowed to stand, unless an additional compensation be given to the seaman, entirely adequate to the new burdens, restrictions, or risks imposed upon him thereby, or the nature and operation of the clause be fully and fairly explained to him.[4] This document must explicitly declare the ports at which the voyage is to commence and terminate.[5] Parol evidence cannot be admitted to vary the contract, as to the amount of wages;[6] but if the amount is omitted by mistake or accident, and without fraud, either party may be permitted to show, by parol testimony, what was the amount of wages actually agreed upon between them.[7] And the seaman also may show, by parol evidence, that the voyage was falsely described to him at the time of signing the articles;[8] or, that they had been fraudulently altered by the master, since he had signed them.[9] But parol evidence is not admissible on the part of the seaman, to prove an agreement for any additional benefit or privilege, as part of his wages, beyond the amount specified in the shipping articles.[10]

§ 424. **Same Subject.** Though the statute above cited contains no express declaration respecting the effect of the shipping articles as evidence of the contract, similar to the English statute on that subject,[1] yet they have been held to be *the only*

[4] Harden *v.* Gordon, 2 Mason 541 ; Brown *v.* Lull, 2 Sumn. 443, 450 ; The Juliana, 2 Dods. 504 ; 3 Kent Comm. 184. And see Mr. Curtis's valuable Treatise on the Rights and Duties of Merchant Seamen, pp. 54–58 ; Flanders on Shipping, p. 74.

[5] Magee *v.* Moss, Gilp. 219.

[6] Veacock *v.* McCall, Gilp. 329.

[7] Wickam *v.* Blight, Gilp. 452 ; The Harvey, 2 Hagg. Adm. 79.

[8] Murray *v.* Kellogg, 9 Johns. 227 ; {Page *v.* Sheffield, 2 Curtis C. C. 377 ; Snow *v.* Wope, ib. 301. Where the shipping articles were in the usual printed form for whaling voyages, with an additional clause in writing containing novel provisions as to the mode of computing the shares of the seamen, it was held that the seaman was not bound by such new provisions, they not having been made known to him at the time of shipment: Mayshew *v.* Terry, Sprague 584.}

[9] The Eliza, 1 Hagg. Adm. 182.

[10] The Isabella, 2 C. Rob. 241 ; Veacock *v.* McCall, Gilp. 329. The contrary seems, at first view, to have been held by Judge Peters, in Parker *v.* The Calliope, 2 Pet. Adm. 272; but it is to be observed that in that case, which was a libel by the cook for wages, the owner claimed an allowance for the value of the ship's slush, which the cook had sold and appropriated to his own use; and the parol evidence admitted by the judge went to show that the slush was given to the cook, as an admitted perquisite of his place ; the evidence being admitted to repel the demand of the owner, as being unjust, and not to support an original claim against him. {In a suit for wages, if the shipping articles are not produced at the trial upon due requirement by the seaman, his statement of their contents will be *prima facie* evidence thereof: Stat. July 20, 1790, § 6 ; The Osceola, Olcott 450.}

[1] By Stat. 2 Geo. II. c. 36, it was provided that the agreement, "after the signing thereof, shall be conclusive and binding to all parties:" The Isabella, 2 C. Rob.

primary legal evidence of the contract on the general principle of the law of evidence;[2] although the charges made on them, of advances to the seamen in the course of the voyage, are not sufficient evidence of such payments, until verified by the supletory oath of the master.[3] But by a subsequent statute, respecting the discharge of seamen in foreign ports,[4] it is, among other things, required that the ship be furnished with a duplicate list of the crew and a certified copy, from the collector of the customs in the place of clearance, of the shipping articles, and that "these documents, *which shall be deemed to contain all the conditions of contract with the crew, as to their service, pay, voyage, and all other things*," shall be produced by the master, and laid before any consul or commercial agent of the United States, whenever there may be occasion for the exercise of his duties under that statute. Such being the effect given by the statute to these certified copies in the cases therein provided for, it is not unreasonable to infer that the originals were understood and intended to have the same effect in all cases. And this inference is supported by another provision, in the previous statute,[5] that in any suit for wages, it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise, the complainant shall be permitted *to state* the contents thereof, and the proof to the contrary shall lie on the master or commander.

§ 425. **Same Subject; Fisheries.** In the *fisheries*, also, the contract of the seamen with the master and owner is, by statute, required to be in writing, in all cases where the vessel is of the burden of twenty tons and upwards. The writing, in addition to such terms of shipment as may be agreed on, must express whether the agreement is to continue for one voyage or for the fishing season, and that the fish or their proceeds, which may

241. These words are regarded as applicable only to the amount of wages, and the voyage to be performed, and not to articles in which the rate of wages is not specified, nor to other stipulations of a special nature; the court of admiralty deeming itself at liberty, on collateral points, to consider how far they are just and reasonable: The Prince Frederick, 2 Hagg. Adm. 394; The Harvey, ib. 79; The Minerva, 1 Hagg. Adm. 54. The English statutes relative to seamen in the merchant service have been revised, improved, and consolidated by Stat. 5 & 6 W. IV. c. 19.

[2] Bartlett *v.* Wyman, 14 Johns. 260; Johnson *v.* Dalton, 1 Cowen 543, 549.

[3] The David Pratt, Ware 496.

[4] U. S. Stat. 1840, c. 48, § 1, vol. v. p. 395.

[5] U. S. Stat. 1790, c. 29, § 6, vol. i. p. 134.

appertain to the fishermen, shall be divided among them in proportion to the fish they respectively may have caught. It must also be indorsed or countersigned by the owner of the vessel or his agent.[1] This statute was not intended to abridge the remedy of the seamen, by the common marine law, against all who were owners of the vessel for the voyage; and therefore it has been held, that where the articles are not indorsed or countersigned by all the owners, the seaman, in a suit for his share of the proceeds of the fish, may show, by the license, and by parol evidence, who were the real owners of the vessel, and, as such, responsible for the proceeds.[2] In the *whale fishery*, which is held not to be a "foreign voyage," within the meaning of the statutes using that expression, no statute has yet expressly required that the contract should be in writing; but the nature and usage of that trade have led to the universal adoption of a written agreement.[3]

§ 426. **Same Subject ; Secondary Evidence.** If the shipping articles are *lost*, the *rôle d'équipage* is competent evidence of the shipment of the seamen, and of the contract made in relation to wages.[1] For though the articles are held to be the only legal evidence of the contract, in cases where by law they are required and have been executed; yet this does not exclude any competent secondary evidence, where the original is not to be had. If, after the voyage is partly performed, the seamen, at an intermediate port, compel the master to enter into new articles at a higher rate of wages, under threats of desertion in case of his refusal, the new articles are void, as being contrary to the policy of the statute, and tending to sanction a violation of duty and of contract; and the original articles remain in force.[2] Nor is the original contract with the seamen impaired or affected by the death, removal, or resignation of the master, after its execution.[3]

§ 427. **Same Subject ; Interpretation.** It may be added that in the *interpretation of this contract*, as well as of all other agreements made between seamen and ship-owners or masters, courts

[1] U. S. Stat. 1813, c. 2, § 1, vol. iii. p. 2.
[2] Wait *v.* Gibbs, 4 Pick. 298.
[3] Curtis on Merchant Seamen, p. 60.
[1] The Ketland *v.* Lebering, 2 Wash. C. C. 201.
[2] Bartlett *v.* Wyman, 14 Johns. 260.
[3] U. S. *v.* Cassedy, 2 Sumn. 582; U. S. *v.* Hamilton, 1 Mason 443 ; U. S. *v.* Haines, 5 id. 272.

of admiralty will take into consideration the disparity of intelligence and of position between the contracting parties, and will be vigilant to afford protection to the seaman; giving him the benefit of any doubt arising upon the contract.[1] They are said to be the "*wards of the admiralty*," "*inopes concilii*," "placed particularly under its protection," in whose favor the law "greatly leans;" and who are "to be treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que trust* with their trustees."[2] Hence an acquittance or a general release under seal, executed by a seaman on the payment of his wages, does not, in admiralty, operate as an estoppel, but is treated only as a common receipt, and as *prima facie* evidence of what it expresses, open to any explanatory or opposing proof which would be received in a court of equity.[3]

§ 428. **Log-book.**[1] Another document, universally found on board merchant vessels, and recognized in courts of admiralty, is the *log-book*, or journal of the voyage, and of transactions on shipboard from day to day. It is kept by the master or mate, but usually by the latter; and is of the highest importance in questions of prize, of average, and of seamen's wages, as well as in other particulars.[2] It is evidence in respect to facts relating to the business of lading, unlading, and navigating the ship,

[1] The Minerva, 1 Hagg. Adm. 355; The Hoghton, 3 id. 112; The Ada, Daveis 407.

[2] Ibid.; The Madonna d'Idra, 1 Dods. 39; The Elizabeth, 2 id. 407; Harden *v.* Gordon, 2 Mason 556; 3 Kent Comm. 176; Ware 369; Brown *v.* Lull, 2 Sumn. 443. In this last case, Story, J., observed, that "courts of admiralty are in the habit of watching with scrupulous jealousy every deviation from these principles in the articles, as injurious to the rights of seamen, and founded in an unconscionable inequality of benefits between the parties. Seamen are a class of persons remarkable for their rashness, thoughtlessness, and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised. Hence it is that bargains between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny, for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of admiralty on this account are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of courts of admiralty. In a just sense they are so, so far as the maintenance of their rights and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned:" 2 Sumn. 449.

[3] The David Pratt, Ware 495, 500, 501; Harden *v.* Gordon, 2 Mason 561, 562; Thomas *v.* Lane, 2 Sumn. 11; Jackson *v.* White, 1 Pet. Adm. 179.

[1] [See Vol. I. § 495.]

[2] Jacobsen's Sea Laws, pp. 77, 91.

the course, progress, and incidents of the voyage, the transactions on shipboard touching those subjects, and the employment and conduct of the crew, but matters totally foreign from these in their character ought not to be entered in the log-book; and, though entered there, must be proved by other evidence. In respect to the general estimation in which it is held in courts of admiralty, it was observed by Lord Stowell, that the evidence of the log-book is to be received with jealousy, where it makes for the parties, as it may have been manufactured for the purpose; but it is evidence of the most authentic kind against the parties, because they cannot be supposed to have given a false representation with a view to prejudice themselves. The witnesses, when they speak to a fact, may perhaps be aware, that it has become a case of consequence, and may qualify their account of past events so as to give a colored effect to it. But the journal is written beforehand, and by persons, perhaps, unacquainted with any intention of fraud; and may therefore securely be relied on wherever it speaks to the prejudice of its authors.[3] The log-book, therefore, is *prima facie* evidence of the truth of all matters properly entered therein, in every particular so entered; and to be falsified, it must be disproved by satisfactory evidence.[4] When offered in evidence, it must, of

[3] The Eleanor, 1 Edw. Adm. 163. And see L'Etoile, 2 Dods. 113. It has been said that the log-book of the party suing can never be made evidence in his favor, under any shape: The Sociedade Feliz, 1 W. Rob. 311.

[4] Douglass *v.* Eyre, Gilp. 147. {In The Sandringham, 10 F. 556, it is said that in a libel for salvage, the log-book is not evidence against the salvors, in favor of the vessel. In The Mary C. Conery, 9 id. 222, it is said that to make the log of any value in cases of disrating seamen, the entries should be made at the time of the transactions referred to. The question of the admissibility of the log-book in favor of the vessel in cases of collision is fully discussed in The Henry Coxon, L. R. 3 Prob. Div. 156. The facts in that case were these: The action was instituted on behalf of the owners of the steamship Gange against the owners of the Henry Coxon, for recovery of damages arising out of a collision between the two vessels on Saturday, Jan. 12, 1878. After the witnesses called for the plaintiffs had been examined, one of the owners of the Henry Coxon was examined as a witness in behalf of the defendants, and gave evidence to the effect that subsequently to the collision the Henry Coxon, having on board the master and all the crew who had been on board at the time of the collision, with the exception of the second engineer, had been despatched on a voyage to Riga; that she was known to have left Riga, homeward bound, on June 12, 1878, and to have passed Copenhagen on the 15th of the same month, but that nothing since had been heard of her, except that one of her boats had been picked up. The second engineer of the Henry Coxon was also examined as a witness on behalf of the defendants. He stated that he had been below at the time of the collision; that the log of the Henry Coxon was in the handwriting of the first mate, who had been on deck at the time of the collision, and that the entry in it relating to the collision had been made on the Monday morning after the collision, and had been signed by the witness after it had been signed by the first mate. The entry was tendered in evidence by the defendants. Sir Robert Phillimore, in his decision, said: "The Henry Coxon made a voyage subsequent to that on

course, be accompanied by proof of its genuineness and identity.[5] Alterations and erasures, apparent on its face, do not necessarily preclude its admissibility in evidence for any purpose, but go in a greater or less degree to impair its value and weight as an instrument of evidence; and in some cases may cause it to be rejected.[6]

§ 429. **Same Subject; Desertion.** For certain purposes, proof by the log-book is made indispensably necessary, by the statute for the government and regulation of seamen in the merchant service.[1] By this statute,[2] it is enacted, that if any seaman

which the collision in question in this action occurred, and since then she has never been heard of. It must, therefore, be concluded that she has perished with all hands. Her crew, on the voyage on which she was lost, consisted of the same crew who were on board her at the time of the collision, with the exception of one man, the engineer in charge of the engines, who was not on deck at the time of the collision. In these circumstances the log of the vessel which has perished is tendered by the defendant's counsel as being evidence in the action, on the authority of several cases, the earliest of which was, I think, the case of Price *v.* Earl of Torrington, 1 Salk. 285; 1 Sm. Lead. Cas. 328 (7th ed.), and it is contended that inasmuch as the entries in this log were made by the first mate of the Henry Coxon, who was on board her when she started on her voyage, on which she must have been lost, and were entries made by him in the course of his duty, and contemporaneously with the occurrence of the facts to which they relate, the court ought to admit them as evidence in this case. Now I think, upon the whole, though the question is not without difficulty, that the principle to be gathered from the authorities is adverse to the admission of the log. I am not satisfied that the log can be considered in the light of a contemporaneous instrument. The collision took place on the Saturday, and the entry which the defendants' counsel have referred to appears not to have been made until the following Monday morning. I think it was to the interest of the person who made the entry relating to the collision, to represent that the collision took place in consequence of the bad navigation of the Gange, and not of his own vessel. There is another matter to consider. It seems to me that the authorities point to this: That entries in a document made by a deceased person can only be admitted as evidence on the grounds on which it is sought to make this log admissible, when it is clearly shown that the entries relate to an act or acts done by the deceased person and not by third parties. Now we all know, as matter of common knowledge in these proceedings, that it is the duty of the mate to enter not only the manœuvres that were executed on board his own ship, and all the matters relating to her navigation, but also to state what was the cause of the collision, and whether it was in consequence of the manœuvres and navigation of the other ship, and that which is set down in the log in respect to one of these sets of facts is ordinarily so mixed up with that relating to the other set, that it is difficult, if not impossible, to separate them so as to disentangle the parts of the entry relating to what was done by the vessel on board which the log was kept from those parts which relate to what was done by the other vessel. I think that this case does not come within the principle of the cases where the evidence of this kind has been admitted."}

[5] U. S. *v.* Mitchell, 2 Wash. C. C. 478; 3 id. 95; Dunl. Adm. Pr. 268.

[6] Madder *v.* Reed, Dunl. Adm. Pr. 251.

[1] [A consul's certificate is insufficient to prove desertion: Graves *v.* The W. F. Babcock, 85 F. 978, U. S. App.]

[2] U. S. Stat. 1790, c. 29, § 5, vol. i. p. 133. The enactment is in these words: "That if any seaman or mariner, who shall have subscribed such contract as is hereinbefore described, shall absent himself from on board the ship or vessel in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he will so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall

shall absent himself from the vessel without leave, and the fact shall be entered in the log-book on the same day, and he shall return to his duty within forty-eight hours, he shall forfeit only three days' pay for each day of absence; but if he shall not return within the forty-eight hours, he shall forfeit all the wages due to him, and all his effects on board the vessel or stored on shore at the time, and be further liable to respond in damages to the owner. The effect of this has been to engraft a new rule upon the general maritime law. By that law, desertion of the ship, during the voyage, *animo non revertendi*, and without sufficient cause, connected with a continued abandonment, works a forfeiture of wages. Mere absence without leave, but with an intention of returning, or without such intent, if followed by seasonable repentance and a return to duty, is not followed by the highly penal consequence of such a forfeiture. But the legislature, considering that a longer absence might endanger the safety of the ship or the due progress of the voyage, has made forty-eight hours' absence without leave *conclusive evidence* of desertion, whereas, upon the common principles of the maritime law, it would be merely presumptive evidence of it. The fact of *absence without leave* must, however, be entered on the log-book *on the very day* of its occurrence, as an indispensable prerequisite to this statute forfeiture; and hence the log-book becomes the indispensable and only competent evidence of the fact.[1] It is not sufficient merely to state that the seaman was *absent*, or, that he *left* the ship; it must also be stated that it was *without leave*, with the entry of his *name*.[2]

§ 430. **Same Subject.** But though the log-book is thus made indispensable to the proof of a statute forfeiture of wages, it is

so absent himself, to be deducted out of his wages ; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and moreover shall be liable to pay to him or them all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place ; and such damages shall be recovered with costs, in any court, or before any justice or justices, having jurisdiction of the recovery of debts to the value of ten dollars, or upwards."

[1] Cloutman *v.* Tunison, 1 Sumn. 373, 380, The Rovena, Ware 309, 312, 313 ; Spencer *v.* Eustis, 8 Shepl. 519. And see Coffin *v.* Jenkins, 3 Story 108 ; Wood *v.* The Nimrod, Gilp. 83 ; Snell *v.* The Independence, ib. 140 ; Knagg *v.* Goldsmith, ib. 207. By the Stat. 7 & 8 Vict. c. 112, § 7, it is incumbent on the owner or master, in such cases, to establish the truth of the entry in the log-book, by the evidence of the mate, or other credible witness.

[2] Abbott on Shipping, p. 468, n. by Story, cf. 12th Eng. ed. 129 ; Curtis on Merchant Seamen, pp. 54, 134–136; The Rovena, Ware 309, 314.

not incontrovertible; but the charge of desertion may be repelled by proof of the falsity of the entry, or that it was made by mistake.[1]

§ 431. **Same Subject; Pleading.** In order to admit the log-book in evidence, it ought regularly to be pleaded in the answer. But this rule does not seem to be always strictly enforced. In a suit for wages, a log-book, brought into court by the owners, not pleaded, but asserted to be in the handwriting of the mate, who was the libellant, was permitted to be adverted to, though resisted by the other party.[1] The affidavit of the master, in explanation of the log-book accompanied by a letter written by him *recenti facto*, has been received.[2] But letters written by the master to his owners immediately after a seaman had left the ship, informing them of his desertion, are inadmissible as evidence of that fact;[3] nor will an extract from a police record abroad be received in proof of a mariner's misconduct.[4]

§ 432. **Other Documents.** There are other documents, admissible in courts of admiralty as evidence in maritime cases, which are required by the laws of particular nations, or by treaties, the consideration of which belongs rather to the general law of shipping than to the law of evidence. Among these may be mentioned the *Sea Letter*, which declares the nationality of the ownership, and commends the vessel to the comity of nations; the *Mediterranean Passport*, required by treaties with the Barbary Powers, and intended for protection against their cruisers; the *Certificate of Property;* the *Crew-list*, *Muster-roll*, or *Rôle d'Équipage*, for the protection of the crew in the course of the voyage during a war abroad;[1] the *Inventory* of the ship's tackle, furniture, etc., and of the several ship's papers relative to the voyage, for proof against captors, both of the dismantling of the vessel, and of the destruction or suppression of her documents; and the *Manifest*, *Invoices*, *Certificates of Origin*, and other documentary proof of the character of the cargo.[2]

[1] Orne *v.* Townsend, 4 Mason 541; Malone *v.* The Mary, 1 Pet. Adm. 139; Jones *v.* The Phœnix, ib. 201; Thompson *v.* The Philadelphia, ib. 210; The Hercules, Sprague's Decisions 534.

[1] The Malta, 2 Hagg. Adm. 158, n.

[2] L'Etoile, 2 Dods. 114.

[3] The Jupiter, 2 Hagg. Adm. 221.

[4] The Vibilia, 2 Hagg. Adm. 228, n.

[1] U. S. Treasury Circular, Feb. 25, 1815.

[2] See Jacobsen's Sea Laws, book 1, c. 4, 5; book 3, c. 4; Commercial Code of

§ 433. 4. **Depositions.** The testimony of witnesses in civil causes of admiralty jurisdiction in the courts of the United States is ordinarily received *viva voce*, in summary causes, such as those for seamen's wages, and the like; but in those of a graver character, especially if expected to be carried to the Supreme Court, the evidence is usually taken in depositions, under a commission.[1] The mode of taking depositions, having been stated with sufficient particularity in a preceding volume,[2] will not here be repeated. It should, however, be observed, that there is a clear distinction between depositions taken under a *dedimus potestatem*, and those taken *de bene esse*, under the Judiciary Act of Congress.[3] The provision made in that statute for taking depositions *de bene esse*, without the formality or delay of a commission, is restricted to the cases there enumerated; namely, when the witness resides more than one hundred miles from the place of trial, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district and more than the above distance from the place, and before the time of trial, or is ancient or very infirm. But whenever a *commission* issues "to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice," whether the witness resides beyond the process of the court or within it, the depositions are under no circumstances to be considered as taken *de bene esse*, but are absolute.[4] The

France, art. 226; Arnould on Insurance, 623–625, 5th (Eng.) ed. 616; [Grace *v.* Browne, 86 F. 155, U. S. App.]. {The weather reports which are kept by the signal service station, if original entries, are probably evidence in an admiralty court. Similar reports, kept by the coastguard in England, were received in England, on being proved to be original entries: The Catherina Maria, L. R. 1 Ad. & Ec. 53.

The value of the weather reports, kept at the signal service stations along the coast, as evidence in an admiralty court, is thus commented on by Hughes, D. J., in The Sandringham, 10 F. 556: "As I am under the necessity of passing upon the relative value of this testimony, I am free to say that I am not inclined to repose entire confidence in the reports of the officers of the signal service as to facts out at sea, when they conflict with testimony of experienced and credible seamen. Indeed, these reports cannot be received between parties to a litigation as evidence in the strict legal sense. They lack the two sanctions necessary to the validity of legal testimony, *i. e.*, that of being given upon oath, and that of being subjected to the opportunity of cross-examination.}

[1] {The Oder, 13 F. 272.}

[2] *Ante*, Vol. I. §§ 320–325.

[3] U. S. Stat. 1789, c. 20, § 30; vol. i. p. 88, Stat. 1793, c. 22, § 6; vol. i. p. 335; *ante*, Vol. I. § 322.

[4] Sergeant *v.* Biddle, 4 Wheat. 508. {It has generally been held in the English courts, that the issuing a commission to take the testimony of witnesses in a foreign country lies in the discretion of the court, and the courts seem somewhat chary of exercising this discretion; and where the expense of issuing such a commission would be greater than the cost of procuring the attendance of the witnesses in court, unless it appears that there is great difficulty in procuring such attendance, the commission

statute provision above mentioned does not apply to cases pending in the Supreme Court but only to cases in the District and Circuit Courts. Depositions can be regularly taken for the Supreme Court only under a commission issued according to its own rules.[5] Under the statute, it has also been held, that the circumstance that the witness was a seaman in the *naval* service of the United States, and *liable* to be ordered on a distant service, was not a sufficient cause for taking his deposition *de bene esse;* and therefore his deposition was rejected. But it was observed, that in such a case there would seem to be a propriety in applying to the court for its aid.[6]

§ 434. **Competency of Deponent.** *Objections to the competency* of a deponent should be made at the time of taking his deposition, when it is taken under the statute, in order that the party may have opportunity to remove them if possible. But if the ground of objection was not previously known, either actually or by constructive notice, the objection may be made at the hearing.[1] And when the party, against whom a deposition is taken, expressly waives all objection to it, this general waiver must be understood as extending to the deposition only in the character in which it was taken, and not as imparting to it any new or different character, as an instrument of evidence. Thus, where a deposition is taken *de bene esse*, and the adverse party waives all objection to it, it is still only a deposition *de bene esse*, and does not, by the waiver, become a deposition in chief.[2]

§ 435. **Rules governing the taking of Depositions.** The general rules for the conduct of commissioners, parties, and counsel, in taking depositions, are substantially the same in admiralty as in equity. But from the peculiar character of the subjects of jurisdiction, and of the persons and employments of the parties and witnesses, and upon the constant necessity of resorting to foreign countries for proof, courts of admiralty are constrained, for the promotion of justice, to administer those rules of evidence which are not prescribed by statutes with less

will probably be refused in a court of admiralty: The M. Maxham, L. R. 1 Prob. Div. 107.]

[5] The Argo, 2 Wheat. 287.

[6] The Samuel, 1 Wheat. 9.

[1] U. S. *v.* Hair Pencils, 1 Paine 400.

[2] The Thomas and Henry, 1 Brock. 367.

strictness than is observed in other tribunals. This is illustrated in its frequent resort to letters rogatory, instead of a commission, especially where the foreign government refuses to suffer a commission to be executed within its jurisdiction, and deputes persons, appointed by itself, to take the depositions. In such cases, especially, it will suffice if the testimony sought is substantially obtained from the witness, as far as he is able to testify, though all the interrogatories are not formally answered. Indeed, it is said that, wherever the business is taken out of the hands of the court, the ends of justice seem to require a departure, in some degree, from the ordinary rules of evidence; though the extent to which this departure should go has not yet been precisely determined.[1] So, where an order of the court has been made, pursuant to an agreement of the parties, that the commission for taking testimony should be closed within a limited time; the court, nevertheless, in its discretion, will enlarge the time, upon the proof of newly discovered and material evidence, coming to the knowledge of the party after the execution of the commission.[2]

§ 436. **Affidavits.** In regard to *affidavits*, it may be here observed, that in instance causes they are seldom of use, except in some cases of salvage,[1] and in matters relating to the progress of the cause. But whenever they are taken, the person preparing the affidavit ought not to make out the statements of fact in language contrary to the natural tone in which the witness or party, if unassisted, would express himself; but should state all the facts and circumstances as the affiant would himself state them if examined in court.[2] As to their admissibility in chief, it has been held that the court will not receive, on the mere affidavit of the defendant, facts which would be a bar to the action;[3] nor will it, upon mere voluntary affidavits, decide upon charges strongly partaking of a criminal nature.[4] Neither is an affidavit admissible in explanation of depositions and supplying the deficiencies therein; it being either a contradiction or a

[1] Nelson *v.* U. S., 1 Pet. C. C. 237.
[2] The Ruby, 5 Mason 451.
[1] In the High Court of Admiralty in England, when cases of salvage are brought upon affidavits, the practice, it seems, is, for the salvors examined first to release their interest. Dunl. Adm. Pr. 265, cites The Catherine of Dover, 2 Hagg. Adm. 149, 152, n. See *supra*, § 412.
[2] The Towan, 8 Jur. 222.
[3] The Lord Hobart, 2 Dods. 101.
[4] The Apollo, 1 Hagg. Adm. 315.

repetition of the depositions.[5] Nor will the court receive the affidavit of a party in explanation and justification of his conduct in certain proceedings which had appeared in evidence in the cause, and had been animadverted upon by the opposing counsel.[6] The general nature of affidavits, their essential requisites, and their weight and effect, are regarded in all the courts in a manner substantially the same; and these having been already fully explained, under the head of Evidence in Chancery,[7] no further consideration of the subject is here deemed necessary.

[5] The Georgiana, 1 Dods. 399.
[6] Wood *v.* Goodlake, 2 Curt. 97.
[7] See *supra*, §§ 379–385.

CHAPTER III.

PLEADINGS AND PRACTICE IN PRIZE CAUSES.

§ 437. We have already seen[1] that the district courts of the United States are clothed with all the powers of prize courts, as recognized in the law of nations. The mode in which these powers are exercised, so far as it is peculiar to prize causes, will now briefly be considered.

§ 438. **Captor must preserve Papers.** Upon the capture of a vessel, as prize of war, it is the duty of the captor *carefully to preserve all the papers and writings found on board the prize*, and to transmit *the whole* of the originals, unmutilated, to the judge of the district to which the prize is ordered to proceed; without taking from the prize any of the money or other property found on board, unless for its better preservation, or unless it is absolutely necessary for the use of vessels of the United States.[1] The delivery of the papers is accompanied by an affidavit that they are delivered up in the same condition in which they were taken, without fraud, addition, subduction, or embezzlement. And the master, and one or more of the principal persons belonging to the captured vessel, are also to be brought in for examination.[2] It is an ancient and fundamental rule of prize proceedings, that the master, at least, of the captured ship should be brought in, and examined upon the standing interrogatories, as well as that the ship's papers should accompany the property brought before the court. The omission to do this must be accounted for in a very satisfactory manner, or the court will withhold its sentence, even in very clear cases.[3]

[1] *Supra*, § 387.

[1] Stat. 1800, c. 33, § 1, vol. ii. p. 46; Articles for the Government of the Navy, arts. 7, 8; Wheat. on Captures, p. 280. The practice in prize causes is ably, though somewhat succinctly, treated in the appendix to 1 Wheaton's Reports, Note II., and 2 Wheaton's Reports, Note I., usually attributed to Mr. Justice Story. {Going into a port within the jurisdiction of one court, no proceedings being taken there, does not deprive a court of another district, where proceedings are taken, of jurisdiction: The Peterhoff, Blatchf. Prize Cases, 463.}

[2] Wheat. on Captures, p. 280; 1 Wheat. 495, 496.

[3] The Arabella, 2 Gall. 370; The Flying Fish, ib. 374; The Speculation, 2 C. Rob.

The duty of an *immediate* delivery of the papers is equally stringent, and every deviation from it is watched with uncommon jealousy. They cannot, in any case, be returned to the captors; but the custody of them belongs to the court alone.[4] Nor are the captors permitted to decide upon the materiality of the papers to be preserved and brought in; but it is their duty to produce all which are found; the determination of their value and relevancy is for the court at the hearing.[5]

§ 439. **Commissioners of Prize.** It is the practice of courts of admiralty and prize, in time of war, to appoint *commissioners of prize*, to take the examinations, *in preparatorio*, of the master and persons on board the captured ship, and to perform such other duties respecting the captured property as may be specially assigned to them under the rules and orders of the court. These officers are duly commissioned and sworn. They are ordinarily charged with the custody of the prize, in the first instance, and until further proceedings are had.[1]

§ 440. **Libel; Monition.** It is the duty of the captors forthwith to proceed to the adjudication of the property captured, by filing a *libel* and obtaining a *monition* to all persons claiming an interest in the property, to appear at a day assigned, and show cause why a decree of condemnation should not be passed. If they omit or unreasonably delay thus to proceed, any person, claiming an interest in the prize, may obtain a monition against them, requiring them to proceed to adjudication; which, if they fail to do, or fail to show sufficient cause for condemnation of the property, it will be restored to the claimants, on proof of their interest therein.[1]

§ 441. **When National Ship is Captor.** When the capture is made by a national ship, the *libel* is filed by the district attorney, in behalf of the United States and of the officers and crew of the capturing ship.[1] It briefly alleges, in distinct

293; The Anna, 5 id. 375, [333], 385, [347], n.; The Dame Catharine, Hay & M. 244.

[4] The Diana, 2 Gall. 93, 95.

[5] The London Packet, 1 Mason 14, 20; The Falcon, Bl. Pr. Cas. 52, and *passim*.

[1] Wheat. on Captures, App. pp. 312, 369.

[1] Wheat. on Captures, p. 280.

[1] {The suit should properly be brought in the name of the United States; but the objection that it is brought in the name of the captors is merely formal, and cannot be first taken on appeal: Jecker *v.* Montgomery, 18 How. (U. S.) 110. See also Proceeds of Prizes, 1 Abb. Adm. 495. And when the proceeds of prizes have been brought into court, the parties entitled thereto may file libels in their own names: ibid.}

articles, first, the existence of the war; secondly, the name and rank of the commanding officer of the capturing ship, and of the ship then under his command; thirdly, the time and fact of the capture, as having been made on the high seas, with the name and general description of the vessel or property captured; fourthly, the national character of the prize, showing it to be enemies' property; fifthly, that the prize is brought into a certain port in the district and within the jurisdiction of the court; sixthly, that, by reason of the premises, the property has become forfeited to the United States and the captors, and ought to be condemned to their use; and, lastly, praying process, and monition, and a decree of condemnation of the property, as lawful prize of war.[2] When the capture is made by a privateer, or by private individuals, the captors employ their own proctor, and the libel is filed by the commander of the privateer, in behalf of himself and crew, or by one or more of the individual captors, in behalf of all.

§ 442. **Claim.** If a *claim* to the property is interposed, it should be made by the owner himself, if within the jurisdiction, and not by his agent; the captors being entitled, in that case, to the answer of each claimant, severally, upon his oath.[1] It must be accompanied by a test affidavit, stating that the property, both at the time of its shipment and at the time of capture, did belong, and, if restored, will belong, to the claimant; but an irregularity in this respect, in a case otherwise fair and free from suspicion, will not be deemed fatal.[2] In general, the claimant must make his claim and affidavit, without being assisted by the papers in shaping them; and if they be found substantially to agree with the documents, he will afterwards be permitted to correct any formal errors from the documents themselves. But in special cases, where a proper ground is laid by affidavits, an order will be made for an examination

[2] See the precedent in Wheat. on Captures, App. No. VII. ; The Fortuna, 1 Dods. 81. {The captor is not confined to the case on which the seizure was made ; but may obtain condemnation on a different ground, if the facts warrant it: Schacht *v.* Olter, 33 Eng. Law & Eq. 28. The libel need not allege for what cause a vessel has been seized, or has become prize of war. It is enough to allege the capture generally as prize of war: The Andromeda, 2 Wallace (U. S.) 481 ; The Revere, 2 Sprague 107 ; Blatchf. Prize Cases, *passim.*}

[1] The Lively, 1 Gall. 315, 337 ; The Sally, ib. 401 ; The Adeline, 9 Cranch 286. {The claim must be made by all the owners, equitable as well as legal: The Ernst Merck, 33 Eng. Law & Eq. 594.}

[2] The Adeline, 9 Cranch 244, 286.

of such papers as are necessary to the party to make a proper specification of his own claim, but not for a general examination of all the ship's papers.[3] It is also a general rule, that no claim shall be admitted in opposition to the depositions and the ship's papers. But the rule is not inflexible; it admits of exceptions, standing upon very particular grounds, in cases occurring in times of peace or at the very commencement of war, and granted as a special indulgence. But in times of known war, the rule is never relaxed.[4] Neither will a claim be admitted, where the transaction, on the part of the claimant, was in violation of the laws of his own country, or is forbidden by the law of nature.[5]

§ 443. **Where no Claimant appears.** Where *no claim is interposed*, if the property appears to belong to enemies, it is immediately condemned. If its national character appears doubtful, or even neutral, the court will not proceed to a final decree, but will postpone further proceedings, with a view to enable any person, having title, to assert it within a reasonable time; and this, by the general usage of nations, has been limited to *a year and a day*, that is, to a full year, after the institution of the prize proceedings. If no claim is interposed within that period, the property is deemed to be abandoned, and is condemned to the captor for contumacy and default of the supposed owner.[1] In fine, the end of a prize court, as was said by Lord Mansfield, is to suspend the property until condemnation; to punish every sort of misbehavior in the captors; to restore instantly, *velis velatis*, if upon the most summary examination there does not appear sufficient ground to condemn; but if the goods really are prize, to condemn finally, against everybody, giving everybody an opportunity of being heard. A captor may,

[3] The San Jose Indiano, 2 Gall. 269; The Port Mary, 3 C. Rob. 233. {The claimant of a vessel seized as prize is allowed to give the ship's papers in evidence, and is bound, therefore, to see that they are true papers: Cushing *v.* Laird, 6 Ben. 408.}

[4] The Diana, 2 Gall. 93, 96, 97; The Vrow Anna Catherina, 5 C. Rob. 15, 19, [20, 24]; La Flora, 6 Id. 1.

[5] The Walsingham Packet, 2 C. Rob. 77, 78. And see 1 Wheat. App. Note II., p. 501, and cases there cited. {The claimant will not be heard for the first time in the appellate court: The William Bagaley, 5 Wall. (U. S.) 377.}

[1] The Harrison, 1 Wheat. 298; The Staat Embden, 1 C. Rob. 26, 29. {The testimony of a person present at the capture of a vessel and cargo is admissible against the cargo, the monition against the cargo not having been replied to, though no one belonging to the captured vessel was sent as a witness: The Wave, Bl. Pr. Cas. 329.}

and must, force every person interested to defend; and every person interested may force him to proceed to condemnation without delay.[2]

[2] Lindo *v.* Rodney, 2 Doug. 613, n. {There is great irregularity and flexibility in the procedure of prize courts, and at any stage of the cases errors and omissions will be corrected: U. S. *v.* Bales of Cotton, 1 Woolw. 236, 245.}

CHAPTER IV.

EVIDENCE IN PRIZE CAUSES.

§ 444. 1. **In Preparatorio.** The prize being brought in, and all the papers found on board being delivered into court, and notice thereof being given by the captors to the judge, or to the commissioners of prize, the next thing forthwith to be done is, to take *examinations* of the captured master and crew, upon the *standing interrogatories*. This is seldom done by the judge, in person, but is usually performed by the commissioners, by his order. The standing interrogatories are prepared under the direction of the judge, and contain sifting inquiries upon all points which may affect the question of prize; of which those used in the High Court of Admiralty in England are understood to furnish the most approved model, and are similar to those adopted in the practice in prize causes in the United States.[1]

§ 445. **Persons examined.** This preparatory examination is *confined to the persons on board the prize*, at the time of capture, unless the special permission of the court is obtained for the examination of others.[1] And, in order to guard as far as possible against frauds and misstatements from after-contrivances, the examination should take place as soon as possible after the arrival of the vessel, and without permitting the witnesses to have intercourse with counsel. The captors, also, should introduce all the witnesses in immediate succession, and before any of the depositions are closed and transmitted to the judge; for after the depositions are taken and transmitted, the commissioners are not at liberty, without a special order, to examine other witnesses subsequently adduced by the captors.[2] The same rule is, with equal strictness, applied to the conduct of the claimants. Thus, when

[1] 1 Wheat. 495. The English interrogatories are printed at large in 1 C. Rob. 381–389. Those used in the United States may be found in 2 Wheat. App. pp. 81–87.

[1] 1 Wheat. 496; The Eliza & Katy, 6 C. Rob. 189, 190; The Henrick & Maria, 4 id. 57; The Haabet, 2 id. 174, 175; The Fortuna, 1 Dods. 81.

[2] The Speculation, 2 C. Rob. 293; 1 Wheat. 496, 497.

a person calling himself the supercargo of the prize, produced himself before the commissioners two days after the vessel came into port, and offered papers in his possession, they refused to examine him, because the testimony was not offered immediately; and the judge confirmed their decision.[3] The ship's papers and other documents found on board and not delivered to the judge or the commissioners, previous to the examinations, will not be received in evidence.[4]

§ 446. **Mode of Examination.** In regard to the *manner of the examination*, though it is upon standing interrogatories, and the witnesses are not allowed the assistance of counsel, yet they are produced in the presence of the parties or their agents, before the commissioners, whose duty it is to superintend the regularity of the proceeding, and to protect the witnesses from surprise or misrepresentation. When the deposition is taken, each sheet is afterwards read over to the witness, and separately signed by him, and then becomes evidence common to both parties.[1] It is the duty of the commissioners, not merely to require a formal direct answer to every part of an interrogatory, but to require the witness to state the facts with such minuteness of detail as to meet the stress of every question, and not to evade a sifting inquiry by vague and obscure statements.[2] To prevent fraudulent concert between the witnesses, they are examined apart from each other. And if a witness refuses to answer at all, or to answer fully, the commissioners are to certify the fact to the court; in which case the witness will be liable to be punished for the contempt, and the claimants will incur the penal consequences to the ship and cargo, resulting from a suppression of evidence. As soon as the examinations are completed, they are to be sealed up, directed to the judge of the district, and transmitted to the clerk's office, together with all the ship's papers which have not already been lodged there by the captors.[3]

§ 447. **Trial in First Instance on Preparatory Evidence.** It is upon this *preparatory testimony*, consisting of the ship's papers, the documents on board, and the depositions thus taken, that *the cause is, in the first instance, to be heard and tried.*[1] And in

[3] The Anna, 1 C. Rob. 331.
[4] Ibid.; 1 Wheat. 497, 498; The Ann Green, 1 Gall. 281.
[1] The Apollo, 5 C. Rob. 286.
[2] The Ann Green, 1 Gall. 283, 284.
[3] 1 Wheat. 498.
[1] The Vigilantia, 1 C. Rob. 1, 4; The Ann Green, 1 Gall. 281, 282; 1 Wheat.

weighing this evidence, the master and the crew of the captured ship are ordinarily regarded as having no interest in the condemnation of the vessel, but, on the contrary, as being concerned to defend their employers; and as having a natural prepossession in favor of their employment, and therefore as being most favorably inclined to the side of the claimant. If there is a repugance between the depositions and the documents, it does not necessarily follow that the conviction of the court must be kept *in equilibrio* until it can receive further proof; for though such is the general rule in courts of admiralty, yet it is a rule by no means inflexible; but it is liable to many exceptions, sometimes in favor of depositions, and sometimes, though more rarely, on the side of the documentary evidence; the preponderance being determined by the court, upon a consideration of all the circumstances of the case.[2] It is, however, to be observed, that the captured property itself, being before the court, constitutes a part, and often an essential part, of the original evidence upon which the cause is in the first instance to be tried; affording, in many cases, a certainty which no papers can give. Whenever, therefore, a proper foundation is laid, the court will direct a survey, in order to ascertain the nature and character of the property in question, or will otherwise satisfy itself on the point, by proof.[3]

448. **Modifications of the Rule.** But this *rule* of the law of prize, that the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured vessel, also admits of some *relaxation;* by allowing the captors, under peculiar circumstances, to adduce extrinsic testimony. Thus, depositions and documents may sometimes be *invoked from another cause*, and *papers found on board other ships* may sometimes be admitted, and in some other cases of reasonable doubt or pregnant suspicion, the captors will not be excluded from the benefit of diligent inquiries. But no papers ought to be admitted *as coming from the ship*, which are not produced at the first examination.[1] Thus,

498; The Liverpool Packet, 1 Gall. 516; 2 Browne, Civ. & Adm. Law, p. 451; [The Adula, 89 F. 351; The Newfoundland, ib. 99; The Olinde Rodrigues, ib. 105.]

[2] The Vigilantia, *supra.*

[3] The Liverpool Packet, 1 Gall. 513, 520. And see The Carl Walter, 4 C. Rob. 207, 213; The Richmond, 5 id. 325; The Jonge Margaretha, 1 id. 189, 191.

[1] The Ann Green, 1 Gall. 274, 282; 1 Wheat. 499; The Apollo, 5 C. Rob. 256; The Vriendschap, 4 id. 166; The Nied Elwin, 1 Dods. 54. But see The Romeo, 6 C. Rob. 351. It seems that papers cannot be invocated, except when the cause is

where a ship had been stopped and searched, and a letter had been taken out by the cruising vessel, and the ship being afterwards captured and libelled as prize, it was prayed by the captors that this letter might be introduced on further proof, the court refused to admit it; the learned judge observing, that it was by no means the disposition of the court to encourage applications of this kind; that it had seldom been done, except in cases where something appeared in the original evidence to lead to further inquiry; and not where the matter was foreign and not connected with the original evidence in the cause, but tended to lead the practice of the court from the simplicity of prize proceedings, and to introduce an endless accumulation of proof.[2]

449. **Joint or Collusive Capture.** In cases of *joint* or *collusive capture*, also, the simplicity of prize proceedings is necessarily departed from; and where, in these cases, circumstances of doubtful appearance occur, the court will permit the parties to adduce other evidence than that which is furnished from the captured vessel, or is invoked from other prize causes.[1]

either between the same parties, or on the same point. Applications for the invocation of proceedings from another cause have been rejected. See Dearle *v.* Southwell, 2 Lee 93. In another case, the rule was stated to be, that original evidence, and depositions taken on the standing interrogatories, may be invoked from one prize cause into another; but depositions taken as further proof in one cause cannot be used in another: The Experiment, 4 Wheat. 84.

[2] The Sarah, 3 C. Rob. 330, cited and approved in The Liverpool Packet, 1 Gall. 516. But see The Romeo, 6 C. Rob. 351; *infra*, § 463.

[1] The George, 1 Wheat. 408. The reasons for this relaxation of the rule were thus explained by Marshall, C. J.: "It is certainly a general rule in prize causes that the decision should be prompt; and should be made, unless some good reason for departing from it exists, on the papers and testimony afforded by the captured vessel, or which can be invoked from the papers of other vessels in possession of the court. This rule ought to be held sacred in that whole description of causes to which the reasons on which it is founded are applicable. The usual controversy in prize causes is between the captors and captured. If the captured vessel be plainly an enemy, immediate condemnation is certain and proper. But the vessel and cargo may be neutral, and may be captured on suspicion. This is a grievous vexation to the neutral, which ought not to be increased by prolonging his detention, in the hope that something may be discovered from some other source which may justify condemnation. If his papers are all clear, and if the examinations *in preparatorio* all show his neutrality, he is, and ought to be, immediately discharged. In a fair transaction this will often be the case. If anything suspicious appears in the papers, which involves the neutrality of the claimant in doubt, he must blame himself for the circumstance, and cannot complain of the delay which is necessary for the removal of those doubts. The whole proceedings are calculated for the trial of the question of prize or no prize, and the standing interrogatories on which the preparatory examinations are taken are framed for the purpose of eliciting the truth on that question. They are intended for the controversy between the captors and the captured; intended to draw forth everything within the knowledge of the crew of the prize, but cannot be intended to procure testimony respecting facts not within their knowledge. When the question of prize or no prize is decided in the affirmative, the strong motives for an immediate sentence lose somewhat of their force, and the point to which the testimony *in preparatorio* is taken is no longer the question in controversy. If another question arises, for instance, as to the proportions

§ 450. **Time allowed for Preparatory Examination.** In regard to the *time within which the preparatory examination must be completed*, no particular period seems to be definitely fixed by the general admiralty law, it being only required that in this, as in all other prize proceedings, the utmost despatch be observed. But, by the English law, the judge or commissioners are to finish the examination within five days after request made for that purpose.[1] This period has been mentioned by some writers as the general rule,[2] and it certainly is in accordance with the principle just mentioned.

§ 451. 2. **Documents.** As to the *admissibility of documents* in prize causes, those found on board the prize are of course admitted, from that circumstance alone, whatever may be their character; they being part of the *mainour*, so to speak, with which the prize was taken. The admissibility of other documents is determined by the general rules of evidence heretofore considered. And the same distinction is to be observed respecting the *proof of documents;* those found on board the captured vessel being admitted, *prima facie*, without other proof of their genuineness than the fact of their having been there found and the verification of

in which the owners and crew of the capturing vessel are entitled, the testimony which will decide this question must be searched for, not among the papers of the prize vessel, or the depositions of her crew, but elsewhere, and liberty must therefore be given to adduce this testimony. The case of a joint capture has been mentioned, and we think, correctly, as an analogous case. Where several cruisers claim a share of the prize, extrinsic testimony is admitted to establish their rights. They are not, and ought not to be, confined to the testimony which may be extracted from the crew. And yet the standing interrogatories are, in some degree, adapted to this case. Each individual of the crew is always asked whether, at the time of capture, any other vessel was in sight. Notwithstanding this the claimants to a joint interest in the prize are always permitted to adduce testimony drawn from other sources to establish their claim. The case before the court is one of much greater strength. The captors are charged with direct and positive fraud, which is to strip them of rights claimed under their commissions. Even if exculpatory testimony could be expected from the prize crew, the interrogatories are not calculated to draw it from them. Of course, it will rarely happen that} testimony taken for the sole purpose of deciding the question whether the captured vessel ought to be condemned or restored, should furnish sufficient lights for determining whether the capture has been *bona fide* or collusive. If circumstances of doubtful appearance occur, justice requires that an opportunity to explain those circumstances should be given; and that fraud should never be fixed on an individual until he has been allowed to clear himself from the imputation, if in his power.

"Under these impressions, the case must be a strong one; indeed, the collusiveness of the capture must be almost confessed, before the court could think a refusal to allow other proof than is furnished by the captured vessel justifiable:" 1 Wheat. 409–411.

[1] 2 C. Rob. 295, n. (*a*). {If a witness has been misled, he may, in the discretion of the court, be allowed to give additional testimony, after his deposition has been completed and submitted to the court: The Peterhoff, Bl. Pr. Cas. 345.}

[2] 2 Browne, Civ. & Adm. Law, p. 446; Jacobsen's Sea Laws, p. 405.

them by the master of the ship;[1] while the proof of other papers is governed by the other rules above referred to.

§ 452. **Title proved only by Bill of Sale.** It is of course expected that every ship has on board the *proper and usual documents*, showing her *national character and ownership*, and the *innocent nature of her employment;* and that these are carefully preserved and readily submitted to the inspection of the captors. These documents have been described in considering the documentary evidence in instance causes.[1] But the proof of title, for obvious reasons, is required with more strictness in prize proceedings than in others; and hence the legal title of the ship can be asserted in the prize court only as to those persons to whom it is conveyed by the *bill of sale*, irrespective of any equitable interest claimed by others; the court looking singly to the bill of sale, the document recognized by the law of nations, and decisive of the ownership. If, by this document, the vessel stands as enemy's property, it is condemned as such, leaving equitable interests, if any exist, to other jurisdictions.[2] And so important is the production of this document deemed, that its absence alone, according to the constant habits of the admiralty court, founds a demand on the party for further proof.[3]

§ 453. **Title; Suspicious Circumstances.**[1] The grand circumstances, which, as Dr. Browne observes,[2] if proved, go strongly to condemn the ship, or at least to excite strong suspicion, relate chiefly to this documentary evidence. Among these are said to be, — the *want* of complete and proper papers; the carrying of *false* or *colorable* papers; the *throwing overboard* of papers;[3] *prevarication* of the master and officers in their testimony *in preparatorio; spoliation* of papers; the *inability* of the master to *give an account* of the ownership; the master's own *domicile* and national character; his *conduct*, and that of the vessel; the *time* when the papers

[1] The Juno, 2 C. Rob. 122. [A paper prepared by the commanding officer, stating the circumstances under which the capture was made, and inserted by him in the log of the prize, cannot be considered at the hearing *in preparatorio:* The Newfoundland, 89 F. 99.]

[1] *Supra*, §§ 417–432.

[2] The San José Indiana, 2 Gall. 284. And see The Sisters, 5 C. Rob. 155; The Vigilantia, 1 id. 1.

[3] The Welvaart, 1 C. Rob. 122.

[1] [See The Olinde Rodrigues, 174 U. S. 510.]

[2] 2 Browne, Civ. & Adm. L. p. 451.

[3] [The Olinde Rodrigues, 174 U. S. 510.] {So is the refusal to permit the papers to be taken on board a belligerent vessel for examination: The Peterhoff, Bl. Pr. Cas. 463.}

were drawn and executed, and whether before or after the existence of the war.[4] It has already been seen[5] that the presumption from the *spoliation of papers* arises more readily in the admiralty courts than in other tribunals, and is administered with greater stringency and freedom; but in prize causes this stringency is exhibited with more vigilance and force than in those on the instance side of the court. Neutral masters are held to be not at liberty to destroy papers; and if they do so, the explanation that they were mere private letters will not be received.[6] The act alone was ground of condemnation, by the law of nations; and this rule is said to be administered in the French and other continental courts, to the extent of the principle; but in the British prize courts the rule is modified to this extent, that if all other circumstances are clear, this alone shall not be damnatory, if satisfactorily accounted for; as, for example, if it were done by a person with intent to promote private interests of his own.[7] A similar modification of the rule, in principle, is admitted in the United States.[8]

§ 454. 3. **Competency of Proof.** It has already been stated, in regard to witnesses in the instance court,[1] that the objection of their competency, on the score of interest, was generally held valid, as it is at common law. But in the prize court, from the nature of the subjects in judgment, it is obvious that this rule must necessarily be subject to many and large exceptions. The practice in the High Court of Admiralty in England prior to the recent statute on this subject seems not to have been perfectly uniform, though apparently inclining against allowing the objection of interest to prevail upon the question of capture.[2] But in the United States it has been clearly held, that the common-law doctrine as to competency is not applicable to prize proceedings;

[4] {The facts that the vessel is off her course, and that her log-book cannot be found, are suspicious circumstances: The Joseph H. Toone, Bl. Pr. Cas. 223. So, that certain parts of the cargo are not on the manifest: The Peterhoff, ib. 463; and the absence of a bill of lading, or manifest, or charter-party, or invoice: The Ella Warley, ib. 288; The Stephen Hart, ib. 387; The Springbok, ib. 434.} [Loitering in the vicinity of a blockaded port after being warned away is sufficient evidence of guilty intent to condemn the vessel: The Newfoundland, 89 F. 510.]

[5] *Supra*, § 408; {The Bermuda, 3 Wall. (U. S.) 514; The Mersey, Bl. Pr. Cas. 187.}

[6] The Two Brothers, 1 C. Rob. 133.

[7] The Hendrick and Alida, Hay & Mar. 106; The Hunter, 1 Dods. 480. And see The Maria Magdalena, Hay & Mar. 247; The Rising Sun, 2 C. Rob. 104.

[8] The Pizarro, 2 Wheat. 227.

[1] *Supra*, § 414.

[2] The Maria, 1 C. Rob. 340, 353; The Drie Gebroeders, 5 id. 339, n. (*a*); The Galen, 2 Dods. 21; The Catherine of Dover, 2 Hagg. 145.

and that in prize courts, no person is incompetent as a witness merely on the ground of interest; but the testimony of every witness is admissible, subject to all exceptions as to its credibility; and accordingly, upon an order for further proof, where the benefit of it is allowed to the captors, their attestations have been held clearly admissible.[3] The testimony of the master, officers, and crew of the captured ship is also admissible, in all stages of the cause, on the same principle. But where a neutral ship was captured for a breach of blockade, and a question arises from the destination of the ship, though in other cases the court is disposed to give great attention to the evidence of the master and mate, their testimony, in this case, will not be deemed entitled to any advantageous preference. For, if there was a fraudulent design to evade the blockade, the master, and probably the mate also, as his accomplice, must have been the principal agents; and therefore, where they speak of the situation of the vessel, their testimony must be outweighed by that of the common seaman, unless there is reason to suspect that these have been debauched by the captors.[4]

§ 455. **Alien Enemy generally not admissible as a Witness.** It is, however, contrary to the practice of the prize court, to send a commission to take evidence in an enemy's country;[1] not that an alien enemy is in all cases and universally disabled as a witness, but that the cases of exception are few. Thus, an American resident in France during a war between France and Great Britain, and therefore subject, in England, to all the disabilities of a French merchant as to the power of becoming a claimant in a prize proceeding, was nevertheless deemed not incompetent as a witness, on that account.[2]

§ 456. **Official Declarations of Foreign States.**[1] The *official declarations of a foreign State* are also, to a certain extent, admissible in evidence. Thus, in the case of a demand for salvage on an American vessel, recaptured from a Spanish cruiser, which had taken her as prize on the ground that she was bound to Malta, then a belligerent port, with a cargo of provisions and naval stores, a document under the seal and sign-manual of the Presi-

[3] The Anne, 3 Wheat. 435, 444. And see The Grotius, 9 Cranch 368.
[4] The James Cook, 1 Edw. Adm. 261.
[1] The Magnus, 1 C. Rob. 35; The Diana, 2 Gall. 97.
[2] The Falcon, 6 C. Rob. 197.
[1] [See Vol. I. §§ 491, 492.]

dent of the United States, declaring that the cargo was the property of the United States, and destined for the supply of its squadron in the Mediterranean, was held admissible in proof of that fact. The learned judge on that occasion observed, that great respect is due to the declaration of the government of a State; not to the extent, which has sometimes been contended for, that the convoy of a vessel of the State, or public certificates that the goods on board are the property of its subjects, should at once be received as sufficient to establish that fact, and to supersede all further inquiry; because it is very possible for governments to be imposed on with regard to facts of that nature, which they can take only on the representation of interested individuals. But when there is an averment like this, *relative to their own immediate acts*, it would be a breach of the comity and respect due to the declarations of an independent State, to doubt the truth of an assertion which could not have been made but upon a thorough knowledge and conviction of the fact.[2]

§ 457. 4. **Mode of taking Testimony.** We have seen that the preparatory examinations, in prize causes, are ordinarily taken before the commissioners of prize, upon the standing interrogatories, and sometimes, though rarely, before the judge. Other testimony is taken in the mode usual in other cases of admiralty and maritime jurisdiction, which has been sufficiently stated. But in the Supreme Court of the United States, in all cases of admiralty and maritime jurisdiction where new evidence may be admissible, the testimony of witnesses must be taken under a commission, issued from that court, or from any circuit court under the direction of a judge thereof, upon interrogatories and cross-interrogatories duly filed; but the rule does not prevent any party from giving oral testimony in open court, in cases where by law it is admissible.[1] No other seal is necessary to be affixed by the commissioners to their return, than the seal to the envelope.[2]

§ 458. 5. **Presumptions.**[1] In prize courts there are certain *presumptions* which legally affect the parties, and are considered of

[2] The Huntress, 6 C. Rob. 110. {The President's proclamation of blockade is conclusive evidence of the existence of a state of war: Prize Cases, 2 Black (U. S.) 635.}

[1] Rules of the Supreme Court, Reg. 27; The London Packet, 2 Wheat. 371.

[2] Grant *v.* Naylor, 4 Cranch 228; Dunl. Adm. Pract. 255.

[1] [There is no presumption that a neutral has notice of the existence of a blockade; nor does the mere fact that a vessel on her regular route touches at a port where notice of the blockade might have been received by cable, create such presumption, where there is no proof, and no good reason to suppose that the news of the blockade had been cabled to such port: The Olinde Rodrigues, 89 F. 105.]

general application, and which therefore deserve particular notice in this place. These relate chiefly to the ownership of the property, the national character of the ship, and the domicile and nationality of the master and claimants.

§ 459. **Title; Ownership; Presumption.** In regard to the *title* and *ownership*, possession is presumptive evidence of property, and therefore justifies the capture of ships and cargoes found in the enemy's possession, though it may not always furnish sufficient ground for condemnation.[1] If, upon further proof allowed to the claimant, there is still a defect of evidence to show the neutral character of the property, it will be presumed to belong to the enemy.[2] Goods found in an enemy's ship, are presumed to be enemy's property, unless a distinct neutral character and documentary proof accompany them.[3] Where a ship has been captured and carried into an enemy's port, and is afterwards found in the possession of a neutral, the presumption is, that there has been a regular condemnation, and the proof of the contrary rests on the claimant against the neutral possessor.[4] Ships are presumed to belong to the country under whose flag and pass they navigate; and this, although purchased by a neutral, if they are habitually engaged in the trade of the enemy's country; even though there be no seaport in the territory of the neutral.[5] This circumstance is held conclusive upon their character, against the claimant; he being not at liberty to deny the character which he has worn for his own benefit and upon the credit of his own oath or solemn declaration. But it is not conclusive against others; for these are still at liberty to show that the documentary and apparent character of the ship was fictitious, and

[1] The Resolution, 2 Dall. 19, 22. {See Prize Cases, 2 Black (U. S.) 635.} [The burden of proof is on the claimant to show that the enemy's property is within the exception of a proclamation, and that cargo shipped in an enemy's vessel by neutrals to parties in the enemy's country is neutral property. But cargo shipped from the captor's country to a neutral port in an enemy's vessel is presumptively neutral: The Buena Ventura, 87 F. 927.]

[2] Wheat. on Captures, App. p. 312; The Magnus, 1 C. Rob. 31, 35; {The Jeuny, 5 Wall. (U. S.) 377.}

[3] 2 Wheat. App. p. 24. {Where a vessel was captured, on an illegal voyage from an enemy's port, and her papers were all destroyed before the capture, so that her national character did not distinctly appear, and the master, who was a British subject and the only claimant, claimed a sum of money which was found on board, and his statements made in his depositions were inconsistent, it was held that her character as a neutral was not made out, and that the money was forfeited: The Wando, 1 Low. 18. The bill of lading is weak evidence of ownership of cargo: The Sally Magee, 3 Wall. (U. S.) 451.}

[4] The Countess of Lauderdale, 4 C. Rob. 283; 2 Wheat. App. p. 25.

[5] The Vigilantia, 1 C. Rob. 1, 15; The Vrow Anna Catharina, 5 id. 164, 170; 2 Wheat. App. p. 28.

assumed for purposes of deception.[6] So, the produce of an enemy's colony is conclusively presumed to be enemy's property, so far as the question of prize is concerned, whatever the local residence of the true owner of the soil may be; and accordingly, the claim of a neutral German to the produce of a plantation descended to him in a belligerent Dutch colony was rejected.[7]

§ 460. **Joint Capture; Presumption.** In questions of *joint capture*, also, there is an important presumption in prize law, in favor of public ships of war; it being generally and with few exceptions presumed that all such ships *actually in sight* were assisting in the capture, and therefore are entitled to a share in the prize.[1] And the benefit of this presumption is extended to all ships associated together by public authority; as, for example, in a blockading squadron; though they were not *all* in actual sight at the moment of the capture.[2] But in the case of a claim of joint capture by a private vessel, this presumption is not admitted; but the claimant must prove actual intimidation, or actual or constructive material assistance.[3] The reason of this distinction is, that public ships are under a constant obligation to attack the enemy and capture his ships wherever seen; and it is presumed that the performance of this duty is always intended; but privateers are under no such obligation, their commissions being taken for mere purposes of private gain by plunder, which they are at liberty to pursue or not, at their pleasure. And in regard to public ships in sight, the presumption may be repelled by proof that the ship, claiming as joint captor, had discontinued the chase, and changed her course, in a direction inconsistent with any intent to capture; or by proof of other circumstances plainly and openly inconsistent with such design.[4]

[6] The Fortuna, 1 Dods. 87; The Success, ib. 131; 2 Wheat. App. p. 30. {Or that the transfer, under which the apparent ownership is in the enemy, was merely colorable: The Ocean Bride, 33 Eng. Law & Eq. 576. In case of an alleged sale to a neutral just before the war, the court will require full proof of the sale, value, price, and payment: The Ernst Merck, ib. 594. See also The Soglaizie, ib. 587.}

[7] The Phœnix, 5 C. Rob. 20; The Vrow Anna Catharina, ib. 164, 170; Boyle *v.* Bentzon, 9 Cranch 191.

[1] The Dordrecht, 2 C. Rob. 55, 64; The Robert, 3 id. 194.

[2] The Forsigheid, 3 C. Rob. 311, 316; La Flore, 5 id. 269; 2 Wheat. App. p. 60.

[3] {The same rule applies to revenue cutters as to privateers: The Bellona, Edw. 63.}

[4] See 2 Wheat. App. pp. 60–67, where this subject is treated more fully, and the cases are cited. {In The Selma, 1 Low. 30, this principle of law is ably discussed by Lowell, J. The facts were these. The case arose out of the action of August, 1864, in the Bay of Mobile. After the ships under the immediate command of Admiral Farragut had passed Forts Morgan and Gaines, they had an engagement with the rebel ram Tennessee, and captured her, and afterwards the Selma and other vessels. These

§ 461. **Enemy; Presumption.** As to the question, *who are to be considered enemies or not*, the presumption is, that every person belongs to the country in which he has a domicile, whatever may be the country of his nativity or of his adoption.[1] And the masters and crews of ships are deemed to possess the national character of the ships to which they belong, during the time of their employment.[2] A neutral consul, resident and trading in a belligerent country, will be presumed and taken, as to his mercantile character, to be a belligerent of that country.[3] Although a person goes into a belligerent country originally for a temporary and special purpose only, yet if he continues there during a substantial part of the war, and beyond the time necessary to disengage himself, contributing, by the payment of taxes and other means, to the strength of that country, the original and special purpose of his coming will not suffice to repel the presumption of his hostile character.[4]

latter vessels were the subject of the proceedings in this case. Three vessels of the Federal Squadron, which were not adapted to passing the batteries, were stationed, some of them near the main channel and others in Mississippi Sound, about twenty miles distant by water from that entrance, but much nearer the bay by way of Grant's Pass, had that passage been open; but it had been wholly obstructed by barriers put there by the Confederate army. The duties of these two squadrons of vessels were to aid the troops in landing and besieging the forts, and to pursue any hostile vessel that might approach their stations from without or within the bay; and the first squadron was besides to assist any of the Federal vessels that might fail to pass the batteries, and put back in distress. The question which arose upon this state of facts was whether both or either of these divisions stationed outside the bay were entitled to share in the captures above mentioned. Lowell, J., after reviewing the English authorities, and stating the English law substantially as it is given by Prof. Greenleaf, holds that the true construction of the prize acts of the United States is different from the English and does not include such constructive captors; but that neither a whole fleet engaged in the closest association known to the English law, that of an authorized blockade, nor such parts of that fleet as may by orders, general or special, give chase to a vessel violating the blockade, are entitled to be considered as constructive captors; but only those which fulfil the statute definition by being within signal distance of the actual captor, at the time of the capture, and by statute, 1864, c. 174, § 10, "under circumstances and in such condition as to be able to render effective aid if required." Cf. The Cherokee, 2 Sprague 235.

The limit of "signal distance" in such cases varies with the circumstances of the case, the clearness of the atmosphere, etc. It must be, in any case, a distance within which a signal might in that particular case be seen if given. Under ordinary circumstances, the distance at which the day signals can be read has been held to be six miles: The R. E. Lee, 1 Low. 36.}

[1] The Indian Chief, 3 C. Rob. 12, 22; The President, 5 id. 278; The Ann Green, 1 Gall. 274; The Venus, 8 Cranch 253. See 2 Wheat. App. 27.

[2] The Embden, 1 C. Rob. 16; The Endraught, ib. 22; The Bernon, ib. 102; 2 Wheat. App. p. 28.

[3] The Indian Chief, 3 C. Rob. 22.

[4] The Harmony, 2 C. Rob. 322. The subject of belligerent character arising from mercantile domicile is further pursued in 2 Wheat. App. pp. 27–29. {Personal hostility of the owners of property is not essential. It is enough if it appear that the property has been in such relation to the enemy that a court of prize may deal with it as if it belonged to the enemy: The Amy Warwick, 2 Sprague 143. A traitor or rebel

may also be an enemy, notwithstanding he owes allegiance: ibid.; The Lilla, ib. 177. See also The Gray Jacket, 5 Wall. (U. S.) 342; The William Bagaley, ib. 377; The Pearl, ib. 574; The Sea Lion, ib. 630; The Springbok, ib. 1; The Peterhoff, ib. 28.] [When a vessel is chartered by a neutral owner to an enemy subject with full power to control her voyages and engage in illicit trade, she is to be treated, when found trying to break a blockade, as enemy's property: The Adula, 89 F. 351.]

CHAPTER V.

FURTHER PROOF.[1]

§ 462. The cause having been heard, upon the ship's papers and the preparatory examinations, if upon such hearing it still appears doubtful, it is in the discretion of the court to allow or require further proof, either from the claimants alone, or equally from them and the captors.[2] In some cases it is required by the court, for its own relief from doubt; in others, it is allowed to the party, to relieve his case from suspicion; and it may be restricted to specific objects of inquiry. It may be ordered upon affidavits and other papers, introduced without any formal allegations, which is the more modern and usual mode, introduced for the sake of convenience; or it may be ordered *upon plea and proof*, according to the more ancient course; in which case the cause is opened to both parties, *de novo*, upon new and distinct allegations.[3] Plea and proof has been termed "an awakening thing;" admonishing parties of the difficulties of their situation, and calling for all the proof which their case can supply.[4] When further proof is allowed to the claimants, in the ordinary mode, the captors are not permitted to contradict, by affidavits, the testimony brought in; counter-proof on the part of the captors being admissible only under the special direction of the court.[5]

§ 463. **By Order of Court.** Further proof may be *ordered by the court itself*, upon any doubt arising from any quarter; whether the doubt arises solely from the evidence already in the cause, or

[1] See on this subject, 1 Wheat. App. Note I.; 2 Wheat. App. Note II.

[2] {The Sally Magee, 3 Wall. (U. S.) 452; The Sarah Starr, Bl. Pr. Cas. 69; The Thomas Watson, ib. 120; The Sarah, ib. 123.} Further proof is not peculiar to prize causes. The court will order it on the instance side, in a revenue cause, where the evidence is so contradictory or ambiguous as to render a decision difficult: The Samuel, 1 Wheat. 9.

[3] The Minerva, 1 W. Rob. 169.

[4] The Magnus, 1 C. Rob. 33. And see 2 Browne, Civ. & Adm. L. p. 453; The Adriana, 1 C. Rob. 313; The Sally, 1 Gall. 403.

[5] The Adriana, 1 C. Rob. 313.

is raised by circumstances extrinsic to that evidence. But this is rarely done upon the latter ground, unless there is also something in the original evidence which suggests further inquiry. Thus, where a vessel was stopped and searched by a ship of war, and a letter, disclosing the hostile character of the vessel, was found on board and was transmitted by the searching officer, officially, to the king's proctor, after which the vessel, being permitted to proceed, was captured and sent in by another cruiser; this letter, under the circumstances, was allowed to be introduced on further proof.[1] Where the case is perfectly clear, and not liable to any just suspicion, upon the original evidence, the court is not disposed to favor the introduction of extraneous matter, or to permit the captors to enter upon further inquiries.[2] And where further proof is ordered by the court expressly with respect to the property and destination of the ship on the return voyage, and it is accordingly furnished by the claimants, the captors will not be permitted to argue for a condemnation on a new ground disclosed by the further proof, but the court will confine all objections to the points already designated for further investigation.[3]

§ 464. **At Request of Claimant.**[1] In cases of reasonable doubt, the court will *admit the claimant to further proof*, where his conduct appears fair, and is not tainted with illegality.[2] It is the privilege of honest ignorance, or honest negligence, to neutrals who have not violated the law of neutrality; as, for example, for the absence of a bill of sale of a ship purchased in the enemy's country.[3] So, where the bill of lading is unaccompanied by any invoice or letter of advice, the neutral claimant may be admitted to further proof, even though the ship and the residue of the cargo were belligerent, and the master had thrown papers overboard.[4] Further proof will also be allowed to the claimant,

[1] The Romeo, 6 C. Rob. 351. But in a prior case, an application nearly similar, was refused. The Sarah, 3 id. 330; *supra*, § 448. And see The Liverpool Packet, 1 Gall. 525; The Bothnea and Janstoff, 2 id. 78, 82.

[2] Ibid.; The Alexander, 1 Gall. 532.

[3] The Lydiahead, 2 Acton 133. {In The Nellie (Bl. Pr. Cas. 557), the case was ordered to stand for further proof though no witnesses were sent with the prize, and no reason given for the failure, and there was no evidence either that the blockade was violated or the captured property was enemy property.}

[1] [The claimant cannot move for the discharge of the ship on the ground that the captor's evidence is insufficient to hold it, and at the same time reserve the right to adduce further proof if his motion is denied : The Olinde Rodrigues, 174 U. S. 510.]

[2] The Bothnea and Janstoff, 2 Gall. 82.

[3] The Welvaart, 1 C. Rob. 123, 124.

[4] The Friendschaft, 3 Wheat. 14, 48.

where the captors have been guilty of irregularity, in not bringing in the papers, or the master of the captured ship.[5] But where further proof is allowed the claimant, proof by his own affidavit is indispensably necessary, as to his proprietary interest, and to explain the circumstances of the transaction; and the absence of such proof and explanation always leads to considerable doubt.[6] If, upon an order for further proof, the party disobeys or neglects to comply with its injunctions, such disobedience or neglect will generally be fatal to his claim.[7]

§ 465. **At Request of Captors.** In *allowing further proof to captors*, the court is more reluctant, and sparing in its indulgence; rarely allowing it when the transaction appears unsuspicious upon the preparatory testimony; and never, unless strong circumstances or obvious equity require it. And in such cases it is admissible only under the special direction of the court; which can never be obtained where the captors have been guilty of gross misconduct, gross ill-faith, or gross negligence, the attendant of fraud; or where the case does not admit of a fair explanation on their side; for the court will not trust with an order for further proof those who have thus shown that they mean to abuse it.[1]

§ 466. **Where Claimant is guilty of Neglect.** An order for further proof will also be *refused to the claimant*, where he has been guilty of culpable neglect, or of bad faith, or other misconduct, justly forfeiting his title to this indulgence from the court.[1] Thus, it has been refused to the shippers in a hostile ship, who had neglected to put on board any documentary evidence of the neutral character of the shipment.[2] So, where a neutral had

[5] The London Packet, 1 Mason 14.

[6] The Venus, 5 Wheat. 127; La Nereyda, 8 id. 108, 171.

[7] La Nereyda, *supra*. {The claimant will not be allowed, upon further proof, to contradict his own testimony, in the preparatory examination, as to domicile or national character: El Telegrafo, 1 Newb. 383; [The Adula, 89 F. 351.] The *claimant* may move for the order, and show the grounds of the application by affidavit, or otherwise, at any time before the final decree is rendered; and such an order may also be made in the Supreme Court of the United States. The making of it anywhere is controlled by the circumstances of each case. It is made with great caution, because of the temptation it holds out to fraud and perjury. It is made only when the interests of justice clearly require it: The Sally Magee, 3 Wall. (U. S.) 459. If the motion for leave to produce further proof be refused, an appeal may be taken: U. S. *v.* The Lilla, 2 Cliff. (C. Ct. U. S.) 169.}

[1] The Bothnea and Janstoff, 2 Gall. 78, 82; The George, ib. 249, 352; The Actor, Bl. Pr. Cas. 200; The Annie, ib. 209; The Elizabeth, ib. 250. [As to what will permit the captors to have further proof, see The Newfoundland, 89 F. 99; The Olinde Rodrigues, ib. 105.]

[1] {The Springbok, Bl. Pr. Cas. 434; The Gray Jacket, 5 Wall. U. S. 342.}

[2] The Flying Fish, 2 Gall. 374.

fraudulently attempted to cover and claim as his own an enemy's interest in the captured property, and afterwards applied for the admission of further proof as to his own interest in the same property.[3] So, where there has been a concealment of material papers,[4] or, a fraudulent spoliation or suppression of papers;[5] or, where the ship purchased of the enemy has been left, in the management of the former owner, in the enemy's trade;[6] or, was captured on a return voyage, with the proceeds of her outward cargo of contraband goods, carried under false papers for another destination;[7] or, where the goods were actually shipped for neutral merchants, between enemy's ports, but with a colorable destination to a neutral port;[8] or, where any other gross misconduct is proved against the claimants, or the case appears incapable of fair explanation;[9] or, the further proof is inconsistent with that already in the case;[10] or, the case discloses *mala fides* on the part of the claimant.[11]

§ 467. **Further Proof, how taken.** As to the *mode of taking testimony* in cases of further proof, it is to be observed that mere oral testimony is never admitted; but the evidence must be in documents and depositions, taken in the manner already mentioned. In the Supreme Court of the United States it is taken upon commissions alone.[1]

[3] The Betsey, 2 Gall. 377. And see The Merrimack, 8 Cranch 317; The Graaf Bernstoff, 3 C. Rob. 109; The Eenrom, 2 id. 15; The Rosalie & Betty, ib. 343, 359; {The Ida, 29 Eng. L. & Eq. 574; Lush. (Adm.) 6.}

[4] The Fortuna, 3 Wheat. 236.

[5] The St. Lawrence, 8 Cranch 434. But if the master should suppress papers relating solely to his own interest, this will not affect the claim of the owners: The Rising Sun, 2 C. Rob. 108.

[6] The Jemmy, 4 C. Rob. 31

[7] The Nancy, 3 C. Rob. 122.

[8] The Carolina, 3 C. Rob. 75.

[9] The Vrouw Hermina, 1 C. Rob. 163, 165; The Hazard, 9 Cranch 209; The Pizarro, 2 Wheat. 227.

[10] The Euphrates, 8 Cranch 385; The Orion, 1 Acton 205. But that this rule is not inflexible, see La Flora, 6 C. Rob. 1.

[11] The Juffrouw Anna, 1 C. Rob. 126.

[1] The George, 2 Gall. 249, 252; Rules of the Supreme Court, Reg. 25, 27; *supra*, § 457.

EVIDENCE IN COURTS-MARTIAL.

EVIDENCE IN COURTS-MARTIAL.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 468. **Martial Law; Military Law.** In entering upon the subject of evidence in courts-martial we are led first to observe the *distinction* between *martial law* and that which is commonly, and for the sake of this distinction, termed *military law*. The difference between them relates more directly to the subjects of jurisdiction, but in its results it affects the rules of evidence. In the language of Lord Loughborough, "where *martial law* prevails, the authority under which it is exercised claims a jurisdiction over all military persons, in all circumstances. Even their debts are subject to inquiry by a military authority; every species of offence, committed by any person who appertains to the army, is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs."[1] It extends also to a great variety of cases not relating to the discipline of the army, such as plots against the sovereign, intelligence to the enemy, and the like.[2] It is "founded on paramount necessity, and is proclaimed by a military chief;" and when it is imposed upon a city or other territorial district, all the inhabitants and all their actions are

[1] Grant *v.* Gould, 2 H. Bl. 98.

[2] Whether persons not belonging to the army can properly be subjected to martial law has been seriously doubted. See the opinion of Mr. Hargrave, in Rowe's Reports, p. xliv. In the more limited view of its extent, *martial law* applies only to military persons, but reaches all their transactions, whether civil or military; while *military law* is restricted to transactions relating to the discipline of the army. It seems, however, to be generally conceded, that persons, taken in open rebellion against the government, may lawfully be tried and punished by martial law; so that the point principally in dispute is, whether persons can be tried by that law for acts of rebellion committed long previous to their arrest. This point was much discussed in Ireland, in the case of Cornelius Crogan, who was condemned and executed by the sentence of a military court, for having been concerned in the rebellion of 1798, without having been taken in arms. His offence was that of acting as commissary of supplies. See Rowe's Rep. pp. 1–142.

brought within the sweep of its dominion.[3] But *military law* has its foundation and limits in the statutes for establishing rules and articles for the government of the army and navy, and in the instructions and orders issued by the executive magistrate pursuant thereto, and in virtue of his authority as Commander-in-Chief.[4] Its jurisdiction extends only to those who are a *part of the army*, in its various grades and descriptions of persons; and it is limited to *breaches of military duty*.[5] These breaches of duty are in many instances strictly defined; particularly in those cases which are fatally or highly penal; but in many others it is impossible more precisely to mark the offence than to call it a neglect of discipline.[6]

§ 469. **Same Subject.** It is thus apparent that while *martial law* may, or does, in fact, assume cognizance of matters belonging to civil as well as to criminal jurisdiction, *military law* has respect only to the latter. The tribunals of both are alike bound by the common law of the land in regard to the rules of evidence, as well as other rules of law,[1] so far as they are applicable to the

[3] {The Duke of Wellington said, in the House of Lords, on the 1st April, 1851, in reference to the Ceylon rebellion of 1849, "that martial law was neither more nor less than the will of the general who commands the army; in fact, martial law is no law at all." And Earl Grey, on the same occasion, said, "that he was glad to hear what the noble Duke had said with reference to what is the true nature of martial law; for it is exactly in accordance with what I myself wrote to my noble Lord Torrington, at the period of those transactions in Ceylon. I am sure I was not wrong in law, for I had the advice of Lord Cottenham, Lord Campbell, and the Attorney-General (Sir J. Jervis), and explained to my noble friend that what is called proclaiming martial law is no law at all, but merely for the sake of public safety, in circumstances of great emergency, setting aside all law, and acting under the military power;" Finlayson on Martial Law, Preface, vii; Parl. Deb. 1851, Ceylon.}

[4] [See Swaim *v.* U. S., 165 U. S. 553.]

[5] Where an officer was charged with scandalous and infamous conduct, 1st, in submitting tamely to imputations upon his honor, and, 2dly, in attempting to seduce the wife of another officer; and was acquitted upon the first specification, but was found guilty of the fact in the second, but acquitted of the charge of "scandalous and infamous conduct, unbecoming an officer and a gentleman;" the sentence was disproved and set aside, on the ground that the fact itself, in the latter specification, divested of all connection with the discipline of the army, was not a subject of military cognizance: Case of Capt. Gibbs, Simmons on Courts-Martial, pp. 439–441. But where the fact itself involves a breach of military discipline, such as striking an inferior officer, and using opprobrious language towards him, though the party is acquitted of the charge of "scandalous and infamous conduct, unbecoming an officer and a gentleman," yet he may well be sentenced under the specification: Case of Lt. Dunkin, Simmons, pp. 442, 443.

[6] 2 H. Bl. 100; 1 McArthur on Courts-Martial, pp. 33–37; 1 Kent Comm. 341, n.; Wolton *v.* Gavin, 15 Jur. 329; 16 Q. B. 48; Mills *v.* Martin, 19 Johns. 7, 20–22; Smith *v.* Shaw, 12 id. 257.

[1] "The act for punishing officers and soldiers by martial law has only laid down such rules for the proceedings of courts-martial as were intended to differ from the usual methods, in the ordinary courts of law; it is therefore natural to suppose that, where the act is silent, it should be understood that the manner of proceeding at

manner of proceeding; but courts-martial, when administering the military law, having cognizance only of criminal offences, are bound by the rules of evidence administered in criminal cases in the courts of common law; and therefore ought not to convict the prisoner until all reasonable doubt of his guilt is removed; allowing the presumption of innocence, in all cases, to operate in his favor;[2] whereas, when taking cognizance, under martial law, of matters of merely civil conduct, such as the non-payment of debts, or the like, they are at liberty to decide according to the preponderance of testimony on either side.[3] The obligatory force of the common law of evidence was solemnly recognized in England, in the case of the mutineers in the ship *Bounty*. These men were tried by a court-martial at Portsmouth; and there being no evidence against one of the prisoners, he was offered as a witness on behalf of another of them, who insisted on the right to examine him; the court, however, by advice of the judge-advocate, refused to permit him to be examined, saying that the practice of courts-martial had always been against it; and the prisoner was condemned to death. But upon the sentence being reported to the king, execution was respited until the opinion of the judges was taken; and they all reported against the legality of the sentence, on the ground of the rejection of legal evidence, and the prisoner thereupon was discharged.[4]

§ 470. **Courts-martial.** A court-martial is a court of limited and special jurisdiction. It is called into existence by force of express statute law, for a special purpose, and to perform a particular duty; and when the object of its creation is accomplished,

courts-martial should be regulated by that of the other established courts of judicature:" Adye on Courts-Martial, p. 45.

[2] 2 McArthur, pp. 52, 54. {"Martial law is a *lex non scripta:* it arises on a paramount necessity to be judged of by the executive. Martial law comprises all persons. All are under it in the country or district in which it is proclaimed, whether they be civil or military. There is no regular practice laid down in any work on military law, as to how courts-martial are to be conducted, or power exercised under martial law; but, as a rule, I should say that it should approximate as near as possible to the regular forms and course of justice, and the usage of the service, and that it should be conducted with as much humanity as the occasion may allow, according to the conscience and the good judgment of those intrusted with its execution." *Vide* Ev. of Sir D. Dundas, Judge-Advocate-General, before the Ceylon Committee, 1849–50: Finlayson on Martial-Law, 383.}

[3] *Supra*, § 29; Adye, pp. 45, 48, 97–116.

[4] Muspratt's Case, 2 McArthur 158; 1 East 312, 313. And see Stratford's Case, ib.; Simmons on Courts-Martial, pp. 485–487; *ante*, Vol. I. §§ 358, 363; Home *v.* Bentinck, 2 Brod. & Bing. 130. See also Capt. Shaw's trial, *passim*.

it ceases to exist. The law presumes nothing in its favor. He who seeks to enforce its sentences, or to justify his conduct under them, must set forth affirmatively and clearly all the facts which are necessary to show that it was legally constituted, and that the subject was within its jurisdiction. And if, in its proceedings or sentence, it transcends the limit of its jurisdiction, the members of the court, and its officer who executes its sentence, are trespassers, and as such are answerable to the party injured, in damages in the courts of common law.[1]

§ 471. **Pleadings.** It is not proposed here to describe the course of practice and forms of proceeding in courts-martial, except so far as they may respect the rules of evidence; and this is chiefly in the form of the complaint or accusation. These proceedings being of a criminal character, the party accused is *entitled*, by the Constitution of the United States, "*to be informed of the nature and cause of the accusation*" against him; and this, not in general terms, but by a particular statement of all that is material to constitute the offence, set forth with reasonable precision and certainty of time and place, and in the customary forms of law. In other words, the accusation ought to be drawn up with all the essential precision, certainty, and distinctness which the prisoner is entitled to demand in an indictment at common law; though it needs not to be drawn up in the same technical forms, the same reasons applying alike in both cases.[1] Hence, in a charge

[1] Wise *v.* Withers, 3 Cranch 331, 337; Duffield *v.* Smith, 3 S. & R. 590; Mills *v.* Martin, 19 Johns. 7, 32; Smith *v.* Shaw, 12 id. 257, 265; Brooks *v.* Adams, 11 Pick. 442; State *v.* Stevens, 2 McCord 32. {A sailor in the United States navy was complained of before a court-martial for desertion. He was acquitted of that charge, but found guilty of an attempt to desert, and sentenced to imprisonment. The sentence was approved by the Secretary of the Navy, and executed by the United States marshal by order of the President. In an action brought against the marshal for false imprisonment, it was held that the offence was within the jurisdiction of the court-martial, that the validity of its proceedings in a case within its jurisdiction could not be inquired into elsewhere, and that the marshal was protected by his warrant: Dynes *v.* Hoover, 20 How. (U. S.) 65. "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts, and deposes the civil administration. . . . If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course; as necessity creates the rule, so it limits its duration; for if *this government* is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." Davis, J.: *Ex parte* Milligan, Supreme Court of the United States, Dec. Term, 1866, 4 Wall. 2. Cf. *Ex parte* Mason, 105 U. S. 696.}

[1] See *supra*, § 10; Kennedy on Courts-Martial, pp. 31, 32; 2 McArthur on Courts-Martial, pp. 8, 9.

of *mutiny*, it is essential to state that the act was done in a *mutinous* or *seditious manner;* in a charge of *murder*, it is necessary to state that the prisoner, of his *malice aforethought*, feloniously *murdered* the deceased; as is required in an indictment for that crime;[2] and so in all other offences at common law; but in prosecutions for other offences, the practice is to adopt the language of the statute or article in which they are described, with a sufficient specification of the act constituting the offence.[3]

§ 472. **Accusation.** The *accusation*, in courts-martial, which stands in place of the indictment in courts of common law, is composed of *charges* and *specifications*. The office of the *charge* is to indicate the nature of the offence, and the article of war under which it falls; and, therefore, it generally is either couched in the language of the article itself, or is stated in general terms, as a violation of such an article, mentioning its number. The former mode is regarded as most proper, and, therefore, is usually pursued; especially where the article includes various offences, or is capable of violations by various and different actions. The latter is allowable only where the article describes a single offence, in which no mistake can be made.[1] The *specification* states the name and rank of the prisoner, the company, regiment, etc., to which he belongs, the acts which he committed, and which are alleged to constitute the offence, with the time and place of the transaction; and where the essence of the offence consists in hurting or injuring the person or property of another, the name and description of the person injured should be stated, if known; and if not, then it should be alleged to be unknown.[2] If the prosecutor is unable precisely to state the time and place of the offence, he may charge that the fact was committed at or near such a place, and on or about such a time. But this is not to be permitted, if it can possibly be avoided without the sacrifice of justice, as it tends to deprive the prisoner of some advantage in making his defence.[3] In fine, though courts-martial, as has just been observed, are not bound to all the technical formalities of accusation that prevail in courts of law, yet they are bound to

[2] See *supra*, § 130.
[3] 2 McArthur on Courts-Martial, pp. 8, 9.
[1] O'Brien on Military Law, p. 233.
[2] O'Brien, p. 234; *supra*, §§ 12, 22. The specification, like a bill in equity, should state the *fact* to be proved, but not the *evidence* by which the fact is to be proved. See Whaley *v.* Norton, 1 Vern. 483.
[3] Kennedy, p. 32.

observe the essential principles on which all charges and bills of complaint ought to be framed, in all tribunals, whether civil, criminal, or military; namely, that they be sufficiently specific in the allegations of time, place, and facts, to enable the party distinctly to know what he is to answer, and to be prepared to meet it in proof at the trial, and to enable the court to know what it is to inquire into and try, and what sentence it ought to render, and to protect the prisoner from a second trial for the same offence.[4]

[4] See Simmons on Courts-Martial, p. 151; *ante*, Vol. II. § 7; Kennedy, p. 31; Army Regulations, art. 87. The nature of the accusation, in courts-martial, may more clearly appear from the following precedents —

1. *On Army Regulations, art.* 5.

Accusation against Lieutenant A. B., of —— regiment (or —— corps) of the army of the United States.

Charge.

Using contemptuous words against the President of the United States.

Specifications.

For that Lieutenant A. B., of —— regiment (etc.), did use the following contemptuous words against the President of the United States, or (*if in conversation*) words of similar import; namely (*here specify the words*). Said words being used by him in a conversation (*or speech, address, writing, or publication, as the case may be*) held (*delivered or published, etc.*) at or near ——, on or about the —— day of ——, A. D. 18— (*or otherwise describe the publication*). (See O'Brien, p. 296.)

On Navy Regulations, art. 13.

Charges and specifications thereof, preferred against Captain J. S. of the navy of the United States, by Captain J. H., of said navy.

Charge 1*st.*

Treating with contempt his superior officer, being in the execution of the duties of his office.

Specification 1*st.*

For that the said Captain J. S., on or about the —— day of ——, in the year ——, being then in command of the United States ship ——, lying in the harbor of ——, did write and send a contemptuous letter to Captain J. H., commandant of the Navy Yard at ——, of the purport following: to wit, (*here the letter is set forth*). Thereby imputing to him unworthy motives in (*here stating the injurious tendency and meaning of the letter*). (See Captain Shaw's Trial, p. 4.)

It has been said, that where the party is accused of having used disrespectful or insulting language, the words themselves ought not to be set forth in the specification, because this would suggest to the prosecutor's witnesses the testimony expected from them, and be equivalent to asking them leading questions. See Kennedy, p. 33. But it may be observed, on the other hand, that to omit this would deprive the prisoner of the precise information of the nature of the accusation to which he is justly entitled in order to prepare his defence. It is, however, to be remembered, that where the language is profane or obscene, the law does not require it to be precisely stated, but, on the contrary, does require that its nature be indicated only in general and becoming terms. In other cases, the injury above alluded to by Mr. Kennedy may be prevented by omitting to read the specification in the hearing of the witness. See Simmons, pp. 462, 463.

§ 473. **Answer.** The *prisoner's answer* to the accusation may be by a special *plea to the jurisdiction* of the court; as, for example, that it has been improperly or illegally detailed; or, that it is not composed of the requisite number of officers; or, that the offence is purely of civil and not of military cognizance; or, that he is not of a class of persons amenable to its jurisdiction. Or, he may answer by a *plea in bar;* such, for example, as that the period of time, within which a prosecution for the offence might be commenced, has already elapsed; or, that he had once been legally tried for the same offence; or, that the proper authority had officially engaged that, on his becoming a witness for the government against an accomplice for the same offence, he should not be prosecuted. And if these pleas are overruled, he still may put the allegations in issue by the general plea of *not guilty;* in the same manner as in criminal courts, on the trial of an indictment.[1]

§ 474. **Judge-Advocate.** The *judge-advocate*, or some person deputed to act in his stead for the occasion, conducts the prosecution in the name of the United States; but he is required so far to consider himself as counsel for the prisoner after the prisoner has pleaded to the accusation, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself.[1]

§ 475. **Courts of Inquiry.** *Courts of inquiry*, in England, are not regulated by any statute, nor by any standing regulation, but depend on the will of the sovereign, or of the superior officer convoking the court, both as to the officers who may compose it, and as to every particular of its constitution. It is not a judicial body, but is rather a council; having no power to compel the attendance of witnesses not of the army or navy, as the case may be, nor to administer oaths; nor is any issue formed which it is competent to try.[1] But in the American military and naval service, these courts have a legal constitution and authority. Military courts of inquiry may be ordered by the general or commanding officer, consisting of one, two, or three officers, and a judge-advocate or other suitable person as a recorder, all of whom are sworn. They have the same powers as courts-martial to summon witnesses and to examine them on oath; and the

[1] Maltby on Courts-Martial, pp. 53–60; 2 McArthur, pp. 26, 27; O'Brien on Military Law, pp. 247–251.

[1] Army Regulations, art. 69.

[1] Simmons, pp. 95–99; 1 McArthur, pp. 107–118; *infra*, § 498.

parties accused may cross-examine the witnesses.[2] Naval courts of inquiry may be ordered by the President of the United States, the Secretary of the Navy, or the commander of a fleet or squadron; and are constituted and empowered in the same manner.[3] The proceedings of these courts are authenticated by the signatures of the president of the court and of the judge-advocate; and in all cases not capital, nor extending to the dismission of an officer in the army, nor of a commissioned or warrant officer in the navy, they are admissible in evidence, provided that oral testimony of the facts cannot be obtained.[4]

[2] Army Regulations, art. 91.
[3] U. S. Stat. 1800, c. 33, § 2, art. 1, Vol. II. p. 51.
[4] Army Regulations, art. 92; U. S. Stat. 1800, c. 33, § 2, art. 2, vol. ii. p. 51. [A military commission is a tribunal as well known and recognized in the United States as a court-martial, though the limits of its jurisdiction and mode of procedure are not so well defined: State *v.* Stillman, 7 Coldw. (Tenn.) 341.]

CHAPTER II.

EVIDENCE IN COURTS-MARTIAL.

§ 476. **1. General Rules.** It has already been intimated, that courts-martial are bound, in general, to observe the rules of the law of evidence by which the courts of criminal jurisdiction are governed. The only exceptions which are permitted are those which are of necessity created by the nature of the service, and by the constitution of the court, and its course of proceeding. Thus the rule respecting the *relevancy of evidence*[1] prohibits the court-martial from receiving any evidence of matters not put in issue by the charge, or which would implicate the prisoner in a new and distinct offence, or in a degree or extent of guilt not appearing in the charge on which he is arraigned.[2] This rule, however, does not forbid inquiry into circumstances which, though collateral, and not mentioned in the specifications, yet have a direct bearing on the matter charged; as, for example, on a charge of larceny of specified goods, the fact that other goods, stolen at the same time and from the same place, were found in the prisoner's possession, unaccounted for, may be shown, for the purpose of identifying the prisoner as the person who stole the missing goods.[3] So, also, on a charge of desertion, the essence of which depends on the intention not to return, evidence is admissible that the prisoner, on the night of his departure, committed a highway robbery, for which he had been tried and convicted.[4] The circumstances of the robbery might be irrelevant; but the fact of the crime, proved by the record of his conviction, would warrant the inference that he did not intend to return. On the same principle, on a charge of using contemptuous, disrespectful, or unbecoming language towards his commanding officer at a stated time, or in a particular letter, evidence that the accused at other times used

[1] *Ante*, Vol. I. § 50.
[2] Simmons, p. 420; Kennedy, p. 52.
[3] Simmons, p. 422. And see *ante*, Vol. I. §§ 52, 53.
[4] Ibid.

similar language on the same subject, is admissible, in proof of his intent and meaning in the language specified in the accusation.[5]

§ 477. **Character of Prisoner.** In regard to the admissibility of *evidence of the prisoner's character*, when offered by himself, courts-martial do not appear to have felt any of the doubts which criminal courts have sometimes entertained; but, on the contrary, it has ever been their practice, confirmed by a general order, to admit evidence in favor of the prisoner's character, immediately after the production of his own proofs to meet the charge, whatever may be its nature; and even to permit him to give in evidence particular instances in which his conduct has been publicly approved by his superiors. But the prosecutor has no right to impeach the prisoner's character by evidence, unless by way of rebutting the evidence already adduced by the prisoner himself;[1] much less will the prosecutor be permitted to give evidence in chief, as to the prisoner's general habits of life, in order to show that he has a general disposition to commit offences of the kind of which he is accused. The prisoner, on the other hand, may always meet the charge by evidence of his own habits of life and traits of character, of a nature opposed to the commission of any offence of that kind; as, for example, in answer to a charge implicating his courage, he may prove his character for personal bravery and resolution.

§ 478. **Opinions.** The *opinions* of witnesses are perhaps more frequently called for in military trials than in any others; but the rule which governs their admissibility is the same here as elsewhere, and has already been stated in a preceding volume.[1] But it is proper here to add, that where the manner of the act or of the language with which the prisoner is charged is essential to the offence, as, whether the act was menacing and insulting, or cowardly or unskilful, or not, or whether the language was abusive, or sarcastic, or playful, the opinion which the witness formed at the time, or the impression it then made upon his mind, being contemporaneous with the fact, and partaking of the *res gestæ*, is not only admissible, but is a fact in the case which he is bound to testify. But in cases of military science, affecting

[5] Simmons, p. 423; *supra*, § 168. And see *ante*, Vol. II. § 418.

[1] Simmons, pp. 427–429; Kennedy, p. 61; O'Brien, p. 191. And see *supra*, §§ 25, 26; *ante*, Vol. I. §§ 54, 55.

[1] *Ante*, Vol. I. §§ 440, 441, 576, 580, n.

the prisoner, and depending on a combination of facts which are already in testimony before the court, and upon which every member of the court is competent, as a military officer, to form an opinion for himself, it is deemed hardly proper to call upon a witness to state his opinion, nor is he bound to give it if called for.[2] It is, however, perfectly proper to put questions involving opinion, to an engineer, as to the progress of an attack, or to an artillery officer, as to the probable effect of his arm, if directed in a certain assumed manner; such questions, though belonging to military science, not being presumedly within the knowledge of every member of a court-martial.[3]

§ 479. **Prisoner may show that a Stranger to the Proceedings did the Act.** Testimony is sometimes admissible, which goes to implicate a third person who is not a party to the trial; as, for example, where it is essential to the prisoner's own justification that he should show that the fact was done by another, and not by himself, such testimony will be received, notwithstanding it may tend to criminate one who is a stranger to the proceedings.[1]

§ 480. **Proof of Substance of Issue sufficient.** The rule, that it is *sufficient if the substance of the issue or charge be proved*,[1] without requiring proof of its literal terms, is also applied in courts-martial in the same manner as at common law. Thus, where a prisoner is charged with the offence of desertion, and the proof is merely that he was absent without leave; the latter fact is the substance of the issue, constituting in itself an offence sufficient to warrant a conviction; the motive and design, which raise it to the crime of desertion, being only concomitants of the act. So, on a charge of offering violence to a superior officer, by discharging a loaded musket at him while in the execution of his office, the prisoner may be convicted and punished on proof of the fact of violence, though it be not proved that he had any knowledge of the rank or authority of the officer; the principal fact being the violence offered, and the rank and authority of the officer being circumstances of aggravation. So, also, where an officer is charged with behaving in a scandalous and infamous manner, unbecoming the character of an officer and a gentleman; and the

[2] See Admiral Keppel's Trial, 2 McArthur, pp. 135–146: General Whitelocke's Trial, id. 147–154.
[3] Simmons, p. 433.
[1] Kennedy, p. 63.
[1] *Ante*, Vol. I. § 56.

facts specified and proved do of themselves constitute a breach of military discipline and good order, but the charge of scandalous and ungentlemanly conduct is not supported by the evidence; yet enough is proved to justify a conviction and sentence for the minor offence involved in the specification.[2] But if the facts stated in the specification do not of themselves constitute a breach of discipline, or fall within military cognizance, and the imputation of scandalous and ungentlemanly conduct is not proved, the prisoner must be acquitted.[3]

§ 481. **Time and Place.** The *allegations of time and place* generally need not to be strictly proved. But if the jurisdiction of the court is limited to a particular territory, the offence must be alleged and proved to have been committed within that territory; and the like strictness of allegation and proof is necessary, where the prosecution is limited within a particular period of time after the offence was committed.[1] The usual allegation as to time is, "on or about" such a day; but where the offence is alleged to have been committed on a precisely specified day, and is proved to have been committed on another and different day, it is said to be in strictness the duty of the court to specify, in their finding, the precise day proved.[2]

§ 482. **Best Evidence required.** The rule, also, requiring *the best evidence of which the case, in its nature, is susceptible*, is the same in military law as at common law.[1] In the administration of this rule, a clear distinction is to be observed between the best possible evidence, and the strongest possible assurance. The rule merely requires the production of such evidence as is primary in its nature, and not secondary or substitutionary. Hence it demands the production of original documents, if they exist and can possibly be obtained, rather than copies or extracts. But it does not insist on an accumulation of testimony, where the fact is already proved by one credible witness. In cases of necessity, it admits the prosecutor as a competent witness. Thus, if an

[2] Simmons, pp. 437, 438, 443. And see Army Regulations, art. 83; Lt. Dunkin's Case, Simmons, p. 442; *supra*, § 468, n.

[3] Captain Gibb's Case, Simmons, p. 439.

[1] See *ante*, Vol. I. §§ 56, 61, 62.

[2] Simmons, pp. 444, 445, n. {As courts-martial have a jurisdiction coextensive with the country, the question of place is of minor importance. Proof, therefore, that the offence was committed in a place different from that alleged, it being still within the jurisdiction of the court, is sufficient: De Hart's Mil. Law, 367; *ante*, § 12, n.}

[1] *Ante*, Vol. I. § 82. [The importance of this rule is clearly shown by the proceedings in the Dreyfus case.]

inferior officer is prosecuted by his superior, on a charge of insulting him *when alone*, by opprobrious and abusive language, the prosecutor is a competent and sufficient witness, to support the charge.[2]

§ 483. **Exceptions.** Courts-martial also admit *exceptions* to this rule, similar to those admitted at common law. Thus, on the trial of an officer or soldier for disobedience of the orders of his superior, it is not, in general, necessary to produce the *commission* of the superior officer in order to prove his official character and rank; but evidence that he had publicly acted and been recognized and obeyed as an officer of the alleged grade, and that this was known to the accused, will be sufficient, *prima facie*, to establish that fact. So, on a charge of desertion or other offence against military discipline, it will be sufficient to prove that the accused received the pay, or did the duties of a soldier, without other proof of his enlistment or oath. And where an officer is charged with a breach of the particular duty of his office, proof that he had acted in that character will be sufficient, without proving his commission or appointment.[1]

§ 484. **Presumptions.** Illustrations might be added of the application of the common-law rules of *presumption*, and of the other rules which govern in the production of evidence; but these will suffice to show the bearing of the general doctrines of evidence upon the proceedings in courts-martial.

§ 485. 2. **Attendance of Witnesses.** Respecting *the power of courts-martial to procure the attendance of witnesses*, it is to be observed, that these courts, like all others which are intrusted with power definitively to hear and determine any matter, have inherent power, by the common law, to call for all adequate proofs of the matters in issue, and of course may compel the attendance of witnesses.[1] The summonses, both on the part of the prosecution and on the part of the prisoner, are issued by the judge-advocate, and are served by the provost-marshal or his deputy, or by a non-commissioned officer appointed to that duty.[2]

[2] Lt. Thackeray's Case, 2 McArthur 103, 104; ib. App. No. 17; Case of Paymaster Francis Simmons, p. 450.

[1] Simmons, p. 454. And see *ante*, Vol. I. § 92; R. *v.* Gardner, 2 Camp. 513.

[1] *Ante*, Vol. I. § 309. {Every judge-advocate of a court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or district where such military courts shall be ordered to sit, may lawfully issue: Rev. Stat. (U. S.) 2d ed. 1878, § 1202, and so of courts of inquiry, ib. § 1342, art. 118.}

[2] 2 McArthur, p. 17. Courts of inquiry have the same power to summon witnesses

If the witness is an officer, he may be summoned by a letter of request from the judge-advocate; and if he is a soldier, a letter is addressed to his commanding officer, requesting him to order the soldier's attendance. Persons not belonging to the army or navy, as the case may be, are summoned by a subpœna. If the court was called by an order, and all witnesses were therein required to attend, a failure on the part of the military witness, to attend, when summoned, it is said, would subject him to arrest and trial for disobedience of orders.[3] But irrespective of such express order to attend, it is conceived that a neglect to attend, without a sufficient cause, would subject a military person to arrest and trial for a breach of discipline,[4] and any person to attachment and punishment for a contempt of court.[5] The production of writings, in the possession of a party or a witness, is obtained in the same manner as in civil cases.[6]

§ 486. **Testimony must be under Oath.** All witnesses in courts-martial, and courts of inquiry, whether military or naval, must be sworn; but the manner of the oath may admit of some question. In the Navy Regulations it is only required, in general terms, that "all testimony given to a general court-martial shall be on oath or affirmation," without prescribing its form:[1] but in the Army Regulations,[2] though it is required that "all persons who give evidence before a court-martial are to be examined on oath *or affirmation*," yet the article proceeds to add, — "in the following form," — "You swear, or affirm (as the case may be), the evidence you shall give in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."[3] The concluding part of this formula is that to which persons who are conscientiously opposed to taking an oath most strenuously object; and the question has arisen, whether this form is imperatively required to be used in all cases, to the exclusion of that which is administered in the civil tribunals to persons conscientiously scrupulous of taking an oath. In a parallel case in the

as courts-martial have, and to examine them on oath: Army Regulations, art. 91; Navy Regulations, U. S. Stat. 1800, c. 33, § 2, art. 1, vol. ii. p. 51.

[3] Simmons, p. 192.

[4] Kennedy, p. 83.

[5] In the Navy Regulations, this power is expressly given; but it is an inherent power in every court, authorized to summon witnesses before it. See U. S. Stat. 1800, c. 33, § 1, art. 37; ib. § 2, art. 1, vol. ii. pp. 50, 51.

[6] *Ante*, Vol. I. §§ 309, 558–564.

[1] U. S. Stat. 1800, c. 33, § 1, art. 37, vol. ii. p. 50.

[2] Army Regulations, art. 73.

[3] {Rev. Stat. (U. S.) 2d ed. 1878, § 1342, art. 92.}

English service, it has been said that this form, without deviation, was to be observed in the examination of military witnesses, with reference to whom it was imperative; but that, with respect to persons not controllable by the article of war, the form might be varied, to meet their peculiar views of religious duty.[4]

§ 487. 3. **Competency of Witnesses.** The rules in regard to the *competency of witnesses* are the same in courts-martial as in the courts of the common law. Hence, as we have seen,[1] the *prosecutor* is admissible as a witness; as also are the *members of the court.* But it is to be observed that the court cannot receive, in private, any communication in the nature of testimony from one of its members; neither ought his private knowledge of any fact, not testified by him as a witness, to influence his decision in the cause; but if he knows any fact material to the issue, he is bound to disclose it to the parties or to the court, that he may be called and sworn as a witness.[2] He is not thereby disqualified from resuming his seat as a member of the court; but where there is a sufficient number of members, without him, to constitute the court, it is more in accordance with the usage in civil courts that he should withdraw.[3]

§ 488. **Same Subject.** Persons incompetent as witnesses at common law by reason of deficiency of understanding, insensibility to the obligations of an oath, direct pecuniary interest in the matter in controversy, infamy, or for other causes,[1] are for the same reasons incompetent to testify in courts-martial. And the mode of proof of these disqualifications is in all courts the same. In regard to infamy arising from conviction and sentence by a court-martial, the prisoner is never thereby disqualified until the sentence has been approved by the superior authority, where such approval is required; nor is he then disqualified, unless the crime itself is, in *legal* estimation, an infamous crime.[2] The crime of

[4] Simmons, p. 208. This author's own opinion, stated in a note, seems much more consistent with the general policy of the law, and with sound principles of construction; namely, that the article was merely intended to insure uniformity in the form adopted, when not at variance with the established religious principles of any sect to which the witness may profess to belong.

[1] *Supra*, § 482; 2 McArthur, 105, 106.

[2] Simmons, p. 466; 2 McArthur, p. 86; Maltby, p. 48; Adye, p. 57.

[3] Simmons, p. 224. {By statute of 1878, March 16, 20 Stat. at L. 30, it is enacted that, in the trial of criminal cases in courts-martial and courts of inquiry, the prisoner is a competent witness if he requests to be allowed to testify, and not otherwise, and his failure to make that request shall not create any presumption against him.}

[1] *Ante*, Vol. I. §§ 227–430.

[2] *Ante*, Vol. I. §§ 372–376.

desertion is not an offence of this description; and of course a conviction for it does not render the party legally incompetent to testify, however it may affect the credibility of his testimony.[3]

§ 489. **Fellow-prisoners.** As to the competency of *fellow-prisoners*, as witnesses for each other, *where several are joined in the same prosecution*, though the general principle is the same in courts-martial as it has, in a preceding volume,[1] been stated to be in suits at law; yet there is a diversity in its application, arising from a diversity in the constitution of the courts. It is clear that, in such cases, in the common-law courts, where against one or more of the prisoners there has been no evidence, or not sufficient evidence to warrant a conviction, a verdict and judgment of acquittal may immediately be rendered, at the request of the others, and the person acquitted may then be called as a witness for them. But the regular course for a prisoner to adopt in that case, in a court-martial, would be, on the receipt of the copy of the charges, to apply to the authority that appointed the court, urging the necessity of a separate trial; and if this is not granted, an application to the court is still open to the prisoner; and the court may proceed to a sentence of acquittal of the party not proved to be guilty, and whose testimony is desired, and adjourn any further proceeding, until sufficient time is afforded for this sentence to be confirmed.[2] But no good reason is perceived against admitting the acquitted party as a witness for the others, immediately upon his acquittal by the court-martial, without waiting for a confirmation of the sentence.

§ 490. 4. **Examination of Witnesses.** Witnesses in courts-martial are invariably *examined in open court*, in presence of the parties, except in those cases where depositions are by law admissible, when taken pursuant to the regulations. It is not competent for the court to examine a witness by a deputation of some of its members for that purpose; though under peculiar circumstances, and in the inability of an important witness to attend at the place appointed for the court to assemble, the court, with the permission or by the order of the authority convening it, may assemble at the quarters or residence of the witness.[1]

§ 491. **Witnesses examined apart.** In the ordinary practice of

[3] Simmons, p. 481.
[1] *Ante*, Vol. I. §§ 357–359, 363.
[2] Simmons, p. 485; Muspratt's Case, 2 McArthur p. 158. And see Adye, p. 57.
[1] Simmons, pp. 461, 462; Adye, p. 115.

the court, *the witnesses are examined apart from each other*, no witness being allowed to be present during the examination of another who is called before him. But this rule is not inflexible; it is, in modern practice, subject to the discretion of the court. Nor is it ever so rigidly observed as to exclude the testimony of a person who has inadvertently been present at the examination of other witnesses.[1] The judge-advocate and the prosecutor being necessarily present during the whole trial, ought, if witnesses, to be sworn immediately after the case is opened on the part of the prosecution; nor is it deemed proper, at any subsequent stage of the proceedings, to examine them in chief, unless when they are called as witnesses for the prisoner.[2] The court, however, in proper cases, and in its discretion, will confront any two or more witnesses whose testimony is contradictory; by recalling them after the close of the cross-examinations, that opportunity may be afforded to explain and reconcile their respective statements, and to discover the truth of the fact.[3]

§ 492. **Evidence taken in Writing.** All *evidence orally given in courts-martial, is taken down in writing* by the judge-advocate, and *recorded* on the proceedings, in the words of the witness, as nearly as may be, and in the order in which it is received by the court. A question, being reduced to writing by the person propounding it, whether it be the prosecutor, the prisoner, or a member of the court, is handed to the president, and, if approved by him, it is read aloud and entered by the judge-advocate on the proceedings; after which, if no objection to it is sustained, it is addressed to the witness. If it is objected to by a single member only, of the court, the party propounding it is entitled to the collective opinion of the whole court as to its admissibility. And if the question is rejected by the court, the question and its rejection are still entered of record with the proceedings. If a witness wishes at any time before the close of all the testimony to *correct* or *retrace* any part of his evidence, in which he has been mistaken, he will be allowed to do so; but this must be done by an addition to what he has before stated, and *not by way of erasure or obliteration;* it being important, in all cases, that the superior authority, which

[1] 2 McArthur, p. 33; Maltby, p. 65; Simmons, p. 465; Kennedy, p. 85. And see *ante*, Vol. I. § 432; O'Brien, p. 203.
[2] Simmons, pp. 464, 465; 2 McArthur, p. 105.
[3] Simmons, p. 468; Kennedy, p. 85.

reviews the evidence, should have an accurate, and, as it were, a dramatic view of all that transpired at the trial.[1]

§ 493. **Right of Court to call Witnesses suo motu.** *Whether* a court-martial has a *right*, of its own accord, *to call witnesses before it* who are not adduced by either of the parties, is a point which has frequently been agitated, and upon which opposite opinions have been held, the more modern being in the negative.[1] It is at least highly inexpedient, in ordinary cases, that the court should thus interfere with the course of the trial; since the necessity of it may always be avoided by suggesting the name of the witness to one or the other of the parties, whose interest might induce them to summon him. And in regard to questions directly propounded by the court, though its right to do so cannot be denied, yet the exercise of the right certainly does, in effect, prevent either party from objecting to the legal propriety of the question; for this has been prejudged by the member propounding it. If the question is perfectly clear of doubt, as to its admissibility, there can no mischief result from its being put by the court.

§ 494. **Order of Examination and Trial.** *The order and course of the examination of witnesses* in courts-martial, and of their cross-examination and re-examination, are the same, in general, as has been stated in trials at law.[1]

§ 495. 5. **Depositions.** By the general principles of military law, *depositions are not admissible in evidence.* It is only in those cases of crime, where, by statutes, they are made admissible on the trial of indictments, that courts-martial, in the English service, have admitted them.[1] But in the American service, it is specially ordered, that, "on the trial of cases not capital, before courts-martial, the depositions of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence; provided the prosecutor and the person accused are present at the taking the same, or are duly notified thereof."[2] This regulation, being a statutory exception to the general rule which excludes depositions, must be confined to the cases expressly mentioned; namely, to cases not capital, and to persons

[1] Maltby, pp. 44, 65, 66; 2 McArthur, pp. 44, 45; Simmons, p. 472; O'Brien, p. 285; Kennedy, p. 105.

[1] See 2 McArthur, p. 107; Simmons, p. 467; O'Brien, p. 259; Kennedy, pp. 132–143.

[1] *Ante*, Vol. I. §§ 431–469.

[1] 2 McArthur, p. 121; Simmons, p. 509.

[2] Army Regulations, art. 74. And see Maltby, p. 65; O'Brien, p. 186.

not in the line or staff of the army. In capital cases, and with respect to persons belonging to the line or staff, the admissibility of depositions is governed by the general rule.[3]

§ 496. **Exceptions by Statute.** *Depositions*, when *taken pursuant to the above regulation*, it is conceived, ought to be taken in the manner and for the causes stated in the acts of Congress on that subject; which, as they have been sufficiently stated in a preceding volume,[1] it is not necessary here to repeat. It may, however, be added, that though a deposition has been informally taken, and therefore is not admissible under the statute, it may still be read as a solemn declaration of the witness to contradict or disparage the testimony he may have orally given in court. It was formerly held, that what a witness has been heard to state at another time, may be given in evidence to *confirm*, as well as to contradict, the testimony he has given in court;[2] but this is not now admitted, unless where the witness is charged with a design to misrepresent, arising from some recently acquired relation to the party or the cause; in which case his prior statements may become material, in order to disprove the charge, by showing that he had made the same statement before such relation existed.[3]

§ 497. 6. **Public and Private Writings.** The rules already stated in a former volume,[1] in regard to the inspection, proof, admissibility, and effect of public records and documents, and of private writings, as they are founded on general principles applicable alike to all judicial investigations, are recognized in all judicial tribunals, whether civil, military, or criminal; subject to a few exceptions and variations of administration, necessarily arising from their diversities of constitution and forms of proceeding. These it only remains for us briefly to illustrate, by a few military examples.

§ 498. **Records of Courts of Inquiry.** In regard to *public military records*, it has been adjudged that the *report of a court of*

[3] {The depositions of witnesses residing beyond the limits of the State, or Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party, and duly authenticated, may be read in evidence, before such court, in cases not capital: Rev. Stat. (U. S.) 2d ed. 1878, § 1342, art. 91.}

[1] *Ante*, Vol. I. §§ 322–324. See U. S. Stat. 1793, c. 20, § 30, Vol. I. p. 88; U. S. Stat. 1793, c. 22, § 6, Vol. I. p. 335; U. S. Stat. 1827, c. 4, vol. iv. p. 197.

[2] Hawk. P. C. b. 2, c. 46, § 14; 2 McArthur, p. 120; Kennedy, p. 98; Cooke *v.* Curtis, 6 H. & J. 93.

[3] *Ante*, Vol. I. § 469; Bull. N. P. 294; 2 Phil. Evid. 445, 446.

[1] *Ante*, Vol. I. §§ 471-498, 557-582.

inquiry is a privileged communication, and cannot be called for without the consent of the superior military authority which convened the court; nor can an office copy of it be admitted without such permission. It stands on the footing of other secrets of state, heretofore mentioned.[1] Therefore, where the commander-in-chief directed a military inquiry to be held, to investigate the conduct of an officer in the army, who afterwards sued the president of that court for a libel, alleged to be contained in his report, and to have been transmitted to the commander-in-chief; it was held, upon the broad principle of State policy and public convenience, that the report, being a matter of advice and information given in the course of public duty, and for the regulation of a public officer, could not be disclosed to the world at the pleasure of private persons, in a private suit, without permission from the superior authority; and that, therefore, in the case at bar, the evidence was properly rejected.[2] In the *English* service, the proceedings of a *court of inquiry* are held not admissible in a *court-martial*, as evidence of the facts detailed in the testimony there recorded; and rightly; for those courts in England are not considered as judicial bodies, they have not power to administer oaths, nor any inherent power to summon witnesses; and the right of the accused party to appear or take any part in the proceedings is questioned; it being deemed rather a council than a court.[3] But in the *American* service, as we have seen,[4] courts of inquiry are established by law, and have a judicial character, with the same power with courts-martial to summon and examine witnesses, and giving the accused the same right to cross-examine and interrogate them. Their proceedings, therefore, are expressly made admissible in evidence in courts-martial in cases not capital, nor extending to the dismission of an officer; provided, that the circumstances are such that oral testimony cannot be obtained.[5]

§ 499. **Of Courts-martial.** The *records of courts-martial*, being the records of judicial tribunals legally constituted, may be proved and admitted in evidence, and have effect, like all other judicial

[1] *Ante*, Vol. I. § 251.
[2] Home *v.* Lord Bentinck, 2 Brod. & Bing. 130; Simmons, p. 471.
[3] Simmons, pp. 96, 98, 503; 1 McArthur, pp. 107–118; *supra*, § 475.
[4] *Supra*, § 475.
[5] Army Regulations, art. 92; U. S. Stat. 1800, c. 33, § 2, art. 2; Vol. I. p. 51; {Rev. Stat. U. S. 2d ed. 1878, § 1342, art. 121.}

records.[1] *General orders* and *regulations*, issued by the President of the United States, pursuant to law, or by the Secretary of War, or the Secretary of the Navy, within the scope of their authority, when duly promulgated, are presumed to be known to all military persons, and therefore will be taken notice of by courts-martial; the printed copies being used merely to refresh the memory. The *Articles of War*, both for the land and naval service, being enacted by Congress, are judicially taken notice of by all persons, as other public statutes.[2]

§ 500. **All Writings made Part of the Record.** All writings and documents, whether public or private, which are admitted in evidence, are noticed in the proceedings of the court; and copies of them should be embodied in the proceedings in the order in which they are produced in evidence; or, if voluminous, extracts of so much as may bear on the question and is required by either party, may suffice. If their genuineness is admitted by the party against whom they are produced, the admission also should be recorded. If, instead of being thus embodied, copies of them are annexed to the proceedings as an appendix, they should be numbered, and lettered, and referred to in their proper place in the proceedings, and each copy should be authenticated by the signature of the judge-advocate, or the president of the court.[1]

§ 501. **Private Letters as to Prisoner's Character.** Though *private letters* are not legal evidence of the facts stated in them, and therefore are not admissible in evidence for that purpose, and cannot be annexed to the proceedings of the courts; yet the usage of courts-martial allows an exception to this rule, in regard to letters in favor of the prisoner's character; by permitting him to embody them in his defence; whereby they become part of the proceedings, and thus are brought to the notice of the authority which revises the sentence, and receive their due weight and consideration.[1]

[1] [And cannot be collaterally attacked: Swaim *v.* U. S., 165 U. S. 553; U. S. *v.* Fletcher, 148 id. 84.]

[2] Simmons, pp. 500–502. And see *ante*, Vol. I. §§ 471–509.

[1] Simmons, p. 508.

[1] Kennedy, pp. 119, 120; Colonel Quentin's Trial, p. 35.

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